

IN THE MATTER OF THE SUSPENSION :
 OF THE TEACHING CERTIFICATE OF :
 JOHNATHAN CREEKMUR, CENTRAL :
 JERSEY ARTS CHARTER SCHOOL, :
 UNION COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In February 2011, an Order to Show Cause was served upon respondent – a non-tenured language arts teacher at Central Jersey Arts Charter School (CJACS) – requiring him to show cause why his teaching certificate should not be suspended for unprofessional conduct pursuant to *N.J.S.A. 18A:26-10* for resigning his position without notice on September 30, 2010. The respondent contended, *inter alia*: that he was unsure of the stability of his employment with the CJACS and therefore explored an employment opportunity in East Orange which required him to start on October 1; and that his conduct was warranted by the allegedly abysmal teaching environment at the charter school.

The ALJ found, *inter alia*, that: at the time of his resignation, respondent was working at CJACS pursuant to a fully executed contract in full force and effect; respondent's signature on his employment contract acknowledged his receipt of an employee handbook which clearly stated that resignations must be in writing with a minimum of 60 days' notice; respondent's conduct in leaving without any notice was grossly unprofessional as it allowed no time for the school administration to smoothly transition his students to a new teacher; respondent's contention that his actions were justified by CJACS's alleged non-compliance with special education requirements is without support in the record; respondent failed to put the interests of his students before his own interests when he suddenly resigned; and his abrupt departure could not help but be disruptive to his students' education. Accordingly, the ALJ concluded that respondent is guilty of unprofessional conduct within the meaning of *N.J.S.A. 18A:26-10* and that his resignation without notice warrants suspension of his teaching certificate for a period of one year. However, the ALJ concluded that the suspension should commence at the conclusion of the 2011-2012 school year in order to avoid disruption in the education of respondent's current students in East Orange.

Upon independent review of the record and the Initial Decision, the Commissioner concurred with the ALJ that respondent's unprofessional behavior warrants the suspension of his teaching certificate for a period of one year, and that this penalty shall commence at the end of the 2011-2012 school year. A copy of the instant decision was forwarded to the State Board of Examiners for the purpose of effectuating the suspension.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 4041-11
AGENCY DKT. NO. 53-3/11

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
JOHNATHAN CREEKMUR, CENTRAL :
JERSEY ARTS CHARTER SCHOOL, :
UNION COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

The petitioning charter school asks the Commissioner to suspend respondent's teaching certificate for one year in consequence of his precipitous resignation after the beginning of the 2010-2011 school year. Upon review of the record, Initial Decision of the Office of Administrative Law (OAL), respondent's exceptions and petitioner's replies thereto, the Commissioner adopts the Initial Decision as the final decision in this controversy.

Respondent's exceptions largely reiterate his arguments before the Administrative Law Judge (ALJ) and are rejected for the reasons articulated by the ALJ. First, the Commissioner finds nothing in the record that would render the ALJ's factual findings – including the finding that the African American studies course was literature based and within the scope of respondent's certification/endorsements – unsupportable. Second, regardless of who petitioner was or was not actually able to employ or utilize in respondent's absence, the kind of difficulties that petitioner encountered in the wake of respondent's abrupt departure were reasonably foreseeable.

Third, even if petitioner's failure to provide enough support for the special education students in his class was the motivation for respondent's resignation, his sudden exit was still not justified. Ironically, the disruption that his departure caused could only have aggravated any difficulties that both the special education students and the other students

experienced. Finally, the Commissioner concurs with the ALJ that the fact patterns in *In re Suspension of the Teaching Certificate of Burgess*, 1983 S.L.D. 195, and *In the Matter of the Suspension of the Teaching Certificate of Rogers*, 1989 S.L.D. 1962, are not similar enough to those in the instant case, to warrant the imposition of a penalty less than the usual one-year certificate suspension.

Accordingly, the petition is granted and respondent's teaching certificate will be suspended for one year. Further, the Commissioner agrees with the ALJ that there is no reason to allow respondent's penalty to inflict disruption upon respondent's current students. Immediate suspension of respondent's certification would put the East Orange school district in the same predicament that petitioner found itself in when respondent suddenly left his employment. Thus, the suspension of respondent's certificate will commence at the end of the 2011-2012 school year. For that reason, this decision shall be forwarded to the State Board of Examiners for appropriate action.

IT IS SO ORDERED.¹



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/04/12

Date of Mailing: 1/04/12

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to P.L. 2008, c. 36. (N.J.S.A. 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 04041-11

AGENCY DKT. NO. 53-3/11

**IN THE MATTER OF THE SUSPENSION OF
THE TEACHING CERTIFICATE OF
JOHNATHAN CREEKMUR, CENTRAL JERSEY ARTS
CHARTER SCHOOL, UNION COUNTY.**

Vittorio LaPira, Esq., for petitioner Central Jersey Arts Charter School (Fogarty and Hara, attorneys)

Biana Savikin, Esq., for respondent Johnathan Creekmur (Bucceri and Pincus, attorneys)

Record Closed: October 21, 2011

Decided: November 21, 2011

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Central Jersey Arts Charter School (CJACS), seeks an order suspending respondent's teaching certificate for a period of one year, contending that he resigned from his teaching position with inadequate notice. Respondent, Johnathan Creekmur, replies that he initially explored alternative employment because he was unsure that he would be reemployed for the 2010–2011 school year. Once he knew

that he had a contract, Creekmur resigned without notice, but asserts that his conduct was warranted by the allegedly abysmal teaching environment at CJACS.

On February 23, 2011, at the request of CJACS, the Commissioner of Education (the Commissioner) entered an Order directing Creekmur to show cause why his teaching certificate should not be suspended for unprofessional conduct, pursuant to N.J.S.A. 18A:26-10. Creekmur filed an answer on April 1, 2011. On April 4, 2011, the Commissioner transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case.¹

A hearing was conducted on September 21, 2011. Post-hearing submissions were filed on October 21, 2011, at which time the record closed.

FACTUAL DISCUSSION AND FINDINGS OF FACT

The parties were able to stipulate to many of the pertinent facts, which they then elaborated upon through testimony. I **FIND** that Creekmur was continuously employed at CJACS as a teacher of language arts from August 25, 2008, through September 30, 2010.

Donna Titus-Johnson was Creekmur's principal. She testified that Creekmur approached her on or about September 15, 2010, to advise that he was considering employment elsewhere. He did not definitively say that he would be leaving CJACS, however. By September 21, 2010, Creekmur had received a written offer of employment from the East Orange public schools, and had accepted the offer in writing. According to Creekmur, only after accepting his new position did he learn he would be required to start there October 1, 2010.

Titus-Johnson first learned of Creekmur's resignation on September 30, 2010, and from students, who advised that he had said goodbye to them. Later that day,

¹ A verified complaint was initially filed on behalf of CJACS on December 23, 2010, but the matter was closed by the Commissioner because it was not accompanied by the requisite order to show cause. Via letter dated March 11, 2011, Creekmur was advised that the petition had been properly refiled, and that the closure of the earlier petition did "not serve to invalidate the Board's original submission date of December 23, 2010 in this matter."

Creekmur confirmed that he would be leaving immediately. Titus-Johnson warned Creekmur that leaving without notice could jeopardize his teaching certificate, but Creekmur simply replied that he hoped Titus-Johnson would choose not to pursue a revocation proceeding. He reminded her of all he had done for CJACS and its students. Shamida Coney, the lead person for CJACS, similarly learned of Creekmur's departure for the first time on September 30, 2010. It is uncontroverted and I **FIND** that Creekmur did not return to CJACS and, indeed, began working as a teacher in the East Orange schools the very next day, October 1, 2010.

Creekmur's departure left Titus-Johnson with a shallow applicant pool from which to draw, as the academic year had started and most teachers were already employed. After Creekmur abruptly left, CJACS temporarily assigned an instructional aide with a substitute teacher's certificate to teach his language arts classes. A replacement teacher was briefly and unsuccessful retained, and the aide was returned to the classroom. CJACS did not hire a permanent replacement for Creekmur until approximately fifteen weeks after his resignation. Creekmur verbally represented that he would assist during the transitional period, and he did so, via email exchanges and Facebook messages to the instructional aide.² Nonetheless, instruction was disrupted for the students in Creekmur's classes, who for a good part of the year received instruction from a substitute teacher.

Creekmur urged that his hasty departure was not to "feather his own nest," but rather was a reaction to the distressing environment at the school. He pointed out that CJACS had been an appealing job due to its location close to home, and that he now travels some twenty some miles each way to get to work. Creekmur further asserted that he was not lured to East Orange by an attractive salary. While his salary there ultimately was about \$24,050 higher than his salary at CJACS would have been during the 2010–2011 school year, he was initially appointed at an annual salary of \$50,218,

² Titus-Johnson conceded that even if Creekmur had afforded CJACS the requisite 60 days notice, it would have been difficult to find a replacement. Creekmur urged that a qualified applicant was available earlier, but his testimony in this regard was not evidential. The record developed at hearing would not allow me to determine if the candidate alluded to by Creekmur was qualified or not, and a decision whether this individual truly met the school's needs rested in the sole discretion of the CJACS administration. But I did hear testimony that this candidate was herself unavailable for sixty days; this certainly was believable given the time of year, and buttresses CJACS's contention that Creekmur left his position at a most inconvenient time for CJACS and its students.

less than the \$51,400 salary in his 2010–2011 contract with CJACS. (J-5.) But quickly thereafter, the East Orange Board twice made adjustments to his salary; by November 2010, Creekmur's salary had been adjusted to \$85,589 by the East Orange Board. (J-9; J-10.)³

Creekmur testified that he was unsure that he had a contract for the 2010–2011 school year at CJACS, offering this testimony to justify his exploration of the opportunity presented in East Orange.⁴ He pointed to confusion regarding his reemployment for the 2009–2010 year as evidence that his concerns about job security were well placed. Apparently, the previous year, his contract was late in coming. Creekmur initially had been offered a position as a literacy coach, and he was even asked to assist in the process of hiring a replacement language arts teacher. The literacy coach position never materialized, and during the summer of 2009 Creekmur still had not signed a contract. Although he was ultimately asked to return for the 2009–2010 school year as a language arts teacher, Creekmur was so unsure he still had a job that he applied for unemployment benefits.

But in fact by mid-May 2010, Creekmur was provided with a contract-renewal notice offering him reemployment for the 2010–2011 school year, which he was required to return signed on or before June 1, 2010. Coney testified that Creekmur did not return the form until June 9, 2010, and she advised Creekmur that his lateness could “affect [his] offer of employment.” This quickly proved to be an empty threat because Creekmur received and signed an individual employment contract memorializing the terms and conditions for his employment with CJACS for the 2010–2011 school year sometime in early June.⁵ Creekmur testified that he did not receive a fully executed copy of his contract until August 2010, and for this reason spent the

³ Minutes of the Board meetings reveal that although Creekmur was initially hired at Step 1 of the salary guide, he was placed at a much higher step once he verified his prior teaching experience. It is unimaginable that Creekmur took the position in East Orange wholly unaware of the potential for a higher salary, making his contention that he did not leave CJACS for a better salary a bit incredible. The salary guides are a matter of public record. As Creekmur states in his post-hearing submission, money was a concern for him, as he “owns his home and is responsible for making payments towards his mortgage.”

⁴ Importantly, Creekmur does not need to justify his decision to pursue alternative employment opportunities, nor does CJACS suggest otherwise.

⁵ His signature is dated June 1, 2010, but he must have signed the document shortly thereafter since the offer-of-employment form was not itself signed until June 9, 2010.

summer again uncertain if he had a job come September. I agree with CJACS that this testimony does not ring true, and, indeed, Coney credibly testified that although Creekmur worked in a CJACS summer program during 2010 she was unaware that he had any concerns about his employment status. Although Creekmur, like most people, needed a job to pay his bills, he never once inquired that summer about his position for September 2010.

Notwithstanding any alleged confusion about his ongoing employment at CJACS during the summer of 2010, it is uncontroverted and I **FIND** that at the time of his resignation in late September 2010 Creekmur was working at CJACS pursuant to a fully executed contract in full force and effect, and, indeed, was being compensated in accordance with the terms of that contract. It is likewise uncontroverted and I **FIND** that Creekmur read and reviewed the contract's terms prior to signing it, and did not express any confusion about the obligations created by it. The contract stated that an employee handbook had been provided to Creekmur, and that he understood that he must also abide by the policies, procedures and job responsibilities contained in that handbook. The handbook states at page 21 that "[t]here may come a time when you choose to leave Central Jersey Arts Charter School to take on another challenge or for some other reason [and] [y]ou must notify the principal in writing and with a minimum of 60 calendar days notice." (J-7.) The contract itself similarly confirms that resignations must be with 60 days' notice. (J-5.)

Creekmur justified his sudden departure from CJACS with a variety of complaints about how the school operated. He testified that he was assigned classes he was not qualified to teach; that he was ill-equipped to assist the non-English speakers and special education students in his classes; and that a scheduling snafu at the start of the year resulted in confusion in the halls and interrupted learning. Creekmur holds instructional certification with a K–8 elementary endorsement. He took and passed the Praxis examination for middle school language arts, which is the only area in which Creekmur is "highly qualified" as that term is defined by No Child Left Behind. He contended that the only subject he was truly qualified to teach was language arts.

For the 2010–2011 school year, Creekmur's weekly course schedule included language arts literacy classes, African-American Studies classes, a community service class and six study hall periods. Creekmur's testimony made it clear that he did not like his schedule, and that he felt that his colleagues received better assignments. He specifically challenged the propriety of being asked to teach African-American Studies. Titus-Johnson clarified that the African-American Studies course was literature based, and designed as an examination of the African-American experience through novels and poetry. She felt it was an appropriate assignment for Creekmur. A course description was consistent with Titus-Johnson's explanation of the goals of this middle-school elective, and it provides:

This class will be about the African-American experience and will be constructed around the voices and language used by Black people themselves. The class will be organized chronologically with the use of novels, films, current events and essays. The class will cover the historical aspects of the African American experience from the struggle against slavery to the 21st century. Students will be required to complete a final examination and an end of course project.

[R-4.]

Creekmur urged that he was ill-prepared to teach this course, which he contended had no curriculum or syllabus to guide him and was really a social studies class. But he admitted that he team-taught the class the prior year, and Titus-Johnson testified, and I **FIND**, that Creekmur did not complain about this assignment at any time while he was still teaching at CJACS. He likewise did not complain about the community service assignment, which Titus-Johnson explained guided students through volunteer experiences required for graduation from CJACS.

Creekmur contended that the school was non-compliant with special education requirements, and Titus-Johnson conceded that a monitoring visit by the Department of Education revealed some procedural errors. Indeed, she shared both a letter from the Department of Education that specified areas of non-compliance, as well as an April 5, 2011, letter from the Department that indicated that all areas of concern had been

corrected. (P-2.) Creekmur urged that the special education students included in his mainstream classes had received support during the years prior to 2010–2011 from a special education teacher, Rebecca Forste Deepchandani. Deepchandani was reassigned to language arts classes for the 2010–2011 school year, and no one was hired to replace the special education support she had supplied in Creekmur's classroom.

Creekmur maintained that this made for an impossible classroom environment. He stated that his special education students were disruptive and impeded the progress of the remaining students. Deepchandani concurred, urging that special education students at CJACS were not receiving the services promised in their Individualized Education Programs (IEPs). She penned a letter on Creekmur's behalf, in which she wrote that "both Mr. Creekmur and I were witnesses to blatant, intentional and unabashed violations of education law and student rights. After having seen what we saw, no self-respecting educator could in good conscience continue to take part in the operation of this school." (R-6.) Deepchandani also ultimately resigned, but despite her vehement concern about the poor conditions at CJACS, she was able to do so with proper notice.

CJACS urges that Deepchandani was a disgruntled employee, who left the school after receiving a disciplinary warning and whose testimony should be given little weight. (P-5.) In troubling testimony, Deepchandani flatly denied having any employment-related issues while working at CJACS prior to her resignation. But when asked, "[d]id they ever warn you that you had excessive tardiness?" she replied, "[t]hey may have." When asked if she had been warned about not properly submitting lesson plans, she stated, "that occurred after I submitted my resignation." Her resignation was tendered in January 2011, and she somewhat recanted this testimony when presented with a copy of a disciplinary notice dated November 8, 2010. (P-5.) Deepchandani now stated that it was possible that she had seen the disciplinary notice before, but did not remember. A disciplinary notice is not something an employee is likely to forget. There was a lack of straightforwardness and candor to Deepchandani's testimony that diminished her credibility and leads me to agree that her anger with CJACS may have colored her recollections of the events.

CONCLUSIONS OF LAW

N.J.S.A. 18A:26-10 provides that “[a]ny teaching staff member employed by a board of education . . . who shall, without the consent of the board . . . , cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.” See also N.J.A.C. 6A:9-17.9. The Commissioner has held that the central purpose of N.J.S.A. 18A:26-10 is “to provide notice to the school so that a suitable replacement can be hired without adversely impacting students.” Penns Grove-Carneys Point Bd. of Educ. v. Leinen, 94 N.J.A.R.2d (EDU) 405, 407.

The decision to suspend a teaching certificate pursuant to N.J.S.A. 18A:26-10 is discretionary and the Commissioner has historically evaluated all circumstances specific to an individual case. As a general rule, however, with rare exception, the Commissioner has imposed suspensions for the one-year maximum period. Black Horse Pike Reg'l Sch. Dist. v. Mooney, 1984 S.L.D. 821; In re Suspension of the Teaching Certificate of Capshaw, EDU 12318-06, Initial Decision (April 30, 2007), modified, Comm'r (June 12, 2007) <<http://lawlibrary.rutgers.edu/oal/search.html>>; E. Amwell Twp. Bd. of Educ. v. Acken, 1986 S.L.D. 2803.

Indeed, the Commissioner has declined to order a full-year suspension only when presented with compelling mitigating circumstances. In Black Horse Pike Regional, supra, 1984 S.L.D. 821, for example, the Commissioner did not suspend the certificate of a staff member who, due to her husband's relocation, resigned a week earlier than required by her contract. The board in Black Horse Pike Regional was able to secure a replacement before the resigning teacher's departure and there was no disruption to the continuity of instruction. The teacher there had an understandable reason for her slightly early departure and had met with her successor to discuss the educational program. She had left lesson plans and final grades for her classes.

None of these mitigating factors are present here. Creekmur's conduct was grossly unprofessional. He literally walked out on his students, urging that his actions were justified by the fact that CJACS was operated in violation of law. This record provided me with no evidence to support this contention, nor is this proceeding the context in which a proper and complete analysis of CJACS and its regulatory compliance could be or should be explored.⁶ A school like CJACS is regularly monitored by the Department of Education, and any concerns about how it functions could have been referred by Creekmur to the Department.

He urges that his abrupt departure from CJACS was "attributable to honest and noble motivations," because the school was so poorly run that he could better serve children by moving on to another school district. But Creekmur's arguments, if accepted by me, would give free reign to dissatisfied teachers throughout the state to walk out on schools that they feel are not up to par, in complete contravention of the requirements of N.J.S.A. 18A:26-10. Employment in a public school is not servitude, and a teacher can resign from a setting that does not feel right, regardless of the reason. But the statute recognizes that a teacher must not depart without notice, even if the teacher dislikes his school; even if the teacher thinks the school is poorly run; and even if the teacher thinks the school is non-compliant with education laws and regulations. Teaching is a unique occupation, where a change in personnel can affect many young lives. N.J.S.A. 18A:26-10 confirms that a dedicated teacher must always put his students first. Creekmur did not do so.

Creekmur cites several cases where the Commissioner declined to enter a one-year suspension, but each is distinguishable on its facts. In In re Suspension of the Teaching Certificate of Burgess, 1983 S.L.D. 195, the Commissioner did not suspend the responding teacher's certificate, but the initial decision noted that the teacher there "did not 'walk off' the job without notice but, in exemplary fashion, left carefully made plans as well as personally owned teaching materials for the benefit of his successor, his pupils, his administrators and his employer." Clinton Twp. Bd. of Educ. v. Burgess,

⁶ I was wholly unconvinced that Creekmur was assigned classes he was unqualified to teach, as he clearly was being asked to teach a literature-based African-American Studies class. Relative to the special education students in his class, any failure by CJACS to comply with the requirements of their IEPs did not justify Creekmur's actions in leaving his entire class of students adrift for months while CJACS struggled to locate a replacement.

1983 S.L.D. 183, 191. Burgess did not leave to take a position at another school, "an act which has in the past been adjudged by the Board of Examiners to be sufficient reason to suspend a teaching certificate." Ibid. Furthermore, Burgess's administrators had offered to help facilitate his early departure, representing that they would attempt to obtain a replacement during the two-week-notice period he did provide.

Here, Creekmur did walk off the job, and did so to take a position at another school. I heard no evidence that comprehensive lesson plans were left for his successor, only that he communicated periodically with the aide assigned to his classes via email and Facebook. Similarly, In the Matter of the Suspension of the Teaching Certificate of Rogers, 1989 S.L.D. 1962, does not support Creekmur's position. There, a certificate was suspended for only three months because, fortuitously, the board located a replacement within a week. Creekmur unsuccessfully urges that he could have been replaced quickly too, if CJACS had hired the applicant he perceived was "qualified," conveniently overlooking that this candidate herself could not come to CJACS without giving her district 60 days' notice. Furthermore, in Rogers the Commissioner was convinced that there was confusion about the requirements of the respondent's contract; no such confusion was evident here.

I must also distinguish Creekmur's conduct from that of the respondent in Rogers, who left a public school position to return to work with profoundly disabled individuals at a State developmental center. Rogers's willingness to do this very important and difficult work colored the Commissioner's perception of his conduct. But here, notwithstanding Creekmur's assertion that his "actions were clearly motivated by the need to serve students effectively in a setting that promoted that goal," I am unconvinced that Creekmur left CJACS to pursue a lofty purpose. He left because he was unhappy at CJACS and East Orange presented a better opportunity.

Creekmur's arguments that his actions did not impair the quality of instruction at CJACS are unavailing. It is incontrovertible that a teacher's abrupt departure is disruptive for students. Likewise, Creekmur's unprofessional conduct negatively impacted his administrators, who had to scramble to secure coverage for his classroom, and his colleagues, who were reassigned to ensure that some modicum of instruction

took place in Creekmur's classroom while a replacement teacher was secured. Creekmur acted "with nary a concern about the well-being of the . . . students in need of his assistance, [CJACS's] ability to find a suitable replacement on such short notice, or the increased workload for his co-workers." Capshaw, supra, EDU 12318-06, Comm'r (June 12, 2007) <<http://lawlibrary.rutgers.edu/oal/search.html>>. Accordingly, I **CONCLUDE** that Creekmur is guilty of "unprofessional conduct" within the meaning of N.J.S.A. 18A:26-10 and that his abrupt resignation from his teaching position, without notice, warrants suspension of his teaching certificate for a period of one year.

Creekmur urges that his students in East Orange will be unfairly punished if he is forced to leave his position there mid-year because his certificate is under suspension. This argument is compelling, because I agree that a suspension, if imposed during the 2011–2012 school year, will affect the students of East Orange in precisely the manner N.J.S.A. 18A:26-10 seeks to prevent. Accordingly, I **CONCLUDE** that the suspension of Creekmur's certificate should commence at the conclusion of the 2011–2012 school year.

ORDER

Based on the foregoing, it is **ORDERED** that Creekmur's teaching certificates be suspended for a period of one year, said suspension to commence at the conclusion of the 2011–2012 school year.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

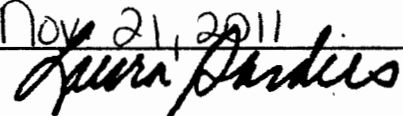
November 21, 2011
DATE

Date Received at Agency:

Date Mailed to Parties: Nov. 21, 2011



ELLEN S. BASS, ALJ

Nov 21, 2011


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner

Donna Titus-Johnson
Shamida Coney

For Respondent

Johnathan Creekmur
Tiffany Overton
Rebecca Forste Deepchandani

Exhibits

Joint Exhibits

- J-1 Employment Contract, 2009–2010
- J-2 Schedule, 2010–2011
- J-3 Rebecca Forste's schedule
- J-4 Lauren Orchanian's schedule
- J-5 Employment Contract, 2010–2011
- J-6 Renewal Notice, 2010–2011
- J-7 Employee Handbook
- J-8 September 14, 2010, minutes, East Orange Bd. of Educ.
- J-9 October 12, 2010, minutes, East Orange Bd. of Educ.
- J-10 November 9, 2010, minutes, East Orange Bd. of Educ.

For Petitioner

- P-1 Not admitted
- P-2 May 4, 2010, letter with attachments
- P-3 Not admitted

P-4 Not admitted

P-5 Disciplinary notice

For Respondent

R-1 Certification of Donna Titus-Johnson

R-2 NJ Hire Advertisement

R-3 Résumé

R-4 Description of Middle School Electives

R-5 Facebook entries

R-6 March 15, 2011, letter from Forste Deepchandani

R-7 Emails

JACK A. PERNA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON,	:	
PASSAIC COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner was terminated in 2009 when his position as Supervisor for Grant Acquisition and Management was eliminated in a reduction in force (RIF). He subsequently filed the instant appeal claiming that the respondent Board violated his tenure and or seniority rights. Petitioner was employed by the Board in several different positions between 2001 until 2009. The Board contended that the petitioner never earned tenure in the district and therefore lacked tenure rights.

The ALJ found, *inter alia*, that: there are no material facts at issue and the matter is ripe for summary decision; tenure is a statutory right with precise statutory requirements, and the staff member claiming tenure rights has the burden of proving his right to tenure; in order to gain tenure, a teaching staff member must work in a position for which a teaching certificate is required, hold the appropriate certificate, and serve for the requisite period of time; an endorsement as a school administrator is required in order for an individual to be authorized to serve in any position that involves services as a district-level administrative officer; petitioner's endorsement as a principal did not constitute appropriate certification for tenure-acquisition purposes because his service was not as an administrative officer of a school or comparable unit; conversely his principal endorsement did not authorize him to fulfill the district-level responsibilities with which he was charged; and petitioner bore the primary responsibility for ensuring that he possessed the appropriate certification and endorsement for the positions in which he served. The ALJ concluded that: based on the job descriptions under which petitioner served, he should have possessed an administrative certificate with an endorsement as a school administrator in order to be legally authorized to fulfill such functions; inasmuch as petitioner did not hold the appropriate endorsement for such assignments, he did not earn time toward tenure while serving in a director position; and therefore his length of service falls short of the statutory requirements for acquisition of tenure. The ALJ recommended dismissal of the petition.

Upon review and consideration, the Commissioner concurred with the ALJ that petitioner did not achieve tenure in respondent's district because he was not properly certificated for the positions in which he served. Accordingly, he adopted the Initial Decision as the final decision in this matter, and dismissed the petition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 9761-09+
 AGENCY DKT. NO. 142-7/09

JACK A. PERNA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
STATE OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF	:	
PATERSON, PASSAIC COUNTY,	:	
	:	
RESPONDENT.	:	

This controversy arose when petitioner's employment with respondent was terminated in consequence of the elimination of his position. The Commissioner has reviewed the record, the Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions to the Initial Decision, and respondent's replies thereto, and is constrained to concur with the Administrative Law Judge (ALJ) that petitioner's separation from employment was not a tenure violation.

Based upon the stipulated facts, it appears that before petitioner came to work in respondent's district he had received training and certification as an educator, and accumulated experience working in the New York school system. In 2000, he was engaged by respondent as a consultant.

In 2001, respondent's Superintendent, Edwin Duroy, sought and received permission from Benjamin Rarick, Director of the Office of State Operated School Districts of the State Department of Education (DOE), to hire petitioner as an "Interim Program Director." Joint Exhibit J-1.¹ After petitioner had served for a year – as "Director of the Paterson Educational Partnership for 21st Century Community Learning Centers" – Duroy again contacted Rarick seeking permission for petitioner to be appointed as "Director of Grant Development and Evaluation." By way of an August 9, 2002 memorandum, Rarick approved the appointment "per [Duroy's] memo to [Rarick] dated August 8, 2002." Joint Exhibit J-6.²

Petitioner then served as Director of Grant Development and Evaluation for approximately five years.³ The Job description for the position was memorialized in December 2003, Joint Exhibit J-3, and included the requirement of an administrative certificate with a supervisor endorsement. A March 15, 2005 revision to the job description also called for a supervisor endorsement. Joint Exhibit J-4. In the course of his service as Director of Grant Development and Evaluation, petitioner earned a masters degree in educational leadership, Joint Exhibit J-7, and an administrative certificate with a principal/supervisor endorsement, Joint Exhibit J-12. The provisional certificate with the principal/supervisor endorsement was issued in January 2005, Joint Exhibit J-11.

At the end of the 2006-07 school year, petitioner's position was abolished, and as of July 1, 2007, petitioner was assigned to be Environmental Science, Health and Safety

¹ J-1 is a memorandum dated July 24, 2001 from Rarick approving the hire and referencing a July 9, 2001 memorandum from Duroy, in which Duroy apparently sought the approval. The latter memorandum – along with any information that may have been annexed thereto -- does not appear to be in the record.

² Duroy's August 8, 2002 "memo," referenced in Rarick's memorandum of approval – along with any information that might have been annexed thereto -- does not appear to be in the record.

³ In December 2006 the job title changed to Director of Grant Development and Evaluation and Pupil Assignment. Joint Exhibit J-13.

Supervisor.⁴ Petitioner challenged respondent's action of moving him from a director position to a supervisor position and the parties eventually -- in December 2008 -- settled the controversy via petitioner's reassignment to the position of "Acting Supervisor for the Office of Grant Acquisition and Management." Joint Exhibits J-19, J-20 and J-21. However, four months later, petitioner was advised that, in consequence of "an economic crisis," his and other positions would be eliminated as of July 1, 2009. Joint Exhibit J-24. Petitioner was further advised that his employment would not be renewed. *Ibid*.

In his petition of appeal, petitioner alleged that:

By virtue of his term of service as a director and supervisor in respondent's employ, [he] attained tenure under his Principal/Supervisor Certificate [sic] pursuant to *N.J.S.A.* 18A:28-5 and 6, with seniority rights pursuant to *N.J.A.C.* 6A:32-5.1, *et seq.* (Petition, Para. 3)

It is petitioner's burden to clearly prove that claim, *Canfield v. Pine Hill Bd. of Educ.*, 97 *N.J. Super.* 493 (App. Div. 1967), by showing that during the relevant time period he had met the precise statutory requirements for attaining tenure. *Picogna v. Cherry Hill Bd. of Educ.*, 143 *N.J.* 391, 400 (1996).

Among the requirements for earning tenure is the necessity that the candidate hold the correct certificate and endorsement for his or her position. *See*, *N.J.S.A.* 18A:28-4; *Nelson v. Old Bridge Bd. of Educ.*, 148 *N.J.* 358, 363 (1997); *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 74 (1982). The ALJ found, Initial Decision at 16, and the Commissioner concurs, that the job descriptions for each position that petitioner held in respondent's district -- except the Environmental Science, Health and Safety Supervisor position -- revealed that each of the jobs were comprised completely of district-level responsibilities, and that, consequently, the

⁴ The position title was changed to "Environmental Science, Health and Safety Supervisor/Officer on May 30, 2008.

certification required for the positions was an administrative certificate with a school administrator endorsement. *N.J.A.C.* 6A:9-12.3(a). It is undisputed that petitioner has never held such certification. Thus, the Commissioner agrees with the ALJ that, because petitioner had never held the appropriate certification for his various directorships, he did not earn tenure.

In his exceptions, pages 2-4, petitioner maintains, as a threshold matter, that the ALJ had no authority to determine the correct certification for petitioner's positions, and that the instant controversy should be held in abeyance while the Executive County Superintendent considers the matter. The Commissioner disagrees. As the ALJ explained:

Although *N.J.A.C.* 6A:9-5.5 envisions that a board of education will submit a request to the county superintendent for permission to use an unrecognized title position prior to appointing a candidate and, if approved, the county superintendent will determine the appropriate certification and title for the position, *Duva*⁵ supports this forum's ability to determine the appropriate endorsement for the "director" position titles held by petitioner in order to decide the transmitted controversy between the parties.

(Initial Decision at 15)

Indeed, in *Duva*, the New Jersey State Board of Education explained:

We recognize that the county superintendent is charged with the responsibility in the first instance for determining the appropriate certification for service in an unrecognized title based upon the duties required to be performed. *N.J.A.C.* 6:11-3.3(b) [predecessor of *N.J.A.C.* 6A:9-5.5]. However, there is no indication in the record that the unrecognized position titles in this case were ever submitted to the county superintendent for determination of the appropriate certification. . . . Moreover, it is well established that the State Board of Education has the ultimate administrative authority to determine certification -- see *South River Education Association v. Board of Education of the Borough of South River*, decided by the State Board of Education, November 4, 1987, *aff'd*, Docket #A-1695-87T8 (App. Div. 1990). As the ultimate fact-finder and administrative decision-maker for disputes arising under

⁵ *Duva v. State Operated School District of the City of Jersey City, Hudson County*, State Board of Education Decision No. 56-99 (March 6, 2002).

the school laws, *Dore v. Bedminster Tp. Bd. Of Ed.*, 185 N.J. Super. 447 (App. Div. 1982), we have reviewed the record before us, including the job descriptions for the director's assignments held by the petitioner. Based on that review, we conclude that the duties of those assignments were of such character as to require that the individual serving in them possess an Administrative Certificate with an endorsement as a school administrator in order to be authorized by statute and regulation to fulfill such functions.

(*Duva, supra*, at 12.)

Subsequent to *Duva*, and pursuant to N.J.S.A. 18A:6-9.1, the Commissioner of Education became the ultimate administrative arbiter of school law disputes. Thus, it is the Commissioner who now has the ultimate administrative authority to determine certification. Since the Commissioner has the discretion to send controversies to the OAL for fact-finding and legal recommendations, it is well within an ALJ's sphere of responsibility to make determinations about certification and present same to the Commissioner for consideration.

Petitioner's reliance on *Joseph Pezzullo v. Board of Education of the Township of Willingboro, Burlington County*, 1987 S.L.D. 198 (Commissioner Decision) is unhelpful. That controversy came to the Commissioner by way of a motion for a declaratory judgment. As declaratory judgments are issued to provide prospective guidance, and not to correct an already perpetrated adverse action, it was appropriate in *Pezzullo* for the Commissioner to direct that determinations concerning the proper certification requirements for "unrecognized" titles be made, in the first instance, by the County Superintendent. Moreover, in *Pezzullo*, the record did not appear to include a board-approved job description for the petitioner's position, making any certification determinations by the Commissioner -- or ALJ recommendations about same -- premature.

In petitioner's second exception to the Initial Decision he asks the Commissioner to muddy the clear definitions in and distinctions between N.J.A.C. 6A:9-12.3(a), (b) and (c).

The offered rationale is that “in a multiplicity of school districts, district-wide positions such as ‘Director of Special Education’ exist which are held by individuals who hold Principal endorsements,” and that by ruling against petitioner in this case the Commissioner would be rendering illegal the employment of those individuals. Petitioner’s Exceptions at 5.

No facts are offered to support the above referenced proposition; likewise, no explanation of how petitioner might have standing to demand action on behalf of such unidentified employees. The Commissioner cannot make determinations based upon speculation. By way of contrast, the facts of the instant case clearly show that during most of petitioner’s years in respondent’s district his job responsibilities were those contemplated by *N.J.A.C. 6A:9-12.3(a)*, and required an administrative certificate with a school administrator endorsement.

Matarazzo v. Board of Education of the Borough of Cliffside Park, Bergen County, Commissioner Decision No. 127-04 (March 18, 2004), cited on page 7 of petitioner’s exceptions, is not apposite to the instant case. In that case, Matarazzo earned tenure as a supervisor of instruction in respondent’s district and was employed in that position until the district abolished it. Three years later, when the district reintroduced three instructional supervisor positions, petitioner unsuccessfully applied for one. After learning that one of the positions had been given to a non-tenured employee, Matarazzo successfully appealed to the Commissioner, claiming entitlement to it. The Commissioner rejected the respondent board of education’s argument that Matarazzo’s tenure in the instructional supervisor position did not attach to the new instructional supervisor position – because the new position included certain district-wide responsibilities.

Petitioner appears to argue that the Commissioner's decision in favor of Matarazzo stands for the proposition that an employee who holds a supervisor endorsement, as opposed to school administrator endorsement, can earn tenure in a district level administrative position whose gravamen is the formulation of comprehensive district wide goal-setting, planning, budgeting and policy implementation. In so doing petitioner fails to appreciate that the Commissioner found in favor of Matarazzo because the new so-called district-wide supervisor position in Matarazzo's district was fundamentally an instructional supervisor position – whose duties could include some district-wide responsibilities but were nonetheless limited to the realm of instruction and/or curriculum. For such a discrete, program specific position with jurisdiction over a defined “unit”⁶ a principal or supervisor endorsement is sufficient. By way of contrast, the wide-ranging, district-wide administrative position held by petitioner in the case at bar did require a school administrator endorsement.

Petitioner also ignores the plain language of *N.J.A.C. 6A:9-12.3(c)* which expressly states that a supervisor endorsement is the required credential for supervisors of instruction -- whose duties are described as “direction and guidance of the work of instructional personnel.” Thus, the language of *N.J.A.C. 6A:9-12.3(c)* contemplates that an instructional supervisor's work will include supervision of certain personnel and instructional matters throughout a district. That does not raise the position of instructional supervisors to the level of district administrator. Matarazzo's attainment of the instructional supervisor position did not signify that an employee with a supervisor endorsement and no school administrator endorsement may hold the kind of district level position that petitioner claims.

In petitioner's third exception he urges that because respondent assigned the wrong certification requirement to his director positions and because the DOE did not “object” to the error,

⁶ See, e.g. *N.J.A.C. 6A:9-12.3(b)*.

he should not be penalized for having held the wrong credentials. Petitioner's Exceptions at 8-9. He also suggests that the Commissioner's approval of a December 2008 settlement between the parties signified that the Commissioner deemed a principal/supervisor endorsement to be the appropriate certification for a district-level position, *i.e.* "Supervisor of Grant Acquisition Management." Petitioner's Exceptions at 10.

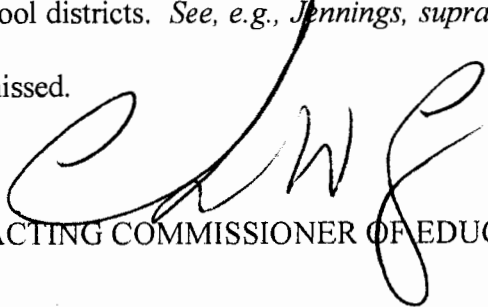
At the outset, the Commissioner notes that it is well established that a teaching staff member is charged with the responsibility to ensure that he or she has earned the appropriate certification for the position which he or she seeks or holds. This is so even where a district has improperly assigned the employee duties for which the employee is not certificated. *Stephen Jennings v. Board of Education of the Borough of Highland Park, Middlesex County*, 1989 *S.L.D.* 1097, 1101 (decided February 28, 1989) (petitioner's reliance upon such actions in the face of clear regulations to the contrary cannot be regarded as reasonable). Thus, respondent's mistake concerning the proper certification for petitioner's jobs will not serve as an excuse for petitioner's failure to have acquired the appropriate endorsement.

Nor can petitioner interpret the above-referenced Commissioner approval of the 2008 settlement or the DOE's consent to petitioner's employment as tacit determinations that petitioner was qualified for the assignments that he was given. Careful scrutiny of the exhibits submitted in this case and the decision authorizing the 2008 settlement reveals no evidence that respondent presented the DOE with the job descriptions for the unrecognized title designations that appeared in the correspondence between respondent and the DOE concerning the employment of petitioner (Joint Exhibits J-1, J-5, J-6, J-9, J-10, J-21, J-22, and J-23).

In summary, petitioner did not achieve tenure in respondent's district because he was not properly certificated for the positions in which he served. While it is regretful that

respondent erred in its determination about the appropriate certification requirements for petitioner's jobs, petitioner was equally and ultimately responsible for ensuring that he held the correct certification. To rule otherwise would be to allow tenure to be established not by statute but by the intentional or unintentional actions of local school districts. *See, e.g., Jennings, supra*, 1989 S.L.D. at 1089-1091. Accordingly, the petition is dismissed.

IT IS SO ORDERED.⁷


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/04/12

Date of Mailing: 1/04/12

⁷ This decision may be appealed to the Appellate Division of the Superior Court pursuant to P.L. 2008, c. 36. (N.J.S.A. 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 09761-09

AGENCY DKT. NO. 142-7/09

JACK A. PERNA,

Petitioner,

v.

STATE-OPERATED SCHOOL

DISTRICT OF THE CITY OF

PATERSON, PASSAIC COUNTY,

Respondent.

Louis P. Bucceri, Esq., for petitioner (Bucceri & Pincus, attorneys)

Elizabeth Murphy, Esq., for respondent (Bauch, Zucker, Hatfield, attorneys)

Record Closed: May 11, 2011

Decided: November 10, 2011

BEFORE **MARGARET M. MONACO, ALJ:**

STATEMENT OF THE CASE

Petitioner Jack Perna claims that respondent State-Operated School District of the City of Paterson (the District) violated his tenure and/or seniority rights by terminating his employment. The District controverts petitioner's tenure claim.

PROCEDURAL HISTORY

Petitioner filed a Verified Petition with the Commissioner of Education (the Commissioner) contesting the termination of his employment. Petitioner asserts that by virtue of his term of service as a director and supervisor, he attained tenure under his "Principal/Supervisor Certificate" pursuant to N.J.S.A. 18A:28-5 and -6, with seniority rights pursuant to N.J.A.C. 6A:32-5.1 et seq., and that the District's failure to continue to employ him constitutes a violation of his tenure and/or seniority rights. Petitioner seeks reemployment in a full-time position within the scope of his tenure and/or seniority as a director or supervisor together with salary, benefits and/or seniority credit lost. The District filed an Answer and Affirmative Defenses to the Verified Petition, and the Department of Education transmitted the contested case to the Office of Administrative Law for a hearing. The matter was reassigned to the undersigned in January 2010, and scheduled for hearing on September 27, 2010. Subsequently, the District filed a motion for summary decision, and petitioner filed a motion for partial summary decision. I entertained oral argument on the motions on May 11, 2011, on which date the record closed.

FINDINGS OF FACT

The pertinent facts surrounding the within motions are not in dispute. The parties submitted a Partial Joint Stipulation of Facts (Stip.), accompanied by various documents (J-1 to J-24). In support of their respective motions, petitioner submitted a certification (Perna Cert. and P-1 to P-10), and the District submitted a certification of its Director of Labor Relations, Luis Rojas, Jr. (Rojas Cert. and Exhibits A to C). Based upon a review of the documentary evidence presented, I **FIND** the following pertinent undisputed **FACTS**:

From July 2000 to August 2001, petitioner served as a non-employee consultant for the District under the title of "Interim Director, Office of Career Learning Academies and Smaller Schools." (Stip. at ¶1.) Prior to his employment with the District, petitioner had been employed as an educator in New York City for twenty-seven years. He holds

New York State permanent teaching certifications in elementary education (N–6) and biology (7–12), and is certified by the City of New York as an Education Administrator Curriculum & Staff Development Specialist and an Education Administrator Senior Program Management Specialist. (Perna Cert. at ¶2; see P-1 to P-4.) Petitioner received a master's degree in biology from the City College of New York in 1979, and a Ph.D. in curriculum and instruction, science education, from Kansas State University in 1992. (Perna Cert. at ¶2; see P-5; P-6.)

Petitioner became employed in the District on August 23, 2001, and served in the position of Director, Paterson Educational Partnership for Twenty-First Century Community Learning Centers, between August 23, 2001, and August 8, 2002. (See Stip. at ¶2.) Petitioner's duties in this assignment were as follows:

- Maintained strong partnerships between the school district and local non-profit organizations, and various state and city agencies; constantly planning and coordinating all of the various enrichment, recreational and cultural activities offered to over 2000 children and 700 adults annually.
- Fiscal management; preparing required quarterly reports for submission to the USDOE.
- Continuously evaluating all activities and practices to assure continuous quality improvements were being made.

[Stip. at ¶2; see Rojas Cert. at ¶3.]

At the time of his hiring, petitioner held a New Jersey county substitute certificate. (See Stip. at ¶3.) The State-district superintendent for Paterson public schools (the State-district superintendent) sought permission from the New Jersey Department of Education (the Department of Education) to employ petitioner. (Ibid.) By correspondence dated July 24, 2001, the director of State-operated school districts for the Department of Education approved petitioner's appointment. (See Ibid.; J-1.) The District relied upon the director's opinion that a county substitute certificate was acceptable to meet State standards. (See Stip. at ¶3; J-2.)

Between August 9, 2002, and December 3, 2006, petitioner served as "Director of Grant Development and Evaluation." (Stip. at ¶4.) Petitioner's appointment to this title was effectuated, retroactively, by the State-district superintendent in October 2002, after express approval of petitioner's assignment by the director of State-operated school districts. (See Stip. at ¶4; J-5; J-6.) Petitioner's job functions and responsibilities for this position were set forth in a job description dated December 10, 2003, which was revised on March 15, 2005. (Stip. at ¶4; see J-3; J-4.) The original job description provides that "[t]he Director of Grant Development and Evaluation seeks out, obtains, and utilizes Federal, State and other funding to as great an advantage as possible to benefit the educational programs, facilities, and personnel of the district." (J-3.) The director also "coordinates the evaluation of selected programs and then reports to the Superintendent and the Board of Education." The job description as revised in March 2005 summarizes the nature and scope of the job title as follows:

The Director of Grant Development and Evaluation coordinates the planning, development, implementation and evaluation of applications and program proposals. The Director must conduct research, identify funding and program opportunities, establish effective lines of communication with key individuals within corporate, Federal, State and other sources, and prepare applications and program proposals within established timelines. The Director works collaboratively with the administrative and instructional staff and communicates effectively with parents, members of the community and colleagues in other districts and schools.

[J-4.]

Pursuant to that job description, the listed job functions and responsibilities included, among others, "[i]dentify and research available funding and program opportunities"; "[e]stablish and maintain effective lines of communication with individuals responsible for funding and grants within the various sectors"; "[o]btain application forms and procedures, analyze program requirements and specifications, and establish an appropriate timeline for grant development"; "develop budgets and accounting procedures for special projects" in collaboration with the school business administrator; "[p]repare and submit applications for review and approval of the Superintendent of

Schools and Board of Education within established timelines”; “ensure that project activities are implemented as planned within State and Federal guidelines” in collaboration with the Assistant Superintendent for Accountability and Compliance; “[c]oordinate program activities with district staff and outside partners”; “[r]ecommend assessment procedures and instruments as required”; and “[p]resent proposals, program plans and evaluative reports to district staff, the Board of Education, members of the community and funding sources as required.” (J-4.) Both the December 2003 and March 2005 job descriptions specify that a New Jersey Administrative Certificate with a supervisor endorsement was required. (J-3; J-4.)

On June 4, 2004, petitioner completed his master’s degree in education leadership. (Stip. at ¶5; see J-7.) Petitioner was issued a Certificate of Eligibility as a principal/supervisor in July 2004. (Stip. at ¶5; see J-8.) On November 8, 2004, the District submitted the paperwork needed for issuance of petitioner’s provisional certification as a principal. (Stip. at ¶5; see J-9.) Included in that submission was a “Statement of Assurance of Principal Position” by the State-district superintendent, which states that petitioner “[h]as been assured the following position which requires principal certification: Director of Grant & Development.” (See Stip. at ¶5; J-10.) In January 2005, the State Board of Examiners (the Board of Examiners) issued to petitioner a Provisional Certificate to serve as a principal. (See Stip. at ¶6; J-11.) In April 2005, the Board of Examiners issued to petitioner a permanent standard Administrative Certificate with a principal/supervisor endorsement. (See Stip. at ¶7; J-12.) Petitioner has never held a New Jersey Administrative Certificate with an endorsement as a school administrator. (Stip. at ¶12.)

Effective December 4, 2006, the District reclassified petitioner’s position as “Director of Grant Development and Evaluation” to the title of “Director of Grant Development and Evaluation and Pupil Assignment.” (Stip. at ¶8; see J-13.) Petitioner served in this position through June 30, 2007. (Stip. at ¶8.) A job description for the position was adopted on October 11, 2006, which summarizes the nature and scope of the position as follows:

The Director of Student Placement, Grant Development and Evaluation coordinates the planning, development, implementation and evaluation of applications and program proposals. The Director must conduct research, identify funding and program opportunities, establish effective lines of communication with key individuals within corporate, Federal, State and other sources, and prepare applications and program proposals within established timelines. In addition, the Director will administer the registration of students for specialized academic programs and schools outside established attendance areas. The Director assists in the development, monitoring and evaluation of academy and magnet school programs. The Director works collaboratively with the administrative and instructional staff and communicates effectively with parents, members of the community and colleagues in other districts and schools.

[J-14.]

The job description listed job functions and responsibilities similar to the prior job description, and specified that the job title required a New Jersey Administrative Certificate with a supervisor endorsement. (J-14.)

By letter dated May 21, 2007, petitioner was notified that the District had determined to abolish the position of Director of Grant Development, Evaluation and Planning, effective July 1, 2007, and that he would be reassigned to the position title of Environmental Science, Health and Safety Supervisor. (P-7; see Perna Cert. at ¶14.) Between July 1, 2007, and December 3, 2008, petitioner served as Supervisor of Environmental Science, Health and Safety. (Stip. at ¶9.) A job description for the position was adopted on October 29, 2007. (Stip. at ¶9; see J-15). The title was changed to "Environmental Science, Health and Safety Supervisor/Officer" with a job description revision on May 30, 2008. (Stip. at ¶9; see J-16.) Both job descriptions specify that the job title required a New Jersey Administrative Certificate with a supervisor endorsement. (J-15; J-16.)

On August 16, 2007, petitioner filed a Petition of Appeal with the Commissioner claiming that his tenure rights were violated. (See Stip. at ¶10; J-17; J-18.) Specifically, petitioner alleged in the Petition that he had "accrued tenure as a director"; he "has

never served in the title of supervisor while employed with the respondent”; and that the District violated his tenure rights “by reassigning petitioner to the title of supervisor while employing non-tenured staff members in director titles in which petitioner is qualified to serve.” (J-18.) A settlement was reached in that litigation under which it was agreed that petitioner would be assigned as “Supervisor for the Office of Grant Acquisition and Management.” (Stip. at ¶10.) The settlement was initially implemented on December 4, 2008, by the appointment of petitioner as “Acting Supervisor for the Office of Grant Acquisition and Management,” and on December 18, 2008, the District’s superintendent appointed petitioner as “Supervisor of Grant Acquisition and Management” pending approval of the settlement by the Commissioner. (See Stip. at ¶10; J-19; J-20; J-21.) The administrative law judge (ALJ) and the Commissioner issued decisions approving the settlement on May 20, 2010, and July 2, 2010, respectively. (See Stip. at ¶10; J-22; J-23.)

By letter dated April 28, 2009, the interim State-district superintendent informed petitioner that the District “is faced with an economic crisis and is forced to reduce administrative and supervisory staff.” The letter further advised that petitioner’s position as “Supervisor for Grant Acquisition and Management” was being abolished as of July 1, 2009, and that petitioner would not be appointed, and his employment would not be renewed, for the 2009–2010 school year. (See Stip. at ¶11; J-24.)

LEGAL DISCUSSION AND CONCLUSIONS

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision “may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” This rule is substantially similar to the summary-judgment rule embodied in the New Jersey Court Rules. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in deciding the motion:

[A] determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The “judge’s function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a “genuine” issue of material fact for purposes of Rule 4:46-2.

[Citations omitted.]

In evaluating the merits of the motion, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Judson, supra, 17 N.J. at 75. However, “[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.” N.J.A.C. 1:1-12.5(b).

Turning to the within matter, the parties do not contest petitioner’s length of service with the District, the endorsements that he possessed, and the job duties for the various assignments that petitioner held. Rather, the parties’ paths diverge concerning whether petitioner’s service in the various “director” position titles should be counted as time toward tenure. Inasmuch as the pivotal issue is a legal issue involving whether petitioner acquired tenure, I **CONCLUDE** that the matter is ripe for summary decision.

The tenure laws, N.J.S.A. 18A:28-1 to -18, define the conditions under which teaching staff members are entitled to the security of tenure. Tenure has been described as a “statutory right” imposed upon a teaching staff member’s contractual employment status. Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), cert. denied, 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed. 2d. 502 (1963). The statutory provisions supersede contractual terms. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 72 (1982). The objective of the tenure statutes is to protect competent and qualified

teaching staff members, after a probationary period, from removal for “unfounded, flimsy, or political reasons.” Zimmerman, supra, 38 N.J. at 71. They are “designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service.” Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949).

It is well settled that the “right to tenure is created and governed entirely by statute,” Breitwieser v. State-Operated Sch. Dist. of Jersey City, 286 N.J. Super. 633, 637 (App. Div. 1996), and tenure “arises only by passage of the time fixed by the statute,” Canfield v. Pine Hill Bd. of Educ., 51 N.J. 400 (1968), rev’g on dissent, 97 N.J. Super. 483, 490 (App. Div. 1967). In order to acquire the security of tenure, the precise requirements set forth in the statute must be met. Picogna v. Cherry Hill Bd. of Educ., 143 N.J. 391, 400 (1996); Kletzkyn v. Spotswood Bd. of Educ., 136 N.J. 275, 278 (1994); Spiewak, supra, 90 N.J. at 72; Zimmerman, supra, 38 N.J. at 72; Ahrensfield v. State Bd. of Educ., 126 N.J.L. 543, 544 (E. & A. 1941). The employee shoulders the burden of proving an entitlement to tenure protection, which ordinarily must be clearly proven. Canfield, supra, 97 N.J. Super. at 493.

N.J.S.A. 18A:28-5 governs the requirements for tenure. The statute directs in pertinent part:

The services of all teaching staff members employed in the positions of teacher, principal, . . . assistant principal, vice-principal, assistant superintendent, and all school nurses . . . , school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect . . . , shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause . . . after employment in such district or by such board for:

- (a) Three consecutive calendar years . . . ; or
- (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
- (c) The equivalent of more than three academic years within a period of any four consecutive academic years.

[Emphasis added.]

Accordingly, in order to gain tenure a teaching staff member must: (1) work in a position for which a teaching certificate is required; (2) hold the appropriate certificate; and (3) serve the requisite period of time. Spiewak, supra, 90 N.J. at 74.

All teaching staff members employed in the public schools must be “the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of . . . pupils in such public schools . . .” N.J.S.A. 18A:26-2; see N.J.A.C. 6A:9-5.1(a) (“any person employed as a teaching staff member by a district board of education shall hold a valid and appropriate certificate”). Similarly, a teaching staff member must possess an appropriate certificate in order to achieve tenured status. N.J.S.A. 18A:28-5 expressly excludes from tenure protection teaching staff members “who are not the holders of proper certificates in full force and effect.” Likewise, N.J.S.A. 18A:28-4 unambiguously directs that “[n]o teaching staff member shall acquire tenure in any position in the public schools . . . who is not the holder of an appropriate certificate for such position, issued by the State Board of Examiners, in full force and effect”

Certificates are issued by the Board of Examiners pursuant to rules and regulations prescribed by the State Board of Education. N.J.S.A. 18A:6-38. The regulations address various certificates that may be issued, describe the requirements for obtaining a particular certificate, and designate which certificates are required for which positions. N.J.A.C. 6A:9-1.1, et seq. The State Board has implemented the certification requirement by authorizing the issuance of three categories of educational certificates: Instructional, Administrative and Educational Services. N.J.A.C. 6A:9-

5.2(a). The State Board has further designated endorsements under each type of certificate, which identify the specific area in which a certificate holder is authorized to serve. Employment in a specific assignment requires that the educator hold the appropriate endorsement. Nelson v. Old Bridge Bd. of Educ., 148 N.J. 358, 363 (1997).

The regulations set forth various endorsements that may be issued under an Administrative Certificate. Pertinent to the within matter, an endorsement as a school administrator is required in order for an individual to be authorized to serve in “any position that involves services as a district-level administrative officer.” N.J.A.C. 6A:9-12.3(a) (emphasis added). Such positions include superintendent, assistant superintendent, and director. Ibid. Holders of this endorsement are authorized “to provide educational leadership by directing the formulation of district-wide goals, plans, policies and budgets, by recommending their approval by the district board of education and by directing their district-wide implementation.” Ibid. They are also “authorized to recommend all staff appointments and other personnel actions . . . for approval by the district board of education,” as well as to “direct district operations and programs,” “supervise and evaluate building administrators and central office staff, including school business administrators,” and “oversee the administration and supervision of school-level operations, staff and programs.” Ibid.

A principal endorsement is required “for any position that involves service as an administrative officer of a school or other comparable unit within a school or district.” N.J.A.C. 6A:9-12.3(b) (emphasis added). Such positions include assistant superintendent for curriculum and instruction, principal, assistant principal, vice-principal and director. Ibid. The holder of a standard principal endorsement is also authorized to serve in the position of supervisor. Ibid. Holders of a principal endorsement are “authorized to provide educational leadership by directing the formulation of goals, plans, policies, budgets and personnel actions of the school or other comparable unit, and recommending them to the chief district administrator, and by directing their implementation in the school or other comparable unit.” Ibid. They are also “authorized to direct and supervise all school operations and programs, to evaluate school staff . . . and to direct the activities of school-level supervisors.” Ibid.

A supervisor endorsement is required “for both supervisors of instruction and athletic directors who do not hold a standard principal’s endorsement.” N.J.A.C. 6A:9-12.3(c). The regulation defines a “supervisor” as “any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel.” Ibid. (emphasis added). A supervisor endorsement “also authorizes appointment as an assistant superintendent in charge of curriculum and/or instruction.” Ibid.

Against this backdrop, petitioner asserts that he acquired tenure predicated on his employment from the issuance of his standard Administrative Certificate in April 2005 until his termination on June 30, 2009. Petitioner argues that his services during those years “were all appropriately performed under the title of Supervisor,” his principal/supervisor endorsement “satisfied the requirements in each of the job descriptions in which he served,” and this endorsement “was appropriate for the performance of all his duties because District-wide services are clearly within the purview of a Supervisor, regardless of any limitations placed on an individual whose certificate is limited to that of Principal alone.” In its answer to the petition and in connection with its motion, the District contests petitioner’s tenure claim as it relates to his service in the District prior to July 1, 2007, when he was reassigned to the job title of Environmental Science, Health and Safety Supervisor. The District contends that based upon petitioner’s high-level district-wide duties during those years, a school administrator endorsement was required in order for his service as a district-wide administrator to count toward tenure. Accordingly, the District maintains that because petitioner did not possess the requisite endorsement while serving as a “director,” this time cannot be credited and, thus, his length of service falls short of the probationary period required by statute to acquire tenure.

The State Board of Education’s decision in Duva v. State-Operated School District of Jersey City, EDU 9801-98, State Bd. of Educ. (March 6, 2002) <<http://lawlibrary.rutgers.edu/oal/search.html>>, is instructive to the issues presented. In Duva, the petitioner (Duva) served as a director for the Jersey City school district from 1980 until 1998, when the school district abolished his position. In October 1980, Duva was appointed to serve in the unrecognized position title of “Director of

Research, Planning and Evaluation,” an assignment for which the district board required an Administrative Certificate with an endorsement as either a principal or supervisor. Duva was later appointed as “Director, Research/Planning/Evaluation” in April 1990, which was also an unrecognized position title for which the job description did not include a certification requirement. From 1994 to 1998, Duva served as “Director, Planning/Evaluation/Grants,” which, according to the job description, required an Administrative Certificate with an endorsement as either a principal or supervisor. Duva, who held an Administrative Certificate with endorsements as a school administrator and as a supervisor, alleged that the district “violated his tenure and seniority rights when it abolished his position as Director, Planning/Evaluation/Grants” and “claimed that by virtue of his service in the position title of ‘director,’ he had acquired tenure rights entitling him to employment as a supervisor over any individuals who had not achieved tenure.” In her initial decision, which was adopted by the Commissioner, the ALJ concluded “that [Duva] had achieved tenure as a ‘director,’ finding that a directorship constituted a distinct position for tenure purposes.” However, the ALJ reasoned that, although Duva possessed certification as a supervisor, “the tenure rights he had accrued as a result of his service as a ‘director’ could not be asserted so as to permit him to claim a supervisory assignment” because “director” and “supervisor” were “separately tenurable position[s].” After declining to approve a proposed settlement between the parties, the State Board addressed the merits of Duva’s appeal and held that “the scope of [Duva’s] tenure protection under his Administrative Certificate extended to all assignments for which he was qualified by virtue of possessing a supervisor’s endorsement” and, therefore, “upon abolishment of his director’s assignment, [Duva] was entitled to be employed in assignments requiring a supervisor endorsement in preference to any non-tenured individuals.”

In so ruling, the State Board explained that “definition of the scope of the positions in which tenure may be achieved is initially provided by the express language of N.J.S.A. 18A:28-5,” under which “an individual must be a teaching staff member serving either in a capacity specifically designated in the statute or serving in a ‘position’ requiring him to hold an appropriate certificate in order to be eligible to achieve tenure.” The State Board held that because “director” and “supervisor” are not specifically listed

in N.J.S.A. 18A:28-5 "there is no basis to hold that these assignments constitute 'separately tenurable positions.'" The State Board explained that "the starting point for determining the scope of [Duva's] tenure protection is the certification that was required in order for him to be authorized to serve in the capacity in which he was employed by the school district," and "[b]ecause [Duva's] service as a 'director' was in an unrecognized position title, it is necessary to examine the duties with which he was charged by the job descriptions under which he served so as to ascertain the certification requirements of those assignments." Although the State Board recognized that such a determination usually fell within the responsibility of the county superintendent, it exercised jurisdiction over the issue because Duva's positions were never submitted to the county superintendent, and predicated on its "ultimate administrative authority to determine certification" and its status as the "ultimate fact-finder and administrative decision-maker for disputes arising under the school laws."

Based upon the State Board's review of the records, including the job descriptions for the director assignments held by Duva, it "conclude[d] that the duties of those assignments were of such character as to require that the individual serving in them possess an Administrative Certificate with an endorsement as a school administrator in order to be authorized by statute and regulation to fulfill such functions." In reaching this conclusion, the State Board noted that while under former N.J.A.C. 6:11-9.3 (now N.J.A.C. 6A:9-12.3) the school administrator and principal endorsements authorize service as a "director," the supervisor endorsement does not expressly authorize such service. The State Board further found that "the duties specified in the job descriptions under which [Duva] served are beyond the scope of those authorized by the supervisor endorsement" and that "the director's assignments at issue . . . had 'a qualitatively higher level of administrative responsibility than that entrusted to a supervisor'" (citation omitted). It also concluded that "an Administrative Certificate with an endorsement as a principal would not constitute appropriate certification for the assignments at issue given the responsibilities set forth in the job descriptions under which [Duva] served," and stressed that Duva's "duties as specified in every job description under which he served involved district-level responsibilities." Accordingly, the State Board held that Duva's "service was not as an administrative officer of a school or comparable unit, and the principal endorsement would not have authorized

him to fulfill the district-level responsibilities with which he was charged.” Although the district had required an Administrative Certificate with a supervisor or principal endorsement in the job descriptions under which Duva served, inasmuch as Duva held a school administrator endorsement while serving as a director the State Board found that “he fulfilled the statutory requirements of N.J.S.A. 18A:28-5” and “he achieved tenure by virtue of his service under that endorsement.” Based on that conclusion, the State Board held that Duva’s “tenure protection extended to all assignments under his Administrative Certificate for which he held the appropriate endorsement, except for those positions specifically enumerated in N.J.S.A. 18A:28-5,” and because Duva possessed both an endorsement as a school administrator and an endorsement as a supervisor, “the scope of [his] tenure protection under his Administrative Certificate extended to all assignments for which he was qualified by virtue of possessing a supervisor's endorsement.” In other words, Duva earned tenure by virtue of his service under his school administrator endorsement, which extended to other assignments, such as a supervisor, for which he held an appropriate endorsement, with the exception of the positions specifically listed in N.J.S.A. 18A:28-5.

Similar to Duva, petitioner’s service as a “director” was in unrecognized position titles. Initially, I do not embrace petitioner’s argument that this matter should be held in abeyance pending submission of the job descriptions to the county superintendent for a decision as to the required endorsement for each position held by him. Although N.J.A.C. 6A:9-5.5 envisions that a board of education will submit a request to the county superintendent for permission to use an unrecognized title position prior to appointing a candidate and, if approved, the county superintendent will determine the appropriate certification and title for the position, Duva supports this forum’s ability to determine the appropriate endorsement for the “director” position titles held by petitioner in order to decide the transmitted controversy between the parties.

The parties agree that the duties performed, and not the title of a position, are controlling for purpose of ascertaining tenure accrual. See Christie v. Bd. of Educ. of E. Orange, 1985 S.L.D. 307. Toward this end, “it is necessary to examine the duties with which [petitioner] was charged by the job descriptions under which he served so as to ascertain the certification requirements of those assignments.” Duva, *supra*, EDU 9801-

98, State Bd. of Educ. (March 6, 2002) <<http://lawlibrary.rutgers.edu/oal/search.html>>. A review of the various job descriptions reveals that, while serving as a “director,” petitioner was responsible for planning, implementing, and evaluating grants and programs throughout the District. Similar to Duva, petitioner’s duties as specified in each job description under which he served involved district-level responsibilities. However, unlike Duva, petitioner did not possess a school administrator endorsement.

N.J.A.C. 6A:9-12.3(a) unambiguously directs that a school administrator endorsement “is required for any position that involves services as a district-level administrative officer,” and such positions include “director.” Among other functions, the school administrator endorsement authorizes its holder “to provide educational leadership by directing the formulation of district-wide goals, plans, policies and budgets, by recommending their approval by the district board of education and by directing their district-wide implementation.” N.J.A.C. 6A:9-12.3(a). Succinctly stated, I agree with the District’s stance that, based on the job descriptions for the “director” position titles petitioner held, a school administrator endorsement was required for those assignments because petitioner served as a district-wide administrative officer and performed district-wide duties. Similar to Duva, “the duties of those assignments were of such character as to require that the individual serving in them possess an Administrative Certificate with an endorsement as a school administrator in order to be authorized by statute and regulation to fulfill such functions.” Duva, supra, EDU 9801-98, State Bd. of Educ. (March 6, 2002) <<http://lawlibrary.rutgers.edu/oal/search.html>>.

The regulations do not evidence a design to authorize one holding a principal or supervisor endorsement to serve in the assignments in issue given the district-level responsibilities set forth in the job descriptions. Although a principal endorsement lists “director” as a position that could be held by an individual with such an endorsement, N.J.A.C. 6A:9-12.3(b) explicitly states that “[t]he principal endorsement is required for any position that involves service as an administrative officer of a school or other comparable unit within a school or district.” The job descriptions establish that petitioner’s duties extended beyond building-level responsibilities, and involved service as a district-level administrative officer and not as a school-level administrative officer. Simply put, petitioner’s endorsement as a principal did not constitute appropriate

certification for tenure-acquisition purposes because his “service was not as an administrative officer of a school or comparable unit, and the principal endorsement would not have authorized him to fulfill the district-level responsibilities with which he was charged.” Duva, supra, EDU 9801-98, State Bd. of Educ. (March 6, 2002) <<http://lawlibrary.rutgers.edu/oal/search.html>>.

The responsibilities specified in the job descriptions are also beyond the scope of those authorized by a supervisor endorsement. Apart from the fact that N.J.A.C. 6A:9-12.3(c) does not expressly list “director” as a position in which someone with a supervisor endorsement may serve, petitioner’s duties as a “director” extended beyond being “charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel.” Rather, like Duva, “the director’s assignments at issue . . . had ‘a qualitatively higher level of administrative responsibility than that entrusted to a supervisor.’” Duva, supra, EDU 9801-98, State Bd. of Educ. (March 6, 2002) <<http://lawlibrary.rutgers.edu/oal/search.html>> (citation omitted). Indeed, the record is bereft of evidence that petitioner ever performed the duties of a supervisor while serving as a “director.” Petitioner does not claim that his duties while serving as a “director” were in the capacity of a supervisor of instruction, and the earlier petition filed on his behalf stated that he “has never served in the title of supervisor while employed with the respondent.”

Contrary to petitioner’s assertion, Matarazzo v. Board of Education of Cliffside Park, EDU 7230-02, Initial Decision (February 9, 2004), adopted, Comm’r (March 18, 2004), aff’d, State Bd. of Educ. (August 4, 2004) <<http://lawlibrary.rutgers.edu/oal/search.html>>, does not support the conclusion that his supervisor endorsement was appropriate. In that case, the ALJ held that the petitioner, who was previously tenured in the position of supervisor of instruction based upon his service as supervisor of social studies and business, was entitled to the position of district-wide supervisor of instruction over a non-tenured teacher. In this regard, the ALJ concluded that the supervisory positions were not “sufficiently different to give rise to a separately tenable position,” and noted that there had been no “showing that any certification or endorsement is necessary or required for the performance of the district wide supervisor position other than certification as a supervisor in order to be authorized

by statute and regulation to perform such functions.” In stark contrast to the present matter, both positions in that case were supervisory in nature and involved the supervision of instruction. The services in issue did not involve the type of district-level responsibilities set forth in petitioner’s job descriptions and in N.J.A.C. 6A:9-12.3(a), which are reserved for holders of a school administrator endorsement. Equally unpersuasive is petitioner’s argument that “to accept the Board’s premise that the certification requirements in its job descriptions . . . were wrong, the court must find that the Commissioner . . . , with full knowledge of the Duva decision, nevertheless allowed Petitioner to be illegally employed from 2005 through June 2007,” and that this forum must also find that the Board of Examiners “wrongfully approved Petitioner for Provisional Certification in a position which was clearly not limited to a single building and was District-wide in scope.” In short, the record does not establish that the Commissioner determined the endorsement required for petitioner’s directorships and the Board of Examiners issued the provisional certification following the District superintendent’s advice, albeit in error, that the position of “Director of Grants & Development” required a principal endorsement. Even if the Commissioner or the Board of Examiners could be said to have made an error with respect to petitioner’s employment, which is not apparent from the record, this does not alter the fact that petitioner did not meet the statutory requirements for tenure as a result of his service as a “director.” And, petitioner benefited from any such mistakes by being employed in assignments for which he failed to possess the appropriate endorsement. I also reject petitioner’s argument that the Commissioner’s approval of the earlier settlement “establishes that a District-wide position dealing with Grants was appropriately performed under the endorsement of Supervisor held by Petitioner.” Simply put, the Commissioner not did address whether petitioner’s assignment as Supervisor of Grant Acquisition and Management pursuant to that settlement would be tenurable and, as previously discussed, an examination of the job duties of the “director” position titles held by petitioner shows that they required an endorsement as a school administrator in order for his service to be credited toward tenure.

Petitioner further asserts in his certification that at all times since his date of hire he was advised by his supervisors that an Administrative Certificate with an endorsement as a principal/supervisor was appropriate for the positions held by him,

and in reliance upon that information and the job descriptions for his position he sought that endorsement and completed his master's degree in 2004. (Perna Cert. at ¶8; see also Perna Cert. at ¶ 3.) Accepting for purposes of the motion the facts certified by petitioner, they do not warrant relief in petitioner's favor.

In Jennings v. Board of Education of Highland Park, 1989 S.L.D. 1085, the State Board of Education reviewed a claim by an athletic trainer/health teacher that he had tenure as a teaching staff member. Jennings possessed an endorsement to teach physical education but did not possess an endorsement to teach health. Jennings asserted that as a condition of his employment the board of education required him to possess a valid teaching certificate, and that he had advised his superiors that he did not hold a health endorsement to teach health, but they were unconcerned. Jennings, supra, 1989 S.L.D. at 1097. Jennings maintained that, as a result, he did not apply for such endorsement, although he had completed the necessary coursework. Ibid. The State Board held that Jennings' physical education endorsement did not authorize him to teach health and, thus, Jennings "did not hold the 'appropriate certificate' for such position as required by N.J.S.A. 18A:28-4 for the acquisition of tenure." Id. at 1099. The State Board further concluded that "the fact that the Board required Petitioner to hold a teaching certificate with a physical education endorsement did not elevate the position of athletic trainer to that of teaching staff member within the meaning of N.J.S.A. 18A:1-1 so as to confer tenure on Petitioner pursuant to N.J.S.A. 18:28-5 based on his employment in that position," and "[t]o hold otherwise would allow each local board of education to define what is a teaching staff member simply through its own certification requirements." Id. at 1100 (citation omitted). In this regard, the State Board noted that the record contained no indication that the duties attending the position of athletic trainer were of such a character as to require a teaching certificate with a physical education endorsement, and held that "in the absence of any allegation or evidence in the record that a physical education certification was, in fact, required by law . . . [the petitioner] has not met the statutory requirements for the acquisition of tenure." Id. at 1100 -01. The State Board further concluded that Jennings could not rely upon the doctrine of equitable estoppel, stating:

Under the circumstances, we conclude that the statements of the athletic director and principal and the Board's improper action in assigning him to teach health without the appropriate certification cannot be used to excuse the Petitioner's failure to acquire a health endorsement, and Petitioner's reliance upon such actions in the face of clear regulations to the contrary cannot be regarded as reasonable. Petitioner had primary responsibility to apply for and possess appropriate certification during his employment. We therefore agree with the ALJ that the Petitioner cannot show a reasonable reliance upon the Board's actions so as to warrant the application of equitable estoppel.

[Ibid. (citation omitted); see also McAneny v. Bd. of Educ. of the Sch. Dist. of the Chathams, 92 N.J.A.R.2d (EDU) 208.]

This rationale applies with equal force to the within matter. That the District's job descriptions required a supervisor endorsement is not controlling for purposes of whether or not petitioner earned tenure. See Duva, supra, EDU 9801-98, State Bd. of Educ. (March 6, 2002) <<http://lawlibrary.rutgers.edu/oal/search.html>>. Rather, tenure is achieved only by satisfying the precise statutory and regulatory requirements, and a board of education does not have the authority to establish its own certification requirements in contravention of the tenure laws. See Jennings, supra, 1989 S.L.D. 1085. Petitioner was primarily responsible for ensuring that he possessed the appropriate certification and endorsement for the positions in which he served. And, petitioner's alleged reliance upon the District's actions cannot be said to be reasonable in view of the regulations to the contrary, and does not excuse his failure to acquire the appropriate endorsement.

In sum, I **CONCLUDE** that, based upon the job descriptions under which petitioner served, the duties of the "director" assignments were of such character as to require that the individual serving in them possess an Administrative Certificate with an endorsement as a school administrator in order to be authorized by statute and regulation to fulfill such functions. I **CONCLUDE** that, inasmuch as petitioner did not hold the appropriate endorsement for such assignments, he did not earn time toward tenure while serving as a "director" and his length of service falls short of the statutory requirements for the acquisition of tenure. Tenure protection in a position is limited to

teaching staff members who hold an appropriate certificate for that position issued by the Board of Examiners. N.J.S.A. 18A:28-4, -5. This certificate requirement is mandated by the tenure statutes and is a necessary prerequisite to achieve tenure. Accordingly, I **CONCLUDE** that the District acted consistent with the tenure/seniority requirements when it terminated petitioner's employment.

ORDER

I **ORDER** that respondent's motion for summary decision be and hereby is **GRANTED** and petitioner's cross-motion for partial summary decision be and hereby is **DENIED**. I further **ORDER** that petitioner's Petition of Appeal be and hereby is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

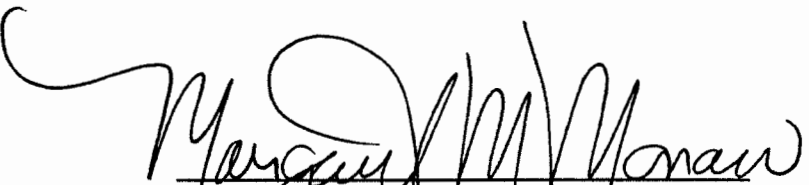
November 10, 2011

DATE

Date Received at Agency:

Date Mailed to Parties:

jb/sej



MARGARET M. MONACO, ALJ

November 14, 2011

November 14, 2011

T.K., on behalf of minor children, D.K., Y.K., and A.K.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF WEST ORANGE,	:	
ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her children, D.K., Y.K. and A.K., are not eligible for a free public education in the West Orange school district. Petitioner was notified by letter from the Board dated June 22, 2011 that her children would be removed from West Orange schools, and that she had 21 days in which to file an appeal of this determination with the Commissioner. The instant appeal was not filed until July 27, 2011. The Board filed a motion for summary decision, contending that petitioner's appeal was untimely filed. Additionally, the Board filed a request for tuition reimbursement for the period of D.K., Y.K. and A.K.'s ineligible attendance in the West Orange school district at the beginning of the current school year.

The ALJ found that, pursuant to *N.J.S.A. 18A:38-1(b)(2)*, T.K.'s petition was filed beyond the 21-day window for the filing of appeals to a residency determination by the board and accordingly must be dismissed. The ALJ additionally found that although the petitioner did not abandon or fail to prosecute her appeal, there is nothing to preclude the Board from collecting tuition for the period of her children's ineligible attendance. Accordingly, the ALJ dismissed petitioner's appeal and granted the Board's counterclaim for tuition in the amount of \$10,045.36.

Upon a full and independent review, the Commissioner determined that the ALJ's finding that petitioner's appeal was untimely is correct only with respect to entitlement to enrollment while the case is pending, and that the case on the merits is not barred by failure to file within 21 days of the board's adverse notice. Additionally, the Commissioner was unable to find any evidence either proving or disproving T.K.'s residency in West Orange, and determined that without a negative finding of residency, there can be no entitlement to reimbursement of tuition. Accordingly, the case was remanded to the OAL for factual findings and legal conclusions regarding the petitioner's domicile.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 9645-11
 AGENCY DKT. NO. 205-7/11

T.K., on behalf of minor children, D.K., Y.K.,	:	
and A.K.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF WEST ORANGE,	:	
ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter and the Initial Decision of the Office of Administrative Law (OAL) on the Board's motion for summary decision. No exceptions were filed.

The Administrative Law Judge's (ALJ) finding that T.K. untimely filed her residency petition is correct only with respect to entitlement to enrollment while the case is pending, pursuant to *N.J.S.A.* 18A:38-1(b). Where residency petitions are filed beyond the 21 days specified in the statute, in order to be entitled to enrollment while the case is pending, a petitioner must file a motion for emergent relief and prevail on that motion. The case on the merits is not barred by failure to file within 21 days of the board's adverse notice.

Here, however, the Commissioner was unable to find evidence – by way of certification or recitation of testimony¹ – proving or disproving T.K.'s residency in West Orange. Without a negative finding of actual residency, there can be no entitlement to reimbursement of tuition.

¹ The Commissioner was not provided with a transcript of the hearing.

Accordingly, this case is remanded to the OAL for the purpose of factual findings and legal conclusions regarding the petitioner's domicile.

IT IS SO ORDERED.²



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/05/12

Date of Mailing: 1/05/12

² This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36*.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 09645-11

AGENCY DKT. NO. 205-7/11

**T.K., ON BEHALF OF MINOR CHILDREN, D.K.,
Y.K. AND A.K.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF
WEST ORANGE, ESSEX COUNTY,**

Respondent.

T.K., pro se

Stephen J. Christiano, Esq., for respondent

Record Closed: October 27, 2011

Decided: November 23, 2011

BEFORE **KELLY J. KIRK, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 27, 2011, petitioner T.K., on behalf of her minor children D.K., Y.K. and A.K., filed a residency appeal with the Department of Education. On August 12, 2011, respondent West Orange Board of Education (Board) filed an Answer to the appeal, and asserted that the petition was filed out of time and that petitioner is not domiciled in the

West Orange school district. On August 12, 2011, the Commissioner transmitted this matter to the Office of Administrative Law (OAL), where it was filed on August 12, 2011, for determination as a contested case.

A pre-hearing telephone conference was held on August 31, 2011, at which time the Board's counsel advised that a motion to dismiss would be filed on behalf of the Board. A schedule was set, whereby the motion was to be filed on or before September 14, 2011, opposition was to be filed on or before September 30, 2011, and the hearing date was scheduled for October 6, 2011. Respondent's motion was filed on September 19, 2011. No opposition was filed by petitioner.

The parties appeared on the hearing date, which was converted to oral argument and testimony on the pending motion. It was revealed that petitioner had mailed opposition to the pending motion to the Board's counsel, but not the OAL. The opposition was accepted at that time. Oral argument and testimony was heard on October 6, 2011. However, petitioner thereafter indicated that she intended to seek legal representation. In light of the petitioner's intention, petitioner was granted two weeks within which petitioner's counsel was to submit a letter of representation, and respondent was to submit a certification and supplemental brief, to which petitioner would be permitted to respond. However, if a letter of representation was not submitted, the motion was to be determined based upon the testimony and record, including the supplemental documents. The supplemental documents were filed with the OAL on October 14, 2011 and October 27, 2011. No letter of representation or response to the supplemental documents was submitted by petitioner to the OAL.

FINDINGS OF FACT

Respondent presented the Certification of Gregory Brennan in support of its Motion for Summary Decision. The contents of the Certification were not disputed. Accordingly, I **FIND** the following facts:

Gregory Brennan is the school registrar. The registrar's office conducted an investigation on the residency of the petitioner and her children, and determined that

petitioner was not domiciled in the West Orange school district. A hearing was held by the Board on June 20, 2011, to decide if petitioner's children remained eligible to attend school in the district. Petitioner did not appear at the hearing. On June 20, 2011, the Board voted to remove petitioner's children from the district schools for failure of the petitioner to demonstrate her children's school eligibility. By letter dated June 22, 2011, sent via regular and certified mail, return receipt requested, the Board sent to the petitioner's school address of record a letter notifying petitioner that the respondent had voted to remove her children from the district schools and that she had twenty-one days from the date of the decision to appeal to the Commissioner of Education. The regular-mail letter was not returned to the Board. On July 27, 2011, T.K., on behalf of D.K., Y.K. and A.K., filed a residency appeal with the Department of Education. The tuition cost for the 2011–2012 school year for D.K. and Y.K. is \$25,328 each, and the cost per diem based upon 180 school days is \$140.71. The tuition cost for the 2011–2012 school year for A.K. is \$18,890, and the cost per diem is \$104.94. As of the date of the certification, school had been in session for twenty-six days.

LEGAL ANALYSIS AND CONCLUSION

A contested case before the Office of Administrative Law “can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts, as developed on motion or otherwise, indicate that a particular disposition is required as a matter of law.” In re Robros Recycling Corp., 226 N.J. Super. 343, 350 (App. Div.), certif. denied, 113 N.J. 638 (1988). N.J.A.C. 1:1-12.5(b) provides, in pertinent part:

The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.

The Board has moved for summary decision and contends that the appeal should be dismissed because it was not timely filed.

The operative statute is N.J.S.A. 18A:38-1, which provides that public schools shall be free to the persons over five and under twenty years of age, if such person is domiciled within the school district or is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district required sworn statements and documents. Additionally, N.J.S.A. 18A:38-1(b)(2) provides, in pertinent part, as follows:

If the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. **The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days.** No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or

guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. **Nothing shall preclude a board from collecting tuition from the parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner;**

...

[Emphasis added.]

The regulation provides that the parent may contest the board's decision before the Commissioner within twenty-one days of the date of the decision. Accordingly, T.K. had until July 11, 2011, to file her appeal. Petitioner did not appear for the June 20, 2011, hearing, but there can be no dispute that the Board mailed her a letter on June 22, 2011, notifying her of its decision to remove her children and of the filing deadline. Petitioner testified that she was on vacation for more than two weeks and did not receive the letter until she returned at the end of June 2011. Even affording T.K. any reasonable inference, if the twenty-one-day period commenced as of the last day of June 2011, the deadline nevertheless would have been July 21, 2011. Yet, she failed to file a Petition of Appeal until July 27, 2011. Accordingly, I **CONCLUDE** that T.K.'s Petition of Appeal was untimely filed and should be dismissed.

The Board contends that pursuant to N.J.A.C. 6A:22-6.2(a),¹ in the event the appeal is dismissed, the counterclaim for tuition remains. N.J.A.C. 6A:22-6.2(a) provides that if an appeal to the Commissioner is filed by the parent, where the petitioner does not sustain the burden of demonstrating entitlement to attend the schools of the district, or abandons the appeal through withdrawal, failure to prosecute or any means other than a settlement or agreement to waive or reduce tuition, the Commissioner may order assessment of tuition for any period of a student's ineligible attendance in a school district, including the twenty-one-day period for filing of an appeal and the period during which the

¹ The citation of N.J.A.C. 6A:22-29(a) in the Board's brief was presumably a typographical error.

hearing and decision on appeal were pending. However, the aforesaid regulation speaks to an appeal where the parent does not sustain the burden of demonstrating entitlement to attend the schools of the district or where the parent abandons the appeal through withdrawal, failure to prosecute or any means other than a settlement or agreement to waive or reduce tuition. In the present matter, the issue is that the petitioner filed the appeal out of time. She did not thereafter abandon or fail to prosecute her appeal.

Nevertheless, pursuant to N.J.S.A. 18A:38-1(b)(2), "[n]othing shall preclude a board from collecting tuition from the parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner."

Based upon the record, T.K. failed to timely appeal to the commissioner, and as set forth above, the appeal is dismissed for this reason. However, the Board filed a counterclaim for tuition for the period of ineligible attendance, and I **CONCLUDE** that the Board may collect from T.K. tuition for the children's period of ineligible attendance.

Based upon the Certification submitted, dated October 18, 2011, the tuition per diem for D.K. and Y.K. was \$140.71 each and the tuition per diem for A.K. was \$104.94, and the total tuition for the period from September 7, 2011, through October 17, 2011, consisting of twenty-six school days, was \$3,658.46 each for D.K. and Y.K. and \$2,728.44 for A.K. Accordingly, tuition is calculated in the total amount of \$10,045.36.

ORDER

It is **ORDERED** that T.K.'s Petition of Appeal be and hereby is **DISMISSED**, and that the Board's counterclaim for tuition be and hereby is **GRANTED**. It is further **ORDERED** that T.K. pay tuition to the Board in the amount of \$10,045.36 for the children's period of ineligible attendance.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/23/11
DATE

Date Received at Agency:

Date Mailed to Parties: Nov. 25, 2011
db

Kelly J. Kirk
KELLY J. KIRK, ALJ

November 23, 2011 (db)
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

#5-12

IN THE MATTER OF THE TENURE :
 HEARING OF MARY LOU FORSELL, : COMMISSIONER OF EDUCATION
 WEST WINDSOR-PLAINSBORO : DECISION
 REGIONAL SCHOOL DISTRICT, :
 MERCER COUNTY. :

SYNOPSIS

The petitioning Board certified tenure charges of unbecoming conduct, lack of professionalism, and failure to respect the privacy rights of students, against respondent – a teacher of business education – for, *inter alia*, behavior that included allowing the display of inappropriate photographs in the classroom, discussing a student's family finances in inappropriate circumstances; and referring to classified students in a derogatory manner. Certain exhibits in this matter, which included images of minor children, were sealed by the Commissioner following a motion from the petitioning Board. The Board sought removal of respondent from her tenured position.

The ALJ found, *inter alia*, that: teachers are role models for students and carry a great responsibility to act correctly; many of the significant facts in this matter are not in dispute; the record shows that respondent failed to properly manage her classroom and in so doing allowed the posting of many inappropriate images depicting matters not properly exhibited in a school classroom – many of which included pictures of students; respondent allowed students to leave class early and did so herself; respondent on more than one occasion failed to exhibit the awareness of or ability to carry out her responsibility to protect the privacy of her students and their families in regard to financial information to which she was privy; and respondent made inappropriate remarks regarding special education, disability issues – including a reference to a classified student as a “sick freak” – and matters relating to personal family decisions. The ALJ concluded that the Board had proven by a preponderance of the credible evidence that respondent is guilty of conduct unbecoming a teacher, and that – with due consideration of her lengthy and previously discipline-free career – the appropriate sanction under the circumstances is removal of respondent's tenure.

Upon independent review of the record, the Commissioner concurred with the findings of the ALJ, and adopted the Initial Decision as the final decision in this matter. Respondent was dismissed from her tenured employment, and a copy of this decision was forwarded to the State Board of Examiners for action against her certificate(s) as that body deems appropriate.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

January 9, 2012

OAL DKT. NO. EDU 2879-11
AGENCY DKT NO. 50-2/11

IN THE MATTER OF THE TENURE :
HEARING OF MARY LOU FORSELL, : COMMISSIONER OF EDUCATION
WEST WINDSOR-PLAINSBORO : DECISION
REGIONAL SCHOOL DISTRICT, :
MERCER COUNTY. :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the District's reply thereto – submitted in accordance with the provisions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

Respondent presents her own factual recitation – based on her testimony at hearing – of the events which transpired resulting in the District's charged Specifications 1, 2, 3 and 6, emphasizing what she avers were mitigating or negating factors which should have been considered by the Administrative Law Judge (ALJ) in reaching his determinations with respect to these charges. Although acknowledging that she – like all teachers – made some mistakes, respondent maintains that in order to properly assess these mistakes and the appropriateness of any penalty, they must be viewed as a small part of respondent's entire professional career record, which she charges the ALJ failed to do.

In reply, the District supports the ALJ's well-reasoned decision and his recommended penalty. It charges that respondent's testimony with respect to the photos on her classroom wall was particularly incredible. It maintains that this charge – which involves a five-

month pattern of conduct demonstrating a serious lack of judgment by respondent – standing alone is sufficient to warrant her termination. When added to the incidents underlying Specification 2 – occurring in two separate school years – demonstrating a pattern of insensitivity and disregard for the confidentiality rights of a student and her mother, and those incidents in Specification 3 evidencing a pattern of insensitive behavior toward classified students, the District contends that it is obvious that the ALJ correctly considered the totality of the evidence in reaching his conclusion that removal of respondent's tenure is the appropriate penalty in this matter.

Upon a considered review of the entire record in this matter,¹ the Commissioner concurs with the ALJ that the District has sustained its burden of establishing Specifications 1, 2, 3 and 6 by a preponderance of the credible evidence, and that respondent's termination from her tenured position is warranted. In so concluding, the Commissioner is in full accord with the ALJ's analysis in this regard:

Based upon the record, I FIND that Ms. Forsell did engage in conduct unbecoming a tenured educator and exhibited a lack of concern for the privacy of students. She failed to properly manage her classroom and in so doing allowed the posting of many entirely inappropriate pictures depicting matters not properly exhibited in a school classroom, pictures which, in many cases, included the images of students. She allowed students to leave class early and did so herself. She on more than one occasion failed to exhibit either the awareness of, or ability to carry out her responsibility to protect the privacy of her students and their families in regard to financial information to which she had become privy. Finally, she made remarks that were simply inappropriate in the context in which they were expressed, regardless of her right to hold such views as she might have in respect to matters regarding special education, disability issues and matters relating to personal family decisions. (Initial Decision at 25)

¹ With respect to respondent's exceptions regarding the facts determined by the ALJ based on the testimony of the witnesses and the credence he ascribed to such testimony, the Commissioner notes that the record before him does not include transcripts of the hearing conducted at the OAL in this matter. Challenges to the factual findings predicated upon credibility determinations made by an ALJ require the party to supply the agency head with the relevant and necessary portion of the transcript. *See In re Morrison*, 216 N.J. Super. 143, 158 (App. Div. 1987)

Turning to the appropriate penalty to be imposed in this matter, the Commissioner is mindful that the "[f]actors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the individual's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring." *In the Matter of the Tenure Hearing of Deborah Suitt-Green, State-operated School District of the City of Newark, Essex County*, decided by the Commissioner October 14, 1997, slip. Op. at 32, citing *In re Hearing of Ostergren, Franklin School District*, 1966 S.L.D. 535, 541; *In re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967).

The Commissioner, nonetheless, concludes that the entirety of the record supports the ALJ's cogent evaluation of these requisite factors here:

If this case only involved Ms. Forsell's inappropriate comment to Ms. D. and her discussion with J.C. in the science class, the matter would not warrant more than a reprimand. The addition of her comments about the "sick freak" and the "abortion" are more troubling. They are indefensible in the context in which they were made, whatever her private views might be. When these are joined with the continued failure to manage, monitor or shutdown a site for the posting of what she had been alerted to as offensive and inappropriate materials that violated any common sense of what belonged on display in a classroom and which violated policies to discourage and stamp out discrimination and bullying, the level of Ms. Forsell's misconduct and failure to live up to the professional standards expected of a tenured teacher is substantially increased. The repeated instances of lack of judgment in matters that could have caused serious offense is difficult to mesh with the high responsibility imposed upon teachers as role models and examples for students. Tolerance, even by neglect, of the sort of materials displayed in her room, is intolerable conduct. Under the circumstances, and with due consideration for her lengthy and apparently previously discipline-free career, I am constrained to CONCLUDE that removal of tenure is the appropriate sanction. (Initial Decision at 25-26)

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. Mary Lou Forsell is hereby dismissed from her tenured position with the

West Windsor-Plainsboro Regional School District. A copy of this decision will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.²



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/09/12

Date of Mailing: 1/10/12

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (N.J.S.A. 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 02879-11

AGENCY DKT. 50-2/11

**IN THE MATTER OF THE TENURE HEARING
OF MARY LOU FORSELL,
WEST WINDSOR-PLAINSBORO REGIONAL
SCHOOL DISTRICT, MERCER COUNTY.**

John Collins, Esq., for petitioner West Windsor-Plainsboro Regional School District (Parker McCay, attorneys)

Michael T. Barrett, Esq., for respondent Mary Lou Forsell (Bergman & Barrett, attorneys)

Record Closed: October 11, 2011

Decided: November 23, 2011

BEFORE **JEFF S. MASIN**, ALJ:

The Board of Education of the West-Windsor Plainsboro Regional School District (Board) filed tenure charges against Mary Lou Forsell, a certified teacher of business education. The original Statement of Tenure Charges incorporated six separate specifications; at trial the Board abandoned Specifications 4 and 5. Specification 1, based upon an observation of Ms. Forsell's class on June 8, 2010, alleged, as its most important concern, that she had permitted or otherwise allowed inappropriate photographs to be displayed in her classroom. Specification 2 alleged that in

connection with her position as junior and then as senior class advisor, she had caused embarrassment and humiliation to a student by violating her privacy and discussing matters concerning the student's family's finances in inappropriate circumstances. Specification 3 alleged that Forsell had referred to classified students in a derogatory manner and had expressed herself in a manner that raised concern as to her ability to properly engage with parents of a classified student. Specification 6 alleged that Forsell had refused to make appropriate accommodations for classified students. The Board's Statement of Charges accused Forsell of unbecoming conduct and a lack of professionalism and a failure to respect the privacy rights of students.

Ms. Forsell filed an answer to the Statement of Charges and the Commissioner of Education transferred the contested case to the Office of Administrative Law (OAL) on March 16, 2011, pursuant to N.J.S.A. 52:14B-1 to- 21 and N.J.S.A. 52:14 F-1 to -13. The Acting Commissioner of Education issued an Order, dated March 11, 2011, sealing certain exhibits, identified in the Order as Exhibits 2-28. Hearings were held on August 22, 23 and 31, 2011. Counsel filed briefs and replies and the record closed on October 11, 2011.

Specification 1

Michael Zapicchi is the Principal of West Windsor-Plainsboro High School North, where Ms. Forsell taught in 2010. He conducted a classroom observation on June 8, 2010 during the 3rd instruction block. Forsell was located at the teacher's computer desk and Zapicchi noted that it did not appear to him that she noticed his presence in the classroom as he sat in its last row. During the first twenty minutes of the class period, Forsell did not address the class in any manner whatsoever. He noticed that on the whiteboard in one-foot tall letters was the statement "Sex is the best." He observed that two students were "romantically engaged", kissing during the class. Two other students were talking about a new computer game that incorporated guns. Profanity was being used, and this stopped when he asked the students what they were doing. During these activities, Forsell did not react or address the class at all. At 10:13 a.m., Forsell got up from her seat and went to the classroom door. She erased the words on the whiteboard and left the room. Zapicchi remained in his seat. A student sitting next

to him said that he did not understand his assignment. When the principal suggested that he inquire of Ms. Forsell, the student said that he would rather ask other students, he proceeded to do.

At 10:38 a.m., Ms. Forsell got up, cell phone in hand, and left the room. Zapicchi could see her foot holding the door open, but he could not hear her talking. She then returned to the classroom and resumed working at her desk. At 10:45 a.m., students began to leave the classroom even though there were five minutes remaining in the period. Forsell exhibited no reaction to this and other students stood up and went to the door. Forsell then got up, passed through the students and left as did some students, at 10:47 a.m., prior to the actual end of the class period at 10:50.

Mr. Zapicchi explained that in addition to these observations, while in the classroom he also noted that there was a collage for approximately one hundred to one hundred and fifty pictures filling the entire wall on the right side of the room. The collage was three to four pictures in height. He noticed that some of the pictures were of a questionable character. After everyone had left the classroom, he reviewed the entire set of pictures. Some of them had faces of students on them. A large number of the posted items were objectionable, either drug or alcohol-related, homophobic, racially insensitive, or insensitive as to economic status or ethnicity. Many of the pictures had been "Photoshopped," manipulated so that the head or just the face of a student were placed on another person's body. Other than the fact that Photoshop was itself a part of the curriculum for Ms. Forsell's class, there was no connection between the images on many of the pictures and the class curriculum. Thirty or forty were "really offensive." A series of most of the pictures does not allow for the identification of the students depicted and the photographs themselves, while in evidence, are sealed, the recitation of what is depicted will not undermine or violate the Commissioner's Order.

R-5 A photo with a female body and face, the latter apparently inported to the body. The woman holds a sign reading, "OUT OF WORK PROSTITUTE WILL WORK FOR FOOD."

R-6 A photo of three partially clad male bodies with imposed faces. The scene appears to be a street parade and the three figures wear large wings. The caption is "GAY PRIDE."

R-7 A photo of a youthful male, nude above the waist, with the words, "Music First congratulates HANSEL MALE MODEL of the YEAR SO HOT RIGHT NOW."

R-8 A photo of a female, face imposed, holding a tube that is attached to a device, with the caption, "HIT THAT HOOKAH."

R-9 A photo of a female with an imposed face. The woman wears a bikini and fishnet stockings. The caption is partially missing, but reads, "YALL -VE ME." There is an apparently handwritten comment on the photo, but it is hard to read.

R-10 A photo of a female and a male, the female face clearly imposed but the male perhaps in the original. The female is bare breasted, and hands, which appear imposed, cup the breasts.

R-12 A photo of an African-American male, face seemingly original, with a caption, "SMOKE ROCKS."

R-13 A cartoon of a penis and testicles, with ejaculate shown as yellow areas that lead to the mouth of a female cartoon head. The size of the penis vis a vis the head of the woman is clearly intended to suggest an out-sized organ.

R-14 A photograph of a male, face imposed. The caption is "STEVE CARELL THE 40-YEAR OLD VIRGIN." The rest of the wording makes it clear that this was a movie advertisement. However, the face, which may well have been Carrell's, has been replaced with that of a young male, and the "40" is x'd out and replaced with "18" and the word, "virgin" is also lined over and the word "SLUT" placed next to it.

R-15 A photo of a woman, clad in bra and panties and very pregnant, holding an outsized glass of beer. The face of the woman is imposed. Across the top of what appears to have been a beer advertisement are the words, "WHOS THE DADDY." The hand holding the beer may itself have been imposed.

R-16 A photograph of a bearded man wearing a turban with a woman, face imposed, next to him. Something sits on the womans' head, although it is hard to be sure if it is a turban. The caption, not entirely readable, has a handwritten word "CAN'T," followed by a word that is hard to decipher but I believe is "GIRLS," and then, "WEAR TURBANS TOO?"

R-17 A photo of a figure, with short hair and an imposed face, holding what appears to be perhaps drug paraphernalia. The caption is "CRACK IS WACK CRACK IS CHEAP."

R-18 A photo of a football player, lying on the ground with his legs spread, with a face of a male superimposed between the legs at the crotch.

R-19 A photo of a cow with the head of a male wearing a cap, the head imposed in place of the animal's head.

R-20 A photograph of what appears to be a figure wearing a bird's head over his head and feathers on his arms and a Native American costume. The caption is "SILLY INJUNS THINK THEY CAN FLY."

R-21 A photo of a man, apparently of Asian ethnicity, pointing, with a caption reading, "EGGROOL GUD 4 UU!!"

R-22 A photograph that may have been taken from a movie, perhaps Chaplin's "The Great Dictator." The face is superimposed and is that of a young male. The costume of the person is no doubt a parody of a Nazi uniform, but again, if the picture is

from the Great Dictator and the original head is that of Chaplin, the symbols on the uniform are not Nazi insignia.

R-23 A photo of a woman, face imposed, standing on a road at the side of a car and bending forward. It is clear enough from the scene and the woman's costume that she is a prostitute and the caption is "HOW MUCH PER HOUR?"

R-24 A photograph of an extremely thin, no doubt anorexic woman, face imposed on the body. The woman is nude, with red stars and leaves covering her breasts and genital area. The caption is, "AM I FAT?"

R-25 A photo of a woman, face imposed, whose dress has seemingly slipped so that her left breast is exposed. A white star obscures the nipple. The caption is "OOPS!"

R-26 A photo of a woman, face imposed, who is lying on her stomach, nude to the waist, her left breast in profile and partially concealed by sheets.

R-27 A photograph of a male, apparently a body builder wearing only a covering over his genital area, with real or perhaps exaggerated musculature, with an imposed face of what appears to be a Black male, mouth open but obviously exaggerated in size. The caption, emanating in bubble fashion from the mouth of the person, reads, 'I WANNA NO WERE DA GOLD AT.'

R-28 An advertisement for a movie, described as "THE MOST OUTRAGEOUS MOVIE EVER." The topless woman pictured jumping in the air, with stars over her nipples, has an imposed face. The movie is entitled, "PERVERT."

R-29 A photo that may have originally been of a female, with a male head imposed that is far too large for the body. The head is of a Black man with gray hair. The caption is "HOT CHICKS!!!"

R-30 A photograph of a woman, face imposed, who is shown with a needle in her arm and a cord around her bicep. The caption is "SOBER SIX HOURS!"

R-31 A photograph of a teenage male. The face and head may well be from the original photo. Imposed over the photo of the fully clothed person are the words "BIG BALLS." In the general vicinity of the genital area of the kneeling figure there are two round forms, not identifiable as to what exactly they may be, but obviously superimposed and explained by the caption.

R-32 A photograph that appears to have been heavily manipulated, showing a figure shot in running shoes, with a face that appears to be added, although not as obviously as in some of the other pictures. The figure wears, thanks to manipulation, a red outfit with stick figure appearing to be a dragon and hand-added goatee and facial hair. A large cone-shaped hat is also added. The word "Rice" is written on the photo with an arrow pointing to some vegetation. The entire presentation is obviously intended to show an Asian, perhaps Chinese, figure.

R-33 A boy, wearing only a loin cloth or underwear, with the words "I'm not even afraid of God" imposed on the picture.

R-34 A picture showing a male, possibly African-American, wearing a long white shirt and pants that seem to be very low to the ground. The caption is "Hat turn sideways pants on the ground Lookin like a fool wit cha pants on the ground! Under the first of two pictures of this male are the letters WTF? Under the second is "EXPLANATION." A figure, possibly an older African-American male with a stocking cap, is also present. Words at the top of the photo read: Made by: J. P. (there is a full name, possibly that of a student).

R-35 A cartoonish picture, of a buck-toothed, triangular-hatted figure with glasses and with a dragon on his clothing, bears a caption reading "Bying88." To the left of the figure is pictured what appears to be a computer game box, "Mioldern War 2." A computer game controller is also pictured.

R-36 Two males are pictured, with the figure on the right with an imposed face. They are shown from the upper chest up, unclothed. The caption is "I'm gay." The image is identified as from "GETTY IMAGES."

R-37 A photo of an African-American male with an open book in front of him. The caption is "E.S.L Class." Also, words on the photo read "Mah Name C.B. (the entire name is present, and again, it may be that of a student) I No speak da English so Good."

R-39 A picture of a teenager kneeling in front of a menorah, with the word "JEW" in the upper left corner of the picture. It appears that the picture of the boy is superimposed over that of the menorah.

R-40 A photo (it is not clear whether this itself may be some sort of created figure rather than a photo of a real woman) of a rather full-figured, bikini-clad woman, with an imposed face and the caption "RECOVERING BULIMIC! YEAH!" The words "FreakingNews.com" appear in the lower right corner.

R-41 A photo of a female with a superimposed face, wearing a top and underwear. The photo appears to be from a poster or publicity item for the movie "The Hangover", as the copyright for "Warner Bros." is displayed.

Mr. Zapicchi advised Ms. Forsell to meet with him at 3:00 p.m. and told her to be accompanied by a teachers' association representative. At the meeting, she appeared to be surprised that he had even been in her classroom and inquired as to which "block" he had been present in the classroom. He noticed that all of the pictures on the wall had been removed and stuffed into the recycling bin. He advised her of the inappropriate pictures that he had observed that had no place in a classroom. She referred to the display as the "Wall of Shame." These photos were apparently done at the end of assignments and just posted on the wall. In a latter discussion with David Miller, another teacher who taught one class a day in the room on three out of every

four days, Zapicchi learned that the posting of pictures had begun in January of that year. Miller was reprimanded in a memorandum placed in his file. He said that he had told Forsell that these were inappropriate postings, but she had replied that she did not think it was a big deal.

Mr. Zapicchi reviewed all of the photos and recognized the faces of students in photos numbered 5, 6, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 28, 30, 31, 36, 37, 39, 40 and 41. All but one of these were students in West Windsor-Plainsboro, although none were in that particular class. He also noted that the student depicted in photograph R-37, which was the picture of a male who says that he does not "speak da English so Good", spoke to him along with the boy's father. While the student explained that at first he was not particularly offended by the "can't read" message, he did later find it offensive and took it down, only to have someone subsequently post it again. Additionally, the principal noted that the term "Smoke Rocks" (R-12) has drug connotations and R-7, which does not depict a student, had sexual connotations. In regard to R-16 (turban reference), the school has a high population of students of Indian background. R-19 (human head on a cow) there were perhaps thirty to forty similar "head and body" (my term) pictures. R-20 ("Silly Injuns") was offensive to Native Americans. R-32 (the "Rice" picture) appeared to have been Photoshopped using a picture from the High School's cross-country team. The student depicted in the "menorah" picture, R-39, who is Jewish, was not offended.

Mr. Zapicchi felt that the presence of these pictures in Ms. Forsell's classroom reflected poorly upon her judgment as a teacher of impressionable students. He was also disappointed in the classroom observation, as there was no lesson plan, no direction given to the students, no addressing of the students. Ms. Forsell seemed not to recognize that he was even in her classroom, and of, course, the presence of the photos on the wall was troubling. The photos violated the School Board's policy against the creation of a hostile environment. He recommended that Forsell be suspended until a determination could be made as to what was the appropriate course regarding her. He acknowledged that she did not produce the pictures and did not direct that they be produced. She did not prevent their removal. However, she is the manager of her

classroom and she should never have allowed or suffered these type of pictures to be posted. This was a reflection of poor management. As for what he observed in the classroom, it involved multiple aberrations. In past years, Ms. Forsell had been found to have effective lessons and to have generally good relationships within the classroom.

Zapicchi noted that the collage was not set up so that the inappropriate photos were obscured. He did not see all of the offensive photos during the course of the class, but did so after it ended. The "Wall of Shame" was at that time the only display of student work in the classroom. In the past there had been proper displays of student projects. No student complained about the pictures.

Specification 2

J.C., now a nineteen-year-old college student, testified that in June 2010, she was a student at West Windsor-Plainsboro North High School. In her junior year she attended the junior prom. Her mother was divorced and disabled and her father "not involved" and although J.C. wanted to attend the prom, her mother could not afford to pay the ticket cost. Her mother contacted Ms. Forsell, who was the Junior Class advisor, and inquired whether the fee could be waived. J.C. had a date for the prom, a sophomore. As Ms. Forsell told J.C., the boy's mother paid for his ticket.

During her senior year, J.C. found herself in similar straits regarding the senior prom. Because of events to be described shortly, J.C.'s mother, rather than speak about the situation with Ms. Forsell, contacted Principal Zapicchi about her dilemma. Zapicchi advised that he would take care of both her ticket and that of her date if necessary and indeed both were paid for. On May 6, 2010, J.C. was in a genetics class in a lab group with three other students. Ms. Forsell, who was not the teacher in the room, nevertheless entered the classroom and approached J.C. She inquired of J.C. how her date's ticket was going to be paid for. J.C. replied that Zapicchi had said that he would take care of it, but Forsell said that he was not going to do so. The conversation from Forsell, conducted in the classroom, was "not friendly" and J.C. was getting "really embarrassed." Other students were in the vicinity of where the two were

talking. The very next day, J.C. was in her English class and Forsell entered and asked her what her date wanted to eat at the prom. She claimed that the meal choice was not on her sheet. J.C. thought that this information has already been supplied, but nevertheless told Forsell. This was a "much more friendly encounter." Forsell was never J.C.'s teacher. When she told her mother about Forsell's actions, her mother was "shocked" and wrote a letter to inform Zapicchi about the events.

J.C. had no recollection that Forsell even mentioned anything about a "refund" in the conversations in either the genetics or the English class.

E.S., J.C.'s mother, confirmed her economic circumstances and her request for assistance regarding the junior prom ticket. Forsell advised that the school could assist. Ms. S. could not afford to pay for her daughter's date's ticket and did not know how that was to be paid for. When J.C. went to pick up the ticket or to hand something in, Forsell told her that the date's ticket was taken care of. Ms. S. was mortified to learn that at a softball game Forsell approached U.D., mother of her daughter's date, and discussed Ms. S.'s financial circumstance with Ms. D and told Ms. D. that she should buy her son's ticket and that the school was buying J.C.'s ticket. When senior year came and the prom ticket issue again arose, she decided to bypass Forsell and contacted Zapicchi directly. She went to see him and explained why she did not want to go through Forsell. He told her that the ticket would be taken care of. He asked if J.C.'s date needed a ticket and Ms. S. said that she did not know. This boy had graduated a year earlier. Zapicchi told Ms. S. that the ticket would be taken care of. J.C. later told Ms. S. about Forsell's visit to the genetics class and the questioning that took place near other students and the classroom teacher, including Forsell's disputing that Zapicchi was taking care of the date's ticket. J.C. told her that she was "embarrassed and mortified." Ms. S. was "furious" and went to see Zapicchi. He told her, "I've been waiting for you, I thought you might come in." Apparently, the genetics teacher had told Zapicchi about Forsell's visit. Ms. S. wrote a letter to Forsell explaining her distress about Forsell's actions. After the junior prom incident involving the conversation with U.D. at the softball game, Ms. S. had thought to let that matter go, but the events regarding the senior prom simply were too much.

Y.D. testified that Ms. F.'s husband had coached her daughter in Little League. Ms. D. did not like his coaching style, but denied that that had anything to do with the current matter, which occurred about nine years after that coaching experience. She was at a high school softball game before the junior prom in the vicinity of other parents in the bleachers. Forsell was there and said that she heard that Ms. D.'s son was attending the prom with J.C. She asked if Y.D. knew that J.C. was "on financial assistance." Ms. D. responded that she did not. Forsell told her that the school was paying for J.C.'s ticket, but not for that of her date. This occurred in the midst of a general discussion among the group of mothers about prom-related matters, such as dresses. As far as Ms. D. recalls, the discussions had not been about tickets and Forsell initiated the comments about the tickets. Other parents were within hearing distance of Forsell's comments. The situation made Ms. D. uncomfortable. She told Forsell that there was no problem, she would pay for her son's ticket. J.C.'s mother called her a couple of days later because her daughter had come home from school upset about the financial matter and she did not want Ms. D. to tell her son about it. Ms. D. told her that she was upset about the public setting of Forsell's comments and more so about Forsell telling J.C. about it.

Mr. Zapicchi testified that a waiver was required if prom tickets were to be paid out of anything other than class funds. For the 2009 junior prom, Zapicchi could not afford to pay for prom date's tickets, as over ten members of the Junior class needed financial assistance. In 2010, Ms. S. contacted him about assistance with her daughter's ticket and asked that he be discreet about it with Ms. Forsell. In 2010, the issue of paying for date's tickets was handled on a case-by-case basis. A few were paid for. Disclosure as to the payment for J.C.'s date was made to the class co-advisor. Money was transferred from the Principal's account to the class account. The co-advisor was told not to tell Forsell what was happening.

Ms. S. came to Zapicchi's office and informed him about what had happened with her daughter and Forsell in the genetics classroom. He had never told Forsell about Ms. S.'s concerns about the junior year experience up to that point. He did when Ms. S. came in to tell him about the senior year episode.

Specification 3 and 6

Specifications 3 and 6 each refer in some fashion to Ms. Forsell's alleged reaction to and treatment of special education students. Douglas A. Eadie, Assistant Principal at High School North for thirteen years, testified that in a meeting with a parent of a classified student and Ms. Forsell in December 2006, Forsell had referred to another student in the presence of this parent, noting that this other student, who was referred to by full name, had been removed from her classroom and mentioning this in regard to a comment as to why this student could not be removed as the other had been. This sort of reference by name is unusual, as names of other students are not usually referred to in such meetings. Eadie contacted the Director of Special Services or the Assistant Director to advise about the discomfort that a member of the child study team also present at this meeting had for Forsell's conduct. When the concern regarding confidentiality was brought to Forsell's attention by a memorandum dated January 22, 2007, from Sue DiDonato, the Director of Special Services, Ms. Forsell apologized for her lack of care. Ms. DiDonato, who retired as of June 30, 2011, confirmed that Eadie had contacted her about the meeting and Forsell's action. When she met with Forsell, she was "cooperative" and assured that there would be no repetition of the breach of confidentiality. DiDonato was convinced that Forsell had not acted out of any bad intentions.

Melissa Levine (formerly Betron), Assistant Principal at High School North for ten years and formerly a special education teacher who served as Ms. Forsell's supervisor for four years as assistant principal, was aware of the incident in which Ms. Forsell had used the full name of a special education student. She was aware of the apology as well. Levine also testified about an observation she conducted of Forsell on March 11, 2005. She had concerns about Forsell's relationship with special education, as it was evident to Levine that Forsell did not feel that special education children belonged in her class, believing that they were inappropriately placed there, as they were a "distraction." Levine recalled that there were perhaps four special education students in the class and they would typically work on different matters than the other students in the class. While Levine's summary of her observation noted that Forsell's lesson was

"effective and demonstrated knowledge of the material," and was "well organized," she also included in her recommendation that Forsell work on developing a better relationship with these students. Some of them were in the class in part for the social interaction that was a needed part of their education and this was explained to Forsell. They had some "back and forth" as to how to get these students more involved in the class.

Levine also explained that on December 20, 2005, she had issued a memorandum to Forsell regarding information that Levine had received that on December 15, 2005; Ms. Forsell referred to a special education student as a "sick freak." This comment was purportedly made in the presence of the student. In her memo, Levine, characterizing the teacher's behavior as "unacceptable", referred Forsell to the mission statement and core values of the District, which she attached to the memo. Levine explained that Forsell did not deny making this statement.

On cross-examination it was noted that in her Annual Evaluation for the school year 2004-2005, issued in September 2005, well after the observation of March 11, there was no reference to the alleged problem regarding special education students, and no further reference to this issue appears in any latter evaluation. The evaluation was positive and Mr. Zapicchi signed off on the document. The evaluation did note that it had been observed that "on several occasions . . . students are dismissed from classes prior to the end of the period" and noted the importance "that students remain actively engaged throughout the hour long period and are kept in the classroom until the bell rings, indicating the end of the class." In her Classroom Observation Report of May 30, 2006, Levine noted that Forsell "uses a variety of materials, technology and resources, assigning students based on individual needs." Levine agreed that at the late stages of the school term students tend to be more "rammy" and, as they are finishing up their final projects for the school year, they tend to be "acting much more independently."

Ms. Levine did not recall if other special education students were assigned to Forsell's classes after her March 2005 observation.

Mary Jane Gosselin, a school psychologist and member of the Child Study Team at West Windsor-Plainsboro for twenty-two years, has been assigned to High School North since 1997. She testified that Ms. Forsell had complained about placement of students in her class in 2006-2007. One student, a freshman, was an object of Forsell's concern because she believed that he was not getting all of his work done. The student had Attention Deficit Hyperactivity Disorder (ADHD). When Gosselin discussed this with Forsell, Forsell expressed disbelief that ADHD really existed and suggested that it was instead merely an excuse. Even after Gosselin explained about ADHD, Forsell had a hard time accepting that it was an actual condition and that it warranted any special attention for students.

Forsell also had a problem regarding a student, S.M., a special education student with ADHD who should have been a student at High School South, but was assigned to High School North because the Child Study Team believed that he needed a more structured classroom environment that was provided at High School North. He was a mainstreamed, general education student who signed up for Ms. Forsell's elective Computer Graphics course. He received an "A" for the first marking period, but experienced quite a few absences due to surgery for scoliosis in the second marking period. Forsell did not give him a grade for the second marking period, during which he was absent for about twenty-five days. He returned for the third and fourth marking periods, but there was a discussion about whether he should return for Forsell's class. Forsell had concerns about his continuing, because he had missed much of the Photoshop portion of the class. The student's parents, who were themselves "fairly computer literate", wanted him to continue and were willing to assist him and to help him make up missed work. Gosselin also wanted him to continue, in part because she was aware that he wanted to pursue a career in computers and the course was a foundational course for further work in that area. Forsell gave the student an "F" for the first semester, adding the "A" earned in the first marking period with the "no grade" for the second. To the witness's knowledge, Forsell did not provide him with any opportunity to make up the missed work. As Gosselin recalled, at some time in January or February Ms. Forsell proposed that if the student did not take her Digital Media

course in the following school year, she would forgive the Photoshop unit. The student wanted to continue so that this was not a favorable solution for the family. Eventually, it was suggested that he take a summer course in Photoshop in a local community college or elsewhere and then it would not be a problem for him to take Forsell's Digital Media class. Forsell did not believe this to be sufficient. He took a course, possibly at Rutgers, at the parents' expense. He then took the Digital Media class.

Dr. Susan Kemler, a Learning Disabilities Teaching Consultant (LDTTC) for sixteen years and previously a teacher, is a member of the Child Study Team. She is familiar with R.S. a female student for whom she served as case manager in the spring of 2005. R.S. had Down Syndrome. Forsell had this student in her Computer Applications class, where the student was assigned for both socialization and for the learning element. In the spring of 2005, Ms. Forsell was present for an Individualized Education Plan (IEP) meeting, in the presence of Kemler and others, including members of the Child Study Team and parents, Ms. Forsell was present as a general education representative, as such a presence was required for under the Individuals with Disabilities Act (IDEA). Just before the meeting was to begin, Forsell and Kemler were alone and the parents had not yet arrived. They were engaged in small talk. In the course of this, Forsell wondered aloud whether the parents "knew ahead of time" about the condition and they did not abort the pregnancy. Kemler "did not know what to say." She offered that Forsell should go back to her class and the IEP meeting was held without her presence. The parent was a widower who had just lost his wife and was quite vulnerable. Kemler, having heard what Forsell had said, was afraid of what she might say in his presence. This statement, which was "more of an opinion", was never reported to anyone. At the time, Kemler was not Forsell's supervisor.

Mary Lou Forsell testified in her own behalf. She holds a teaching certificate and is highly qualified in Business Education. She taught for seven years at Montgomery High School and seven years in middle school. She was tenured in Montgomery. She lives in West Windsor and has three daughters who attended that school system. She began to teach in the West Windsor-Plainsboro district, teaching computer applications, graphics and digital media. She served as the class advisor for eight years, advising

regarding the school play, doing videos for sports teams, sport program books, and arranging chaperones. As a class advisor she would start with the freshmen class, and if her selection as class advisor was continued for the next year, move on and up with the class each year through those freshmen's senior year. She did so in 2005 and again started with the freshmen in 2010. The class advisor is involved with the class trip to Disney World, proms, and fundraising. In May 2009, she was the junior class advisor. She found and booked the venue for the prom, created spread sheets to chart payments and meal selections, collected payments and made deposits with the venue, which was the Adventure Aquarium in Camden. In her capacity as advisor, she received an e-mail from E.S., the mother of J.C., concerning the possibility of financial assistance for her daughter to enable her to attend the prom. She wrote back that she would forward the request to Mr. Eadie. She asked him if the ticket could be paid for and was told that it could, but she asked also if he was paying for the date's ticket and was told that he was not paying for the date. She advised Ms. S. of this information.

Forsell was present at a softball game where she encountered Ms. D. Other parents were close by, some in the bleachers, although "not on top of each other." There was general discussion about the prom, dresses, who was going with whom. It was only in this conversation that Forsell first learned of her own daughter having a prom date. Ms. D. complained that she had to pay for two tickets, as she had a sophomore son who was attending with a junior date. Ms. D. asked if it was customary for a sophomore boy to pay for a ticket if he was going to the prom with a junior. Forsell advised that this was not the custom, that if a junior invited a sophomore the junior paid for the ticket. She asked Ms. D. who the date was and was told that it was J.C. Forsell said "Oh" and related that that was a "special case" and that Ms. D. "might consider buying the ticket." She explained that this discussion was held in a conversational tone and she heard nothing of it for the rest of the school year.

In May 2010, Forsell was the senior class advisor, in charge of the prom, which was to be held at the Westin Hotel. Students would bring her the money for the tickets and she would record the payments on a spread sheet that showed who bought a ticket, how much they paid, whether by check, and what the dinner choice(s) were.

Over 400 persons were to attend and she had to tell the venue about the meal selections, arrange for the place cards and table numbers. She noted on her list that J.C. had paid \$80, although the list did not indicate whether the payment was by cash or check. She spoke to her co-advisor and she explained that she had sold the ticket to J.C. The list contained nothing as to the student's date or the meal choice. Lots of students attended the prom without dates. As the date of the event came closer, Forsell had to get place cards done. There were six or eight students without any meal selection indicated. During her prep period, Forsell tracked down these students. When she saw J.C., J.C. asked if it was too late to bring a date. When Forsell responded that it was not too late, J.C. told her that "Mike Z." (Zapicchi) was paying for her date. Forsell told her that he was not, as in respect to another student, Zapicchi had told Forsell that he was not paying for dates' tickets. J.C. disputed this, saying that "he is paying for mine." Forsell explained that she thought that she might owe J.C. a refund if she had paid cash. She told J.C. that she did not know what J.C. was paying for. That concluded the conversation. Forsell was "confused" and she went to see Zapicchi, who said, "I need to talk to you." He then explained that Ms. S. had approached him and wanted a waiver for the cost of the prom ticket but also insisted that she did not want Forsell to know about the request. As a result, he went behind Forsell's back to her co-advisor, who had, it turned out, misplaced the information about the date's meal selection. She then approached J.C. to inquire as to the meal selection and upon obtaining this had no other contact with J.C. When Forsell received a letter from Ms. S., dated May 8, 2010, in which Ms. S. referred to the discussion with Ms. D. that had occurred at the athletic event the previous year, and Ms. S.'s contact with and request to Zapicchi regarding avoiding providing information about the senior prom ticket issue with Forsell, Forsell felt that she had been blindsided, as no one had previously expressed to her any unhappiness. If she had known that Ms. S. was unhappy with her she would have let her co-advisor handle matters involving J.C.

Addressing the June 8, 2010, classroom observation, Forsell explained that this was two days before the start of final examinations. She was collecting past due assignments and students were working on a ten-part final project that constituted their final exam. She was having interaction with students who still owed back assignments.

When the class ended she received an e-mail directing her to meet with Mr. Zapicchi at 3:00 p.m. She spoke to Donald Miller, who was the other teacher assigned to use the classroom. He jokingly said that maybe Zapicchi did not like the wall with the big collage of pictures.

Ms. Forsell explained that Photoshop, which was part of the course curriculum late in the school year, enabled one to switch heads and bodies. While students were not allowed to play games on the computers in class, if they finished their assignments early they were permitted to "play with Photoshop and do creative things." This is how the wall started to grow. Periodically, Forsell would take down pictures and if she knew which student had posted an inappropriate picture she would speak to the student. She had removed pictures four or five times. On June 8, after she had spoken to Mr. Miller, she examined the wall and saw photos that were inappropriate. Her reaction was "Oh, my God, I didn't see this." She took all of the photos down and cleaned the room. There were perhaps one hundred photos on the wall. She does not contest the fact that the photos entered into evidence were among those she removed. Many of them were inappropriate. Some were actually pictures that she had previously taken down that had been posted again. She never directed students to put pictures on the wall and certainly not any inappropriate pictures. In retrospect, allowing any pictures to be posted was "a very bad idea." No students, no teachers or any staff ever complained about any of the pictures. It was "her fault" that the wall of pictures existed. She was very busy and failed to keep an eye on the wall.

Ms. Forsell had no recollection of the alleged "abortion" conversation related by Ms. Kemler. As for the "sick freak" remark, she recalls that there was a student, T.F., who was not in her class. There was a supply closet located next to her classroom. T.F. could not legally be locked in the closet but he had an aide who would lean on the door to keep him in the closet when he had "melt downs." T.F. would scream to be let out of the closet and curse at the aide. This would sometimes occur several times in a week. Sometimes the closet door would open and the aide would sit on top of T.F. to restrain him. When these situations would occur, students in her classroom would pay attention to the events outside the classroom instead of the work in the room. She

asked Ms. Levine if there was a classroom available to move T.F. to and Levine told her there was not. When this all happened again, Forsell lost her temper and said to the aide, "Is there anything you can do about this sick freak." The student was in the closet when she made this comment, which she "shouldn't have said." She received a memorandum. She responded with an e-mail and said that the facts were incorrect because the student was in the closet and "at no time did I have any conversation with the student or the student with me."

Ms. Forsell explained that she had not really suggested that ADHD did not exist, but that instead she had told Ms. Gosselin that she did not understand what it was. Gosselin did not say anything to her in response. Over the years Forsell had "lots of classified students in her class," some with ADHD, although she was not sure what the classification was for these students on their IEPs. She never refused to implement an IEP and no one ever told her that she had not implemented an IEP.

As for S.M., the student who had been frequently absent from her class in, as she thought, "the second semester." She never received an e-mail that he was absent and did not know what had happened to him. She gave him "initially an incomplete" and she approached his case manager at the end of the school year, who told her that he had been out of school due to surgery. The case manager said she had forgotten to tell this to Forsell. Forsell noted that he had missed about twenty-five assignments and asked what the case manager would like her to do about his making up the work. The case manager said that she would speak to his parents. The case manager reported that due to the amount of work that he had to make up and the work from other "academic" classes that he had missed, that he would only make up the academic work, which did not include the computer class work. This information led to a change in the student's grade to an "F". Months later, Ms. Gosselin wanted to change the "F" to a "D" because the student had taken a computer course at Rutgers. But no classwork was exhibited to her and she did not see how she could change his grade in the absence of such work. Gosselin also told her that she was placing the student into Forsell's Digital Media course. Forsell was uncomfortable with this decision because he

had not taken the Photoshop unit in the earlier course, which was a prerequisite for Digital Media. However, he did take Digital Media and did very well.

Summing up, Ms. Forsell admitted that she had made some errors in judgment, but she claimed to have learned from these.

On cross-examination, Ms. Forsell said that tasteful pictures were permitted to be displayed on the wall, not distasteful or inappropriate ones, but that she had not realized that the inappropriate pictures on the wall on June 8 were there. She had not had a chance at that date, so late in the school year, to purge the wall as she had earlier in the year. In her answers to interrogatories she noted that the pictures were not visible from her desk, obscured as they were by the students' computers. She would purge the wall when the class was empty. She referred to it as the "Wall of Shame" because the students referred to the "cone of shame" a dog wears after a visit to a veterinarian. She originated the name "Wall of Shame" for the wall of photos, but is not aware whether the students used that name for it. Photos originally posted on it were "goofy," "funny." She should have stopped the posting before June 8.

Referencing the prom issues, Forsell stated that Mr. Eadie had told her that he was not paying for prom dates' tickets. At the softball game, Ms. D. was seated in the bleachers, two rows in front of her. Mrs. N. was behind and to her left and Mrs. T. to her right. Ms. D. turned to Forsell and asked if it was customary to pay for a date's ticket. Not knowing who Ms. D.'s child's date was, Forsell advised that it was not customary for the date. She asked who the date was and when Ms. D. told her, she said that "Oh, that's a special circumstance. You might consider paying for your son." That was all that she said. As for the senior prom, when she noted that the meal selection for J.C. was not listed, she went to see her and J.C. said that she was bringing a date. This conversation was in "kind of the front of" J.C.'s science classroom. When Forsell said that J.C. should bring her the payment for the ticket, J.C. responded that "Mr. Z." or "Mike Z." was paying for the date's ticket. Forsell responded that he was not doing so. She acknowledged that she should have removed J.C. from

the classroom for this conversation. She did ask many students what they wanted to eat and did not take them out of their classrooms for this inquiry.

Discussion

Teachers are role models for students. In that sense they carry a greater responsibility to act correctly than the typical public employee. State Bd. of Exam'rs v. Charlton, 96 N.J.A.R. 2d (EDE) 18, 21. Teachers who are tenured are protected in their positions from removal without cause, and the burden to establish sufficient cause to discipline a tenured teacher rests upon the school board, which must prove the facts supporting sanctions by a preponderance of the credible evidence.

Ms. Forsell is charged with unbecoming conduct and a lack of professionalism. "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

In this case many of the significant facts are not in dispute. Ms. Forsell acknowledges that the photos entered into evidence were indeed posted on the wall of the classroom as late as June 8, when Mr. Zapicchi observed them. Her explanation that she had previously removed offensive and tasteless photos from the wall may be true, but even if she did that, it is quite evident that she did not follow through with that

purging process. But what is more troubling is that, alerted as she claims to have been that students had a penchant for posting what she claims she herself saw as inappropriate postings, she nevertheless allowed the wall to continue to exist and allowed continued postings. If she knew there had been a problem and that she had had to speak to some students about what they posted, it would have been absolutely her responsibility to either stop all postings or to carefully and regularly monitor the items posted. She might, for instance, have distributed guidelines to the students that would have hopefully limited the postings to items that properly reflected both the appropriate use and yet maintained the proper boundaries as to what was posted. Instead, through her neglect or indifference, and without adequate excuse, she permitted to be posted what are undoubtedly a collection of inappropriate materials. These include racially, ethnically, economically insensitive postings, as well as postings that involve drug and alcohol references. Actual students are made part of the pictures through the use of the Photoshop process, thereby associating them, however unknowingly, with the totally inappropriate references and messages contained in the posted materials. Ms. Forsell has not suggested that these items were appropriate displays of the coursework, and they surely were not. Her failure to properly manage a display that she allowed to be existent in her classroom cannot be excused by her claims about how busy she was, especially as she was, by her own testimony, already aware of the misuse to which the wall had been put. And the lack of complaints from students is of no moment, as it is not clear if some of those whose images were included were aware of that fact, and far more importantly, the responsibility rested upon the teacher to control her classroom and assure the propriety of events therein and not on the teenaged students, whose sense of propriety and willingness to complain about such matters cannot be assumed to have reached the level expected of tenured educators.

Ms. Forsell's lack of judgment may also be seen as evident in her conversations with J.C. She should not have allowed a discussion that touched on the issue of who was paying for tickets for the senior prom to have occurred in close proximity to other students, and no doubt could have had that conversation in a hallway or elsewhere, either at the time when he went to the science class or perhaps at another time that

would not have required that the student be interrupted in her class work. The conversation at the baseball game about the junior prom also may reflect a lack of judgment. If she thought that J.C.'s situation was one presenting something different from the customary situation that she was discussing regarding who would pay for a date's prom ticket, it might have been appropriate to either contact J.C. or her mother, privately, to note that Ms. D. had inquired, but suggesting that there was some "special circumstance" about J.C. was not her business.

Ms. Forsell's admission of the impropriety of her outburst about the noisy special education student in the hallway, her reference to him as a "sick freak", is hardly excused by her claim that she lost her temper. While she does not recall the "abortion" comment testified to by Ms. Kemler, I have no reason to doubt Kemler's account, and, frankly, such a remark seems in keeping with Forsell's seeming inability to recognize limits and to avoid comments made in inappropriate times and places. I **FIND** that Kemler was credible and that Forsell did make the comment.

As for the discussion about the student who missed the Photoshop element of Forsell's course and later took her Digital Media course, I fail to see this as a tenure issue. She appears to have been uncomfortable with the idea of his taking a second level course for which Photoshop was a prerequisite when the student had not taken that element of the course and she had not seen the work he supposedly did at Rutgers. He took the Digital Media course and did well. Her expression of concern and her evident feeling that he should not be permitted to take the second course may have been a sign of her rigidity, or of her uncertainty that he was actually prepared for the Digital Media course, but on the whole I see nothing about this incident that warrants any discipline. And to that end, while some of her other comments might be viewed as indicative of her feelings about special education, in this context I do not see her actions as demonstrative of a chargeable offense, but instead of a good faith concern about the appropriateness of this student's participation in a course for which she might have legitimately questioned his preparedness.

Based upon the record, I **FIND** that Ms. Forsell did engage in conduct unbecoming a tenured educator and exhibited a lack of concern for the privacy of students. She failed to properly manage her classroom and in so doing allowed the posting of many entirely inappropriate pictures depicting matters not properly exhibited in a school classroom, pictures which, in many cases, included the images of students. She allowed students to leave class early and did so herself. She on more than one occasion failed to exhibit either the awareness of, or ability to carry out her responsibility to protect the privacy of her students and their families in regard to financial information to which she had become privy. Finally, she made remarks that were simply inappropriate in the context in which they were expressed, regardless of her right to hold such views as she might have in respect to matters regarding special education, disability issues and matters relating to personal family decisions. I **CONCLUDE** that the Board has established these matters, as charged in Specifications 1, 2, 3 and 6, by the requisite preponderance of the credible evidence. I **CONCLUDE** that there is no violation of standards in regards to the issue of student S.M.

Penalty

If this case only involved Ms. Forsell's inappropriate comment to Ms. D. and her discussion with J.C. in the science class, the matter would not warrant more than a reprimand. The addition of her comments about the "sick freak" and the "abortion" are more troubling. They are indefensible in the context in which they were made, whatever her private views might be. When these are joined with the continued failure to manage, monitor or shutdown a site for the posting of what she had been alerted to as offensive and inappropriate materials that violated any common sense of what belonged on display in a classroom and which violated policies to discourage and stamp out discrimination and bullying, the level of Ms. Forsell's misconduct and failure to live up to the professional standards expected of a tenured teacher is substantially increased. The repeated instances of lack of judgment in matters that could have caused serious offense is difficult to mesh with the high responsibility imposed upon teachers as role models and examples for students. Tolerance, even by neglect, of the sort of materials displayed in her room, is intolerable conduct. Under the

circumstances, and with due consideration for her lengthy and apparently previously discipline-free career, I am constrained to **CONCLUDE** that removal of tenure is the appropriate sanction.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 23, 2021

DATE



JEFF S. MASIN, ALJ

Date Received at Agency:

11/23/11

Date Mailed to Parties:

11/23/11

/caa

List of Witnesses

For Petitioner

Michael Zapicchi

J.C.

E.S.

Y.D.

Douglas A. Eadie

Melissa Levine

Mary Jane Gosselin

Dr. Susan Kemler

For Respondent

Mary Lou Forsell

List of Exhibits

For Petitioner

- P-1 Letter to Mary Lou Forsell from E.S., dated May 8, 2010
- P-2 West Windsor-Plainsboro School District, West Windsor-Plainsboro High School North—Classroom Observation Report, dated June 8, 2010—Administrator: Michael Zapicchi
- P-3 West Windsor-Plainsboro Regional School District, Special Services Department—Memorandum to Mary Lou Forsell from Sue DiDonato, January 22, 2007
- P-4 West Windsor-Plainsboro School District, West Windsor-Plainsboro High School North—Classroom Observation Report, dated March 11, 2005—Administrator: Melissa Betron

P-4a Memorandum to Mary Lou Forsell from Melissa Betron, dated December 20, 2005

P-5 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-6 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-7 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-8 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-9 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-10 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-11 Not in Evidence

P-12 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-13 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-14 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-15 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-16 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-17 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-18 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-19 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-20 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-21 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-22 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-23 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-24 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

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P-26 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-27 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-28 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-29 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-30 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-31 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-32 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-33 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

P-34 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

- P-35 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)
- P-36 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)
- P-37 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)
- P-38 Not in Evidence
- P-39 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)
- P-40 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)
- P-41 Photo recovered from classroom on June 8, 2010 (EXHIBIT SEALED)

For Respondent

- R-1 Certifications of Respondent
- R-2 Classroom Observation, dated January 30, 2002
- R-3 Annual Evaluation-2001-2002
- R-4 Classroom Observation, dated March 17, 2003
- R-5 Annual Evaluation—2002-2003
- R-6 Letter of Commendation—John Yeager, May 24, 2003
- R-7 Classroom Observation, dated October 21, 2003
- R-8 Annual Evaluation—2003-2004
- R-9 Classroom Observation, dated March 11, 2005
- R-10 Annual Evaluation—2004-2005
- R-11 Classroom Observation, dated May 30, 2006
- R-12 Annual Evaluation—2005-2006
- R-13 Memo from Sue DiDonato, dated January 22, 2007
- R-14 Classroom Observation, dated March 1, 2007
- R-15 Annual Evaluation—2006-2007
- R-16 Classroom Observation, dated December 18, 2007
- R-17 Annual Evaluation—2007-2008
- R-18 Classroom Observation, dated June 2, 2009
- R-19 Annual Evaluation—2008-2009
- R-20 Classroom Observation, dated June 8, 2010
- R-21 Annual Evaluation—2009-2010

LOGAN ALEXANDER AND THE HORACE	:	
MANN INSURANCE COMPANY,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF TRENTON, MERCER COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners sought reimbursement from the respondent Board for costs incurred in defending petitioner Alexander – a security officer employed by the Board – in a Superior Court civil action alleging sexual assault and harassment, which was settled in August 2010. Respondent contended that it has no obligation to indemnify because the issue of indemnification was resolved by the Superior Court settlement agreement.

The ALJ identified the threshold question to be whether the Commissioner has jurisdiction to decide the matter, and whether the civil settlement addressed all of the claims – in which case, there is nothing left for the Commissioner to decide; in seeking to defeat the respondent Board's assertion that all aspects of this matter ended with the Superior Court's August 2010 order approving settlement, petitioners are relying on specialized rules and practices of the Superior Court rather than on the Commissioner's expertise to resolve the claims. The ALJ concluded that in the current instance, the original demand for cross-claim and indemnification was before the Superior Court as part of the civil lawsuit; accordingly, the expertise to determine whether the Superior Court ended that claim with the civil settlement lies with the Superior Court and the question should, therefore, be brought before that court rather than the Commissioner. The ALJ recommended dismissal of the petition without prejudice.

Upon independent review of the record and the Initial Decision of the OAL, the Commissioner concurred with the ALJ that this matter is appropriately dismissed for lack of jurisdiction. In so determining, the Commissioner was compelled to agree that the interpretation of the Superior Court settlement forms the base of this controversy. The petition was dismissed without prejudice.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
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January 9, 2012

OAL DKT. NO. EDU 422-11
AGENCY DKT. NO. 654-11/10

LOGAN ALEXANDER AND THE HORACE	:	
MANN INSURANCE COMPANY,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF TRENTON, MERCER COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions – filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4 – were duly considered by the Commissioner in making his determination herein. The Board did not submit reply exceptions.

Exceptions of the petitioners essentially recast and reiterate their arguments advanced below. In that it is determined that these – in pertinent part – were fully considered and addressed by the Administrative Law Judge in her decision, further elaboration on them is unnecessary here.

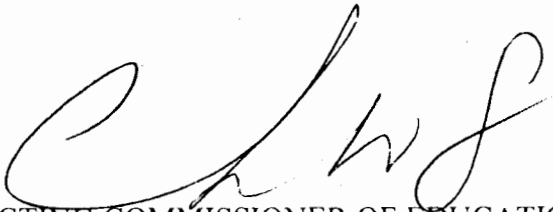
Upon full review and consideration the Commissioner concurs with the ALJ that this matter is appropriately dismissed – without prejudice – for lack of Commissioner of Education jurisdiction. In so determining the Commissioner is compelled to agree that “at the base of [this] controversy lies the interpretation of the Superior Court settlement,” (Initial Decision at 4) in the matter entitled *Zalactier Cartagena, Individually and as Guardian ad Litem for Chrystal Harper, a minor v. City of Trenton Board of Education*,

Elizabeth Ramirez, Howard White and Logan Alexander, Jr., Superior Court of New Jersey Law Division, Mercer County, Docket No. MER-L-2081-08. As such, the Commissioner is in full accord – for the reasons clearly presented on p. 4-7 of her decision – with the ALJ’s conclusion in this matter. Specifically:

I CONCLUDE that in the current instance, the original demand for cross-claim and indemnification was before the Superior Court as part of the civil lawsuit. The expertise to determine whether the Superior Court ended that claim in its “Order Entering Judgment and Directing Deposit of Funds” dated August 17, 2010...lies with the Superior Court, and the question should, therefore, be brought before the Superior Court. Should the Superior Court determine that the settlement did not encompass the indemnification claim, the question of the Board’s responsibility to indemnify is then properly brought before the Commissioner. (Initial Decision at 7)

Accordingly, the recommended decision of the OAL is adopted and the instant petition of appeal is hereby dismissed without prejudice.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/09/12

Date of Mailing: 1/10/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 00422-11

AGENCY DKT. NO. 654-11/10

**LOGAN ALEXANDER AND THE HORACE
MANN INSURANCE COMPANY,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY OF
TRENTON, MERCER COUNTY,**

Respondent.

Edward A. Cridge, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Patrick F. Carrigg, Esq., for respondent (Lenox, Socey, Formidoni, Brown,
Giordano, Cooley & Casey, attorneys)

Record Closed: November 7, 2011

Decided: November 29, 2011

BEFORE **LAURA SANDERS**, ACTING DIRECTOR AND CHIEF ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners Logan Alexander ("Alexander") and The Horace Mann Insurance Company seek reimbursement from the Board of Education of the City of Trenton ("the Board" or "respondent") for costs incurred in defending Alexander in a Superior Court

action alleging sexual assault and harassment. Respondent contends that it has no obligation to indemnify because the actions did not arise out of Alexander's position, and he has not demonstrated a favorable outcome.

Petitioners filed with the Commissioner of the Department of Education ("the Department") on November 16, 2010. Following respondent's reply, which was received on December 30, 2010, the Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on January 19, 2011. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. As Alexander was involved in more than one legal action, it was agreed in a conference call on February 18, 2011, that the parties would submit briefs on the question of whether the claim for reimbursement was limited to a particular case, or was, of necessity, related to all of the actions, including a criminal proceeding in which he pled guilty. The last of the briefs was received on April 19, 2011; however, in a series of conference calls, the parties represented that they required additional time to pursue settlement discussions. In August they advised that there was no further reason to delay a decision on the cross-motions. In the meantime, however, it had become clear that there is a threshold factual dispute over whether a Superior Court order already settled the claims presented here. Therefore, oral argument was scheduled on the question of proper jurisdiction. That argument having occurred on November 7, 2011, the record closed on that date.

FACTUAL DISCUSSION

The parties agree on this much. On March 9, 2007, Logan Alexander, a security officer employed by the Trenton Board of Education, was arrested on charges of aggravated criminal sexual contact and endangering the welfare of a child, in connection with Student One.¹ On March 12, Student Two and her grandmother alleged that Alexander had kissed the child on her neck, given her gifts, and attempted to contact her at home through telephone calls. On the same date, the Trenton Board of Education placed Alexander on administrative leave until further notice "due to the

¹ For reasons of safeguarding the children involved in these allegations, they are referred to as Students One, Two, and Three.

allegations made involving [Alexander] with children." (Respondent's Brief, Exhibit C). On March 22, 2007, Student Three alleged that Alexander had touched her inappropriately and threatened to harm her brothers if she told anyone.

On August 16, 2007, Alexander was indicted on charges of aggravated criminal sexual contact relative to Student One and sexual assault as to Student Three. On August 20, 2008, Student Two filed a civil lawsuit, alleging sexual assault by Alexander. On October 16, 2008, the Board filed an answer, asserting cross-claims for contribution and indemnification against Alexander. (Petitioners' Brief, Exhibit B.) The Board did not file an answer to the civil suit on behalf of Alexander or take any action to defend him. Therefore, pursuant to an insurance agreement, petitioner Horace Mann Insurance Company assigned counsel to Alexander. On December 29, 2008, that counsel filed an answer to the lawsuit on Alexander's behalf, asserting cross-claims for contribution and indemnification from the Board. (Petitioners' Brief, Exhibit C.) That same answer included the following statement by Alexander, "Certification Pursuant to R. 4:5-1 'I hereby certify that this matter is not the subject of any other action now pending in any other court or arbitration proceeding and that no such other action, or arbitration proceeding is contemplated.'" On April 22, 2009, Alexander pled guilty to endangering the welfare of a child, N.J.S.A. 2C:24-4.

During the pendency of the civil lawsuit, Alexander, the grandmother of Student Two, and Student Two all gave deposition testimony. In the deposition, Alexander admitted calling the home of Student Two and purchasing a pair of stuffed dogs for her outside of school. (Respondent's Brief, Exhibit L.) The grandmother of Student Two stated that Alexander contacted her house on Saturday morning, asking to speak to Student Two; however, she refused his request and hung up on him. The student stated that he kissed her neck in the hallway one morning between classes. (Respondent's Brief, Exhibit N.) Alexander denied this in his deposition. (Petitioners' Brief, Exhibit G.)

The civil suit involving Student Two was settled among all parties on August 17, 2010. The settlement begins with the following statement:

. . . the Attorneys for the parties having reported to the Court that a settlement of the infant Plaintiff's claim has been arrived at between the Plaintiffs and the Defendants and the Court having taken proofs on the record and having approved said settlement

[Petitioners' Brief, Exhibit J.]

It then recites that Alexander is to pay \$12,500, and the Trenton Board \$27,500, and specifies what portion of the \$40,000 total is to be paid to the plaintiff's attorney for disbursements and fees. There is no mention of the cross-claims, and no document or any part of the hearing record that specifically addresses preservation of the petitioner's right to seek indemnification. Prior to reaching the settlement, neither Alexander nor his counsel, Arnold M. Mellk, advised the Board that they intended to seek recoupment of Mellk's attorney's fees and the \$12,500 from the Board, or that they were agreeing on the settlement on the basis that the asserted cross-claim for indemnification was preserved.

LEGAL ANALYSIS

The threshold question is whether the Commissioner has jurisdiction to decide the matter. At the base of the controversy lies the interpretation of the Superior Court settlement. If the civil settlement addressed all the claims, there is nothing left for the Commissioner to decide.

Petitioners argue that as a matter of Superior Court practice and rule, the settlement could never have included the cross-claim for indemnification. They point to R. 4:44-3, which requires a court, in matters involving minors, to determine whether a settlement

is fair and reasonable as to its amount and terms. . . . If the court approves the settlement it shall enter an order reciting the action taken and directing the appropriate judgment in accordance with R. 4:48A, whose provisions shall also apply to deferred payments under structured settlements. The court, on the request of the claimant or the claimant's

attorney or on its own motion, may approve the expenses incident to the litigation, including attorney's fees.

Petitioners contend that the so-called "Friendly Hearing" is for the purpose of determining that settlements are fair to and consistent with the minor's best interests, and would not, as a matter of course, include disposition of claims and counter-claims between defendants. Further, they note the fact that the order specifically addresses only "a settlement of the infant Plaintiff's claims" as plain-language support for the lack of a global settlement.

Respondent indicated that during discussions prior to reaching the settlement agreement, Alexander did not advise the Board that, in addition to the \$27,500 the Board was agreeing to pay, he would seek to recoup the settlement amount of \$12,500 from the Board, plus his attorney's fees. (Respondent's Brief.) "Petitioner did not make these contentions because same would necessarily have altered the scope of negotiations among the parties." (*Ibid.*) Respondent argues that the settlement was a contract, and that a contracting party is bound by the apparent intention he or she outwardly manifests to the other party. Hagrish v. Olson, 254 N.J. Super. 133 (App. Div. 1992). Further, respondent contends that it is immaterial whether a party has a secret intention that he does not manifest outwardly. Looman Realty Corp. v. Broad St. Nat'l Bank of Trenton, 74 N.J. Super. 71, 82 (App. Div. 1962).

With regard to jurisdiction and indemnification, Bower and Wills O'Neill & Mellk v. Board of Education of East Orange, 149 N.J. 416 (1997), involved a kindergarten teacher charged with abusing students during the school day. After dismissal of a first indictment, and prior to dismissal of a second indictment, Bower filed a petition with the Commissioner of Education seeking indemnification under N.J.S.A. 18A:16-6.1. While Bower was appealing the Commissioner's dismissal of his appeal, a second indictment was dismissed, and Bower's attorneys filed suit on behalf of Bower and themselves in the Law Division, seeking attorney fees and reimbursement for disbursements in both actions. A judge awarded a portion of the sought fees. Bower, supra, 149 N.J. at 422. In a side comment, the Supreme Court noted, "(Although the question is not raised, the Law Division action should have been dismissed because the Commissioner of

Education has primary jurisdiction to hear and determine all controversies arising under the school laws)." Id. at 420.

The policy reason for deferring to the primary jurisdiction of an administrative agency is to enable the decision to be made by "the forum or body which, on a comparative scale, is in the best position by virtue of its statutory status, administrative competence and regulatory expertise to adjudicate the matter." Boss v. Rockland Elec. Co., 95 N.J. 33, 40 (1983) (quoting Hinfey v. Matawan Reg'l Bd. of Educ., 77 N.J. 514, 531-32 (1978)). Thus, the doctrine of primary jurisdiction will apply where "the case is properly before the court, but agency expertise is required to resolve the questions presented." Boldt v. Correspondence Mgmt., Inc., 320 N.J. Super. 74, 83 (App. Div. 1999).

Had the civil suit against Logan Alexander and the Board been resolved by a verdict, there is little question that a subsequent action for indemnification would properly have been brought before the Commissioner, who has expertise in enforcing the extensive statutory scheme governing education in this state, including claims under N.J.S.A. 18A:6 and 6.1.

The problem here is that respondents contend that they believed the silence in the discussions over the settlement meant that Alexander and the Board were discussing an amount of money to dispose of the entire dispute, and that until the petitioner indicated an intent to file with the Commissioner, they believed the affair to be ended. (See Respondent's Brief.) Petitioner essentially argues that under various Superior Court rules and practices, this could not have been a reasonable belief, and, therefore, the settlement never involved the indemnification claim. Further, petitioner contends that the claim for indemnification before the Commissioner did not ripen sufficiently to allow filing until the settlement disposed of criminal and civil liability in the matter.

It is apparent that even the petitioners are relying not on the Commissioner's expertise but on the specialized rules and practices of the Superior Court for resolving claims, in seeking to defeat the respondent's assertion that all aspects of the matter

ended with the Superior Court's order approving settlement. The statute granting the Commissioner plenary authority also makes clear that claims against boards that "do not arise under the school laws but rather from statutory or common law" are "typically and appropriately adjudicated in the courts." Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 425 (App. Div. 2002).

A dispute between parties to a contract who simply happen to be a school board and an employee does not present a controversy over which the Commissioner has jurisdiction. Such matters do not require the educational expertise of the Commissioner and are properly brought in a court of competent jurisdiction.

[Smith v. Bd. of Educ. of Willingboro, 97 N.J.A.R.2d (EDU) 205, 206–07 (citation omitted).]

The Commissioner will not rule on the enforceability of a contract where "the interpretation of the contract is the primary issue at hand and not merely implicated in a question of the school laws." Id. at 207.

I **CONCLUDE** that in the current instance, the original demand for cross-claim and indemnification was before the Superior Court as part of the civil lawsuit. The expertise to determine whether the Superior Court ended that claim in its "Order Entering Judgment and Directing Deposit of Funds" dated August 17, 2010 (Petitioners' Exhibit J) lies with the Superior Court, and the question should, therefore, be brought before the Superior Court. Should the Superior Court determine that the settlement did not encompass the indemnification claim, the question of the Board's responsibility to indemnify is then properly brought before the Commissioner.

ORDER

The petitioners' claim is **DISMISSED WITHOUT PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 29, 2011
DATE

Laura Sanders
LAURA SANDERS
ACTING DIRECTOR & CHIEF ALJ

Date Received at Agency:

November 29, 2011

Date Mailed to Parties:

November 29, 2011

/caa

OAL DKT. NO. EDU 3863-11
 AGENCY DKT. NO. 38-2/11

G.S. and L.G. on behalf of K.N. and C.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF SOUTH PLAINFIELD,	:	
MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed Settlement and Release (Agreement) and the Initial Decision of the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following observation. Sections 4 and 5 appear to call for the execution of actions prior to consideration of the settlement by the Commissioner. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same, a principle which the parties acknowledge in Section 15 of the Agreement.

Thus, the Commissioner adopts the Initial Decision as the final decision in this case providing that the parties have either successfully implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same. Assuming

the foregoing, the matter is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1|10|12

Date of Mailing: 1|11|12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03863-11

AGENCY DKT. NO. 38-2/11

**G.S. AND L.G. ON BEHALF OF
K.N. AND C.S.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF SOUTH PLAINFIELD,
MIDDLESEX COUNTY,**

Respondent.

Lee C. Honecker, Esq., for petitioners

Joseph L. Roselle, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: November 18, 2011

Decided: November 21, 2011

BEFORE **MARGARET M. MONACO, ALJ:**

On or about February 11, 2011, petitioners G.S. and L.G. on behalf of K.N. and C.S. filed a Petition with the Commissioner of Education challenging the residency

determination by respondent Board of Education of the Borough of South Plainfield (the Board). The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on April 1, 2011, for determination as a contested case. Following the adjournment of the hearing scheduled for August 19, 2011, at petitioners' request, the hearing was rescheduled for October 6, 2011. The parties appeared at the OAL on October 6, 2011, and the hearing was adjourned at the parties' joint request to provide more time toward an amicable resolution between the parties. Subsequently, under letter dated November 17, 2011, counsel for the Board submitted the attached Settlement Agreement and Release, along with the attached Resolution of the Board approving the settlement agreement.

Having reviewed the record and the terms of the settlement I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that settlement should be approved. Accordingly, I approve the settlement **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 21, 2011

DATE

Date Received at Agency:

Date Mailed to Parties: Nov. 23, 2011
jb

Margaret M. Monaco

MARGARET M. MONACO, ALJ

November 23, 2011

Laura Sardis

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

**SCHENCK
PRICE
SMITH &
KING, LLP**

ATTORNEYS AT LAW

~ Founded 1912 ~

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1912-2012

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NOV 18 6 35 51
NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

November 17, 2011

Via Regular Mail

Hon. Margaret M. Monaco
New Jersey Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: G.S. and L.G. o/b/o K.N. and C.S. v. South Plainfield Board of Education
OAL Dkt. No. EDU 3863-11

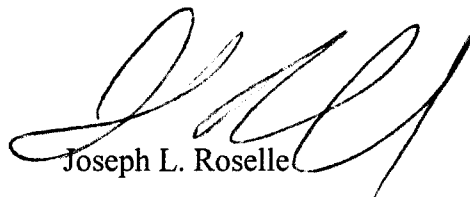
Dear Judge Monaco:

This firm represents the Respondent, South Plainfield Board of Education, in the above-referenced matter. Previously, the parties indicated to Your Honor that a settlement agreement was reached in this matter, which included a total payment by Petitioners to the Board in the amount of \$5,000.00, representing back tuition, as well as the dismissal of the case against the Board and any additional counterclaim by the Board. At its November 9, 2011 meeting, the Board approved the settlement agreement by a vote of 6-0.

Accordingly, please find enclosed an original and one (1) copy of the executed Settlement Agreement, as well as the Board's resolution to accept same.

Thank you for your attention to this matter. Should Your Honor have any questions or require additional documentation, please do not hesitate to contact me.

Respectfully submitted,
SCHENCK, PRICE, SMITH & KING, LLP


Joseph L. Roselle

JLR/afc

Encl.

cc: Lee C. Honecker, Esq. (via regular mail w/encl.)

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for the
South Plainfield Board of Education

NOV 18 P 5:51

OFFICE OF ADMINISTRATIVE LAW

G.S. and L.G. o/b/o K.N. and C.S.,

Petitioners,

v.

SOUTH PLAINFIELD BOARD OF
EDUCATION,

Respondents.

BEFORE THE COMMISSIONER
OF EDUCATION

OFFICE OF ADMINISTRATIVE LAW

OAL Docket No.: EDU-3863-11

Agency Ref. No.: 38-2/11

SETTLEMENT AND RELEASE

This Stipulation of Settlement and Release ("Agreement") is made by and between Petitioners, Gianne Statiroudis and Larry Guarino, and the Respondent, South Plainfield Board of Education ("Board").

RECITALS

WHEREAS, in or about March of 2011, Respondent South Plainfield Board of Education found, based on the results of a residency investigation, that minor students K.N. and C.S. were not domiciled in the South Plainfield School District ("District") and thus not entitled to a free, public education in the District and passed a resolution ordering the removal of the students from the District; and

WHEREAS, Petitioner thereafter commenced an administrative action to challenge the Board's residency determination with regard to K.N. and C.S.; and

WHEREAS, this administrative action is captioned G.S. and L.G. o/b/o K.N. and C.S. v. South Plainfield Board of Education, and is presently pending before the Commissioner of

Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 3896-11, Agency Dkt. No. 38-2/11 ("the Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, in order to avoid the expense, inconvenience, distractions and inherent uncertainties associated with continuation of this dispute, and the fees and expenses that inevitably would result therefrom, the Parties, by this Agreement, herein agree to adopt a full and final settlement of any and all claims, lawsuits, complaints, and/or disputes between Petitioners and Respondent in connection with any and all damages and losses arising from the Litigation; and

WHEREAS, by this Agreement, Petitioner will voluntarily dismiss the Litigation with prejudice, without costs to any party as against the other;

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. The Parties mutually agree that, since April 26, 2011, K.N. and C.S. are domiciled in South Plainfield and thus have been, and currently remain, entitled to an education in the South Plainfield School District since that date in accordance with the provisions set forth in N.J.S.A. 18A:38-1, et seq., provided that Petitioners and/or K.N. and C.S. continue to be domiciled in the District.
2. The Parties mutually agree that for a period of time prior to April 26, 2011, Petitioners, along with K.N. and C.S., did not reside in the South Plainfield School District.
3. Petitioners shall pay the Board the sum of Five Thousand Dollars (\$5,000.00), representing back tuition due and owing for the period of K.N. and C.S.'s ineligible

attendance in the District during the 2010-2011 school year and which shall constitute a full and final settlement of the claim for back tuition asserted against Petitioners by Respondent Board of Education in the Litigation.

4. The amount of \$5,000.00 is to be paid as follows: Within fifteen (15) days following the adoption by the Board of Education of a resolution accepting this Agreement, but in no case prior to the receipt of a fully executed copy of this Agreement, Petitioners shall make an initial lump sum payment in the amount of Three Thousand Dollars (\$3,000.00), in the form of a check made payable to the "South Plainfield Board of Education," hand-delivered or mailed to the office of Mark Resnick, Interim School Business Administrator/Board Secretary, Roosevelt Administration Building, 125 Jackson Avenue, South Plainfield, New Jersey 07080. The remaining amount of Two Thousand Dollars (\$2,000.00) shall be paid in equal monthly installments of Twenty-Five Dollars (\$25.00) each, until the full amount of \$2,000.00 has been satisfied.
5. Each payment of \$25.00 is due on the first (1st) day of each Month at the office of the School Business Administrator at the above address, beginning in the month following that in which the payment of the initial \$3,000.00 sum was made. Payments received by the School Business Administrator after the 5th of the month shall incur a late fee of \$5.00. Any payment and late fee not received by the 15th of the month shall constitute a default by Petitioners and a breach of this Agreement. Petitioners will receive receipts for each payment from the School Business Administrator.
6. Petitioners, in consideration of this Stipulation of Settlement and Release, and in full, final, and complete settlement of the matter, hereby agree to a withdrawal and/or dismissal, with prejudice, of their Petition of Appeal in this matter.

7. Petitioners further understand and agree that, if they fail to make a payment in accordance with the agreed-upon payment plan, the entire remaining unpaid amount shall immediately become due and owing, payable in a single lump sum.
8. Petitioners further agree to indemnify Respondent for any and all costs, including court costs and attorneys fees, associated with any action instituted by Respondent to enforce the terms of this Agreement should Petitioners breach the Agreement and/or fail to adhere to the agreed-upon payment plan.
9. The terms of this Agreement shall in no way constitute acceptance or assent by the Board that K.N. and C.S. nor any other child of Petitioners are automatically entitled to a free public education in the District at any point in the future, and the Parties understand and agree that Respondent reserves the right to investigate Petitioners' residency status in the District at any time, in order to determine whether or not Petitioners and/or his, her or their children remain domiciled in the District.
10. This Agreement is subject to approval by the South Plainfield Board of Education. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.
11. In exchange for the above consideration, Respondent South Plainfield Board of Education agrees to release Petitioners from any and all claims, cross-claims, counterclaims, demands, liabilities, damages, indebtedness, costs, attorneys' fees, actions or obligations of any nature, which solely arise out of or are related in any way to this Litigation, through the date of this Agreement.
12. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

13. This Agreement is to be construed in accordance with the laws of the State of New Jersey.
14. Petitioners hereby represent that he/she/they is/are freely entering into this Agreement, that he/she/they is/are acting with the advice of counsel of his/her/their choosing, and the he/she/they has/have read and fully understand the contents and effects of this Agreement.
15. This Settlement may be subject to the approval of the Office of Administrative Law and the Commissioner of Education. In the event that such approval is necessary, the terms of this Agreement shall not be binding until said approvals are received.
16. This Agreement shall be binding upon all parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors, predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, shareholders, members, employees, agents and assigns.
17. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than those set forth herein. This Agreement supersedes all previous arrangements or understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioners and Respondent.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement,
consisting of six pages, effective on the day and year first above written.

FOR PETITIONERS

Date: 10.26.11


GLANNE STATIROUDIS, PETITIONER

Date: 10/26/11


LARRY GUARINO, PETITIONER

**FOR RESPONDENT,
SOUTH PLAINFIELD BOARD OF EDUCATION**

Date: 11-9-11


Jim Giannakis, Board President

Committee of the Whole Meeting
November 9, 2011

VII. FINANCE

A. Acceptance of Settlement Agreement in the Matter of L.G and G.S o/b/o K.N. and C.S. v. South Plainfield Board of Education

RESOLVED, that the Board approves the settlement in the matter captioned L.G. and G.S. o/b/o K.N. and C.S. v. South Plainfield Board of Education, OAL Dkt. No. EDU 3896-11, in accordance with the terms and conditions therein; and

BE IT FURTHER RESOLVED, that the Board President is authorized to sign the agreement on behalf of the Board.

MOTION: Mrs. Boyle SECOND: Mrs. Miller VOTE: 6-0
Absent: Mr. Seesselberg, Mr. Sorrentino and Mr. Stevenson

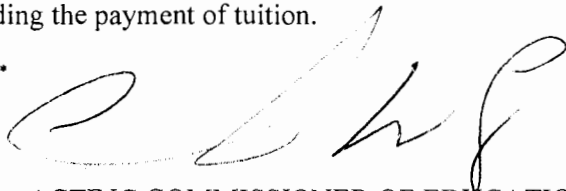
OAL DKT. NO. EDU 2758-11
 AGENCY DKT. NO. 33-2

Y.C., on behalf of minor child, A.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF SOUTH PLAINFIELD,	:	
MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and advisement of petitioner's failure to appear, transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C. 1:1-14.4* – along with copies of the notification sent to petitioner by the OAL on December 1, 2011, providing petitioner thirteen days to submit an explanation for such nonappearance – have been reviewed. There being no explanation filed by petitioner, the petition of appeal is hereby dismissed with prejudice due to petitioner's failure to appear at hearing or provide an explanation for her nonappearance.

Notwithstanding the dismissal of the petition, the Commissioner notes that the Board's Answer in this residency matter contained a claim for tuition which was left unresolved by the Administrative Law Judge. In that the record before the Commissioner contains no affidavit of a responsible Board official attesting to the amount of tuition claimed by the Board as a consequence of the ineligible attendance of petitioner's child in its schools, this matter must be remanded to the OAL for supplementation of the record in this regard and an appropriate recommended order regarding the payment of tuition.

IT IS SO ORDERED.*


 ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1|10|12

Date of Mailing: 1|11|12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*.

NATHAN THOMAS,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON,	:	
PASSAIC COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

In October 2010, the petitioner filed an appeal contending that his employment was terminated by the respondent in a reduction in force, in violation of his tenure and seniority rights. A hearing in the matter was scheduled for October 31, 2011 at the Office of Administrative Law (OAL). Petitioner received appropriate notice of the hearing, but failed to appear. Accordingly, the ALJ dismissed the petition.

Upon review, the Commissioner concurred with the ALJ that because petitioner failed to appear at the scheduled hearing, the matter is appropriately dismissed for failure to prosecute.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

January 11, 2012

OAL DKT. NO. EDU 12105-10
AGENCY DKT. NO. 538-9/10

NATHAN THOMAS,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON,	:	
PASSAIC COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge that – because petitioner failed to appear at the October 31, 2011 hearing in this matter, after having received due notice of such hearing – this matter is appropriately dismissed for failure to prosecute.

Accordingly, the recommended decision of the OAL is adopted and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/11/12

Date of Mailing: 1/12/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL

NATHAN THOMAS,

Petitioner,

v.

**STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON, PASSAIC
COUNTY,**

Respondent.

OAL DKT. NO. EDU 12105-10
AGENCY REF. NO.# 538-9/10

Louis P. Bucceri, Esq., for petitioner (Bucceri & Pincus, attorneys)

Sidney A. Sayovitz, Esq., for respondent (Schenck, Price, Smith & King,
attorneys)

Record Closed: October 31, 2011

Decided: November 30, 2011

BEFORE **CAROL I. COHEN, ALJ:**

This Matter having been opened by the Court on application of the Paterson State-Operated School District and the Petitioner having been given notice that if he failed to appear on October 31, 2011 his petition for relief would be dismissed. The petitioner having failed to appear, it is on this 30th day of

November, 2011 **ORDERED** that the above-captioned matter be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 30, 2011

DATE

Date Received at Agency:

Date Mailed to Parties:

db

Carol I. Cohen
CAROL I. COHEN, ALJ

November 30, 2011 (db)

November 30, 2011 (db)

NELSON MENDEZ,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON,	:	
PASSAIC COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

In October 2010, the petitioner filed an appeal contending that his employment was terminated by the respondent in a reduction in force, in violation of his tenure and seniority rights. A hearing in the matter was scheduled for October 31, 2011 at the Office of Administrative Law (OAL). Petitioner received appropriate notice of the hearing, but failed to appear. Accordingly, the ALJ dismissed the petition.

Upon review, the Commissioner concurred with the ALJ that because petitioner failed to appear at the scheduled hearing, the matter is appropriately dismissed for failure to prosecute.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

January 11, 2012

OAL DKT. NO. EDU 11358-10
AGENCY DKT. NO. 327-8/10

NELSON MENDEZ,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON,	:	
PASSAIC COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge that – because petitioner failed to appear at the October 31, 2011 hearing in this matter, after having received due notice of such hearing – this matter is appropriately dismissed for failure to prosecute.

Accordingly, the recommended decision of the OAL is adopted and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/11/12

Date of Mailing: 1/12/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL

OAL DKT. NO. EDU 11358-10
AGENCY REF. NO.# 327-8/10

NELSON MENDEZ,

Petitioner,

v.

**STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON, PASSAIC
COUNTY,**

Respondent.

Louis P. Bucceri, Esq., for petitioner (Bucceri & Pincus, attorneys)

Sidney A. Sayovitz, Esq., for respondent (Schenck, Price, Smith & King,
attorneys)

Record Closed: October 31, 2011

Decided: November 30, 2011

BEFORE **CAROL I. COHEN, ALJ:**

This Matter having been opened by the Court on application of the Paterson State-Operated School District and the Petitioner having been given notice that if he failed to appear on October 31, 2011 his petition for relief would be dismissed. The petitioner having failed to appear, it is on this 30th day of

November, 2011 **ORDERED** that the above-captioned matter be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 30, 2011

DATE

Date Received at Agency:

Date Mailed to Parties:

db

Carol I. Cohen
CAROL I. COHEN, ALJ
November 30, 2011 (db)
November 30, 2011 (db)

IN THE MATTER OF THE TENURE HEARING :

OF CYNTHIA PERELLA, SCHOOL DISTRICT : COMMISSIONER OF EDUCATION

OF THE CITY OF BRIDGETON, : DECISION

CUMBERLAND COUNTY. :

SYNOPSIS

The petitioning Board certified charges of conduct unbecoming against respondent – a tenured secretary employed by the district since 2001 – for allegedly stealing cash and checks in the amount of \$250 from a classroom in December 2010, and for breaking and entering a secured office for improper purposes in October 2010. Respondent denied the charges. The Board sought respondent's removal from her tenured position.

The ALJ found, *inter alia*, that: witnesses for the petitioning Board presented credible and believable testimony, while respondent's testimony was incredible and unbelievable; based on the security videotape entered into evidence, the missing funds were taken either by the respondent or by the ninth grade special education teacher who had been collecting the money in question for a school fundraising activity, as they were the only two persons in the classroom during the period in which the money went missing; respondent's excuse for entering the locked classroom sounded like an effort to create an alibi; the theory of respondent's counsel that a student had somehow gained access to the money – which was in a locked closet, inside a locked classroom – is unlikely; and without question, theft constitutes unbecoming conduct. The ALJ concluded that, based on the credible evidence and testimony presented at hearing – which included testimony regarding an October 2010 incident, which indicated that respondent had been searching in a file cabinet in a place where she did not belong – respondent is guilty of petty theft. Accordingly, the ALJ ordered that respondent be dismissed from her tenured employment.

Upon independent review and consideration, the Commissioner concurred with the ALJ's findings and determination, noting that the overall record supports the Board's charges. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the respondent was dismissed from her tenured position.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 4694-11
AGENCY DKT NO. 75-4/1

IN THE MATTER OF THE TENURE HEARING :
OF CYNTHIA PERELLA, SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE CITY OF BRIDGETON, : DECISION
CUMBERLAND COUNTY. :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the respondent. Board of Education (Board) did not file a reply thereto.¹

In her exceptions, the respondent argues that the Administrative Law Judge (ALJ) erroneously sustained the Board's charge of unbecoming conduct and that the evidence is insufficient to warrant termination of respondent's employment and forfeiture of her tenure rights. Respondent maintains her innocence and contends that the Board did not do enough to investigate the theft. She asserts that no effort was made to search her pocketbook, home, or person, nor was any inquiry made to determine if the checks were cashed or if stop payments were effected. Respondent opines that without such an investigation there is inadequate proof that a theft actually took place or that she is responsible.

In support of this, she posits that the Board's main witness, Ms. Vargas, could have made a mistake and taken the envelope with the money in it, placing it in her pocketbook since she was going to the bank to make a deposit. At that point, someone other than the respondent could have taken the money during the 23-minute period the purse was in Ms.

¹ The record contains no transcripts from the hearings conducted at the OAL on September 29, October 14 and October 27, 2011.

Vargas' possession. Respondent further argues that anyone entrusted with a key can enter any locked room twice and a locked closet at any time since there is no policy or protocol prohibiting such a practice.

Upon full review and consideration, the Commissioner finds and concludes that in the absence of any basis in the record on which to dispute the fact-finding and credibility determinations of the ALJ pursuant to *N.J.S.A. 52:14B-10(c)*, *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987), the Commissioner concurs with the ALJ that the Board has established that respondent is guilty of unbecoming conduct for the petty theft of \$250.00. The Commissioner finds respondent's exceptions unpersuasive, largely reflecting arguments and objections based on conjecture and surmise, and he further concludes that the overall record supports the Board's charges.² The Commissioner also finds no basis in the record to reject either the ALJ's recitations of testimony or his determinations of witness credibility. The ALJ found that the respondent was not credible, and that he did not believe her testimony. In contrast, the ALJ found that Ms. Vargas was credible and "answered all questions without equivocation" and "seemed to take no pleasure in offering her testimony against the respondent." The ALJ had the opportunity to assess the credibility of the witnesses who appeared before him and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by

² Another incident occurred on October 13, 2010 in which a set of keys to filing cabinets containing confidential school information went missing under suspicious circumstances. Respondent reported that she had found the keys in an area previously searched by other staff. Testimony revealed that the respondent had been observed looking in the filing cabinets behind the owner's desk. The ALJ could not make a finding that respondent committed another theft, but he did find that "she was in a place where she did not belong."

sufficient, competent, and credible evidence in the record.
[N.J.S.A. 52:14B-10(c)].

Moreover, the Commissioner fully concurs with the ALJ's assessment of respondent's conduct in light of applicable law and prior decisional precedent, and agrees that the conduct proven in this proceeding amply warrants respondent's dismissal and forfeiture of her tenure rights.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter. Respondent is hereby dismissed from her tenured position with the Bridgeton Board of Education.

IT IS SO ORDERED.³


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/11/12

Date of Mailing: 1/12/12

³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to P.L. 2008, c. 36. (N.J.S.A. 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4694-11

AGENCY DKT. NO. 75-4/11

**IN THE MATTER OF THE TENURE
HEARING OF CYNTHIA PERELLA,
BRIDGETON BOARD OF EDUCATION.**

A. Paul Kienzle, Jr., Esq., for petitioner

Ned P. Rogovoy, Esq., for respondent

Record Closed: October 27, 2011

Decided: November 30, 2011

BEFORE **BRUCE M. GORMAN, ALJ:**

STATEMENT OF THE CASE

Respondent appealed the action of the Board of Education terminating her employment for unbecoming conduct.

PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was filed at the OAL on November 23, 2010, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on September 29, 2011, October 14, 2011, and October 27, 2011 and the record closed.

FACTUAL DISCUSSION

This case concerns a charge of unbecoming conduct. Specifically, respondent is accused of two offenses: 1) theft of approximately \$250 in cash and checks from a classroom at Bridgeton High School on December 3, 2010; and 2) breaking and entering a secured office for improper purposes on October 13, 2010.

1. December 3, 2010

The alleged theft occurred in the classroom of Tracy Vargas. Vargas testified for the Board. She is a ninth grade special education teacher at Bridgeton High School. Her assigned classroom is room A-26 located on the second floor. She has been employed as a teacher since 2005.

In December 2010, Vargas was in charge of a fundraising activity for the Bridgeton High School ninth grade. The specific project involved the sale of various clothing items such as sweatshirts and t-shirts bearing the high school logo. The proceeds were to be used for the benefit of the Ninth Grade Success Academy.

On December 3, 2010, Vargas had no assigned teaching duties during period 4A. She determined to use that time period to work on the Success Academy fundraiser. During the prior week, she had received payments totaling \$250, consisting of checks in the amount of \$120 and cash in the amount of \$130. Sitting at her classroom desk, Vargas recorded the funds on a spreadsheet. After recording the payments, she recounted the money and then placed it in an envelope.

When she placed the money in the envelope, Vargas looked up and saw respondent standing in the doorway watching her. Immediately to the left of the doorway was a supply closet. Vargas walked across the room with the envelope in her hand. As she did so, she told respondent she was glad to see her because she wanted to tell her that she could pay for the sweatshirt she had ordered after she was paid on December 15. Respondent had previously told Vargas that she was struggling

financially, and Vargas felt sorry for her. Respondent had told her she was attempting to raise her grandchildren and was finding it extremely expensive. It was for that reason that Vargas volunteered respondent could have extra time to pay for her sweatshirt. Vargas told her, "Don't worry about paying me today. Just give me the money when you get it."

With respondent watching her, Vargas then placed the envelope on a shelf inside the closet and locked the closet door. According to Vargas, her classroom door opens outward and to the left. Consequently, respondent had a clear view of her placing the envelope containing the money inside the closet.

Respondent then departed, and Vargas followed her, locking her classroom door behind her. Vargas went to the school accountant's office to obtain a deposit slip so that she could deposit the money in the bank. On her way down to the accountant's office, Vargas again encountered respondent. Respondent asked if she was going to lunch, and Vargas responded that she was going to run some errands.

Vargas obtained the deposit ticket, ran her errands, and returned to her classroom. On her way back to the classroom, she encountered a teacher named Dan Martinez, who provided her with a \$40 check for a purchase. Vargas returned to the classroom intending to add the Martinez check to the money already in the envelope and then deposit the money in the bank. She found the classroom door locked

Upon returning to the classroom, she found a note from respondent on her desk. The note stated:

Tracy,

I just wanted to say thank you for being there for me and being a good friend.

Thanks.
Cindy

(R-1).

Respondent thought finding the note on her desk was odd because respondent had to unlock the door to leave it there. Vargas noted that respondent could have simply taped the note to her door. After reading the note, she went directly to her closet to retrieve the money, intending to record the funds on the deposit ticket and take them to the bank. She found the closet locked; but when she unlocked and opened the closet, the envelope containing the money was gone.

Vargas was positive she had placed the envelope in the closet, but just to be certain, she searched the entire room. When she could not find the money, she went to see Charles Leyman, the head of security for the high school, and advised Leyman that the money was missing. Leyman and Vargas immediately proceeded to Vargas's classroom, where Leyman used his grand master key to unlock the closet. He and Vargas searched the closet but failed to find the money. Vargas then requested that Leyman check the school's video system to see who had entered her classroom. Robert L. Stevens, Director of Safety and Security for the school, testified the surveillance system is comprised of a rapid eye camera system, consisting of four decks with sixteen cameras per deck. The system monitors the interior hallways and common areas, including but not limited to the cafeteria, parking lots and auditorium.

Leyman immediately contacted Principal Williams. Williams in turn contacted the high school technologist, Armando Gomez, and requested that he review the video system to see who had entered Vargas's classroom. Gomez printed pictures from the video system depicting respondent entering Vargas's classroom during the relevant time period.

After learning respondent was the only person who entered her classroom, Vargas started back to Room A-26, only to again encounter respondent in the hallway. At that time, she asked respondent if she had seen an envelope on her desk. By this time, Vargas knew that it was respondent who had entered her classroom. She testified that she asked respondent this question because she was hoping that respondent would turn over the envelope. According to Vargas, she had a pleasant

relationship with respondent and did not want to think that she was the one who had taken the money.

Respondent responded by saying, "Don't tell anybody. We'll look for it together."

Vargas then wrote a statement delineating the events of December 3, 2010 (P-4).

Vargas was vigorously cross-examined. She answered all questions without equivocation. If she did not know the answer, she said she did not know the answer. In her written statement, she wrote that she had placed the envelope on the top shelf of the closet. During her testimony, she admitted that statement was in error. She stated she had placed it on the second shelf. Vargas explained that she could not reach the top shelf without standing on a chair. Vargas made no effort to reconcile the two statements, but admitted her mistake. Throughout her testimony, she was specific about what had happened and made no effort to embellish her recollection. At the same time, she evidenced the demeanor of someone who was reluctantly performing a distasteful task. She appeared to take no pleasure in offering her testimony against respondent. To the contrary, she appeared to regret the necessity of her testimony. I found Vargas to be credible and believable.

Stevens reduced the camera images of the time period in question to a DVD (P-10). This tribunal reviewed the contents of the DVD. The video shows two views of the hallway, reflected by two cameras numbered fifteen and sixteen. The view from camera fifteen shows classroom A-26 on the left side; the view from camera sixteen shows classroom A-26 on the right side. The better view is had through camera sixteen.

The video begins at 11:04 a.m. At 11:06, respondent walks down the hallway, opens the classroom door to room A-26 and stands in the doorway. She stands there for approximately one minute and then leaves. At 11:07, Vargas leaves the classroom, locking the door. At 11:08:45, respondent can be seen opening the door with a key and

entering the classroom. At 11:09:37, she leaves the classroom. At 11:12:38, respondent re-enters the classroom. At 11:13:21, respondent leaves the classroom again. Respondent's counsel stipulated that no one else entered the classroom. At 11:30:18, Vargas returns to the classroom.

Harry Victor Gilson testified. Gilson was Superintendent of the Bridgeton School District. He retired in August 2010, but returned as Interim Superintendent on December 1, 2010. Gilson was serving as Superintendent at the time the money was stolen from Vargas' classroom.

On the afternoon of December 3, 2010, Gilson received a telephone call from Lynn Williams, the high school principal, advising him of the theft in Vargas' classroom. Gilson proceeded to the high school where he met with respondent and her union representative, David Price. He found respondent in tears.

Gilson's goal was to determine what had happened. To that end, he suggested that if the money was repaid and respondent were to resign, it might be possible to avoid police involvement. Gilson's best recollection was that either Price or respondent asked, "If the money was repaid, could this go away?"

On cross-examination, Gilson agreed that, regardless of what may have been said concerning his proposal, respondent consistently stated that she had not taken the money.

Lynn Williams testified for the Board. Williams is principal at Bridgeton High School and served in that capacity on December 3, 2010.

On that date, Vargas advised her that money was missing from her classroom. Williams and Leyman then reviewed the video of the hallway outside classroom A-26. During the time period Vargas was absent from the room, the video showed respondent entering the classroom twice. No other person entered the classroom. After reviewing the video, Williams contacted Gilson and Gilson instructed her how to proceed.

Williams then met with respondent. Throughout the interview, respondent was upset and crying. She insisted she had not taken the money. She claims she entered A-26 the first time looking for Vargas and came back the second time to leave the note (R-1) for Vargas.

Respondent and her union representative Price then went into another office to confer while Williams waited with Stevens and Leyman. A short time later, Price returned and said that respondent would repay the money if such action would resolve the matter.

On cross-examination, Williams agreed that respondent herself never offered to repay the money. That offer came from Price when respondent was not in the room. Respondent at all times insisted she had not taken the money.

Williams delineated respondent's position in the school hierarchy. Respondent served as the school's business secretary. Her functions including typing requisitions, collecting book fine money, and controlling petty cash. Respondent was also the "keeper of the keys." She dispensed and collected the individual classroom keys to the teachers at the beginning and end of each school year. Respondent herself had a master key that opened every door in the school. Williams admitted that approximately thirty master keys existed.

David L. Price testified for the respondent. Price is a retired language arts teacher who worked twenty-four years in the Bridgeton school district. During most of that time, he was an active member in the Bridgeton Education Association and served as an employee representative.

On December 3, 2010, Price was completing his duties when he was approached by Roseann Amaranto, Association Vice-President. Amaranto asked him to represent respondent. She advised him that she did not feel she had sufficient experience to deal with the situation then confronting respondent.

Price proceeded to the administrative area where he met with Williams and respondent. Price listened to Williams' description of what had transpired, and then asked for time to speak to respondent alone. Price and respondent went to a separate office, where she advised him she had not taken the money and did not know what the matter was all about. Price went back to Williams and reported that respondent asserted she was innocent. He was told to wait.

While Price and respondent were waiting, Gilson appeared. At that time, Gilson spoke directly to respondent. He was extremely kind to her. He stated that people make mistakes. Gilson did not want to hurt anyone, but stated that the matter had to be clarified.

Gilson then advised respondent that she could make restitution and resign. At this juncture, Gilson noted that the amount of missing money made the offense indictable.

Respondent answered the offer by stating that, "I can't say I did something I didn't do."

Price and respondent then met further with Williams. Williams advised that charges would be filed. Leyman told respondent she would be arrested by the Bridgeton Police Department. Ultimately an officer appeared and respondent was taken away in a police car.

Price testified that respondent never stated she would repay the money. Nor did she state, "If I repaid the money would that make it go away," or words to that effect.

On cross-examination, Price admitted that he is a strong advocate for the union and its employees.

Gilson testified in rebuttal. Gilson testified that his recollection differed from that of Price. According to Gilson, either Price, respondent, or both of them, posed the question, if respondent repaid the money, would the case go away?

2. October 13, 2010

Rosemarie Cwik testified. Cwik serves as secretary to high school principal Williams. She has worked for Williams since 1993 and followed her to the principal's office when Williams was promoted in 2005.

Cwik has a private office adjacent to that of the principal. Her office is accessed through a doorway that enters out into an internal hallway running through the administrative portion of the high school (P-13). Inside her office were a series of filing cabinets containing confidential school information, including Williams' personal information and various state and national reports. These file cabinets were accessed by a series of keys which Cwik maintains on one key ring. Each file cabinet key was color coded with a rubber band. During the day, Cwik kept the keys in a coffee cup on her desk covered with a tissue. At night she hid them in a pre-arranged location.

On October 13, 2010, Cwik arrived at work intending to make an appearance at the funeral of a deceased high school student. As she was preparing to leave for the wake, respondent appeared in her office. Cwik advised respondent that she was going to the wake. As she talked with respondent, she locked the file cabinets. Respondent offered to watch her phone while she was out, but Cwik declined. She then placed the file cabinet keys in the coffee cup and respondent left her office. Cwik followed after her, locking the door as she left.

Cwik proceeded to Freitag's Funeral Home, some five minutes from the school, signed the condolence book and immediately returned to the school. She took her pocketbook with her. Upon returning, she found the keys missing from the coffee cup, and the file cabinet drawer where she normally kept her pocketbook was open. Cwik promptly called Leyman. At that moment, Leyman was in the copy room next to the

main office. Leyman testified that he could see everything in the copy room, and the keys were not in the copy room.

While she waited for Leyman to arrive, Cwik scoured her office looking for the keys. While she was in the process of searching, the District Performing Arts Supervisor, Timothy Cabbage, passed her office. Cabbage saw her searching frantically and asked if anything was wrong. When she told him that her keys were missing, Cabbage advised that when he had passed her office earlier, he saw her door open. Respondent was inside Cwik's office kneeling down looking in the file cabinet drawer where Cwik normally kept her pocketbook.

Leyman then arrived and the two searched Cwik's entire office but did not find the keys. When they could not find the keys, respondent suddenly appeared in the doorway and advised Cwik that she had found her keys. She led Cwik to the copy room and pointed to the keys, which were lying on the floor.

Leyman testified that when he received the call from Cwik that her keys were missing, he was in the copy room, clearly observed the copy room, and the keys were not on the floor.

Timothy Cabbage testified. He confirmed that on the morning of October 13, 2010, he walked down the internal hallway from the main office. As he passed Cwik's office, he observed the respondent inside Cwik's office, looking inside the file cabinet drawer behind Cwik's desk. When he passed down the same hallway in the opposite direction sometime later, he observed Cwik searching her office. At that time, he advised her what he had seen.

Respondent's Testimony

Respondent testified in her own defense. She has served as a secretary for the Bridgeton Board of Education since April 2001. Her immediate supervisor has always been Assistance Principal Steve Lynch.

Respondent agreed that she is responsible for the keys to the building and that she possesses a master key. She requires the master key because she is the business secretary and receives packages which she then must deliver to the various teachers in their classrooms.

On December 3, 2010, respondent went to Vargas' classroom A-26. Respondent could not remember why she went to the classroom. What she did remember was that she and Vargas discussed the sweatshirts that she had ordered. Vargas advised her that she could pay later.

Respondent stated that in the past, she and Vargas had occasionally discussed their personal lives. Vargas was attempting to become pregnant. Respondent told Vargas that she had custody of her three grandsons and was finding them expensive to raise.

Respondent was grateful that Vargas was not requiring her to pay for the sweatshirts immediately. After leaving the classroom, she immediately returned to thank Vargas. When she arrived she found the door locked and Vargas not there. Respondent then decided to leave a note. She returned to her work area, found a tablet and a pen, and went back to the classroom. She again entered the classroom, wrote the note and left it for Vargas. Respondent identified the note (R-1).

Sometime between 12:30 p.m. and 1:30 p.m., respondent was working at the front desk when she was approached by Amaranto and told to proceed to Williams' office. While at Williams' office, she was interrogated. Respondent insisted she never took the money and never offered to pay back the money.

On cross-examination, respondent insisted that the only reason that she returned to the classroom was to thank Vargas for not requiring her to pay for the sweatshirts. She admitted that Vargas is an honest and kind person. She again reiterated that she never offered to repay the money if the case would go away.

Respondent offered no testimony about the October 13, 2010, incident.

I observed respondent carefully as she testified. Her recollection of the Vargas incident of December 3, 2010, was minimal. She did not know why she went to Vargas' classroom and could offer no explanation as to why she had to return twice to thank Vargas for what appears to have been an innocuous kindness. She failed to address a number of points in the prior testimony, most notably: (1) that she met Vargas in the hallway as Vargas was leaving the classroom; (2) that she met Vargas later in the early afternoon, was advised that the money was missing, and told Vargas, "Don't tell anyone. We'll look for it together"; (3) she offered no explanation for why she was in Cwik's office looking in a file drawer behind the desk on October 13, 2010.

I did not believe respondent's testimony.

LEGAL DISCUSSION

The Board of Education seeks to terminate respondent's employment based upon a charge of unbecoming conduct. The definition of unbecoming conduct was considered in In the Matter of Craig Venson, City of Plainfield, CSV 7545-07, Initial Decision (June 9, 2009), aff'd, Civil Service Commission (August 6, 2009). In that case, the judge wrote:

"Unbecoming conduct" is broadly defined as any conduct that adversely affects the morale or efficiency of the governmental unit or that has a tendency to destroy public respect and confidence in the delivery of governmental services. In re Appeal of Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). Unbecoming conduct may include behavior that is not in accord with propriety, modesty, good taste or good manners, or behavior that is otherwise unsuitable, indecorous or improper under the circumstances. Conduct unbecoming a public employee may be less serious than a violation of the law, but it is inappropriate on the part of the public employee. Ferrogine v. State Dep't of Human Servs., Trenton Psychiatric Hosp., CSV 2441-98, Initial Decision (April 17, 1998), modified, MSB (July 6, 1998)

<<http://lawlibrary.rutgers.edu/oal/search.html>>. It is a fact-sensitive determination rather than one based on a legal formula.

During the course of the hearing, respondent's counsel attempted to raise the possibility that a student had hidden in the classroom or climbed through the classroom window and gained access to the money in the locked closet. Given Vargas' presence in the classroom prior to 11:07 a.m., I **FIND** it unlikely that a student could have hidden without her seeing him/her. The possibility that a student came in through the classroom window seems unlikely, given that the classroom was located on the second floor of the high school building.

In the end, the case comes down to two possibilities: either Vargas took the money herself and then attempted to cover her tracks by claiming a robbery had occurred, or respondent took the money. Based upon the contents of the video (P-10), Vargas and respondent were the only two persons in the classroom during the period in question. One or the other of them must have taken the money.

After hearing the testimony, I am satisfied that it was respondent who took the money. Vargas' testimony was credible and believable. She offered a detailed account of what transpired. On the other hand, respondent's story was incredible and unbelievable. Respondent entered classroom A-26 during Vargas' absence. Her explanation for her presence in the classroom was inadequate. Her excuse that she wanted to leave a note to thank Vargas for her kindness smacks of an effort to create an alibi. I am satisfied that respondent took the money.

Taking the money was an act of petty theft. Without question, theft constitutes unbecoming conduct. Accordingly, respondent must be removed from her tenured position with the school district.

I am also satisfied that respondent entered Cwik's office on October 13, 2010, for no proper purpose. She offered no reason for her presence at that location. While I cannot find that her purpose was to steal, given her subsequent conduct on December

3, another act of petty theft may well have been her intent. Although I cannot make that finding, I can **FIND** that she was in a place where she did not belong.

In summation, respondent committed an act of theft. In so doing, she engaged in unbecoming conduct and must forfeit her right to employment. The charges must be **SUSTAINED**.

ORDER

I **ORDER** that the charge of unbecoming conduct be **SUSTAINED**.

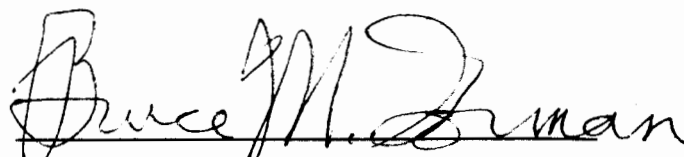
I **ORDER** that respondent's employment with the Bridgeton Board of Education be terminated and that she forfeit her tenure rights thereto.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11-30-11
DATE


BRUCE M. GORMAN, ALJ

Date Received at Agency:

11-30-11

Date Mailed to Parties:

11-30-11

/sd

WITNESSES

For petitioner:

Harry Victor Gilson
Robert L. Stevens
Tracy Vargas
Charles F. Leyman, Jr.
Rose Marie Cwik
Timothy Cabbage

For respondent:

Cynthia Perella

EXHIBITS

For petitioner:

P-1 Letter of Suspension, 12/7/10
P-2 Tenure Charges, 2/23/11
P-3 Neither introduced nor admitted
P-4 Vargas Statement, 12/3/10
P-5 Neither introduced nor admitted
P-6 Neither introduced nor admitted
P-7 Neither introduced nor admitted
P-8 Stevens Timeline
P-9 Photographs
P-10 Video, 12/3/10
P-11 Hand drawing of Room A-26
P-12 Memo from Williams to Leyman re: Missing Keys
P-13 Hand Drawing of Internal Offices (building layout)

For respondent:

R-1 Note to Tracy from Cindy

OAL DKT. NO. EDU 9191-11
 AGENCY DKT. NO. 203-7/11

J.C. and V.M., on behalf of N.C. and Z.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF FORT LEE, BERGEN	:	
COUNTY,	:	
RESPONDENT.	:	
_____	:	

The record of this matter, the proposed Consent Order-Settlement and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon such review, the Commissioner rejects the provisions of the Consent Order, with the following observations. Under Paragraphs 2 through 6 of the parties' Order, reference is made to actions that may have already taken place, thus preceding consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same. Additionally, in Paragraph 7 of the Consent Order, the Administrative Law Judge (ALJ) seeks to retain jurisdiction of the matter in the event that a dispute arises regarding the district of residence of the minor children. The Commissioner notes that the ALJ has no power to retain jurisdiction once the Initial Decision is rendered; authority is then within the province of the Commissioner to render the Final Decision. Finally, the Consent Order lacks the requisite signatures of the petitioners and is, therefore, rendered inadequate as an agreement between the parties.

Accordingly, the Commissioner rejects the Initial Decision as the final decision in this case and remands the matter for the purpose of curing these defects.

IT IS SO ORDERED.


 ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/11/12

Date of Mailing: 1/12/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

CONSENT ORDER

SETTLEMENT

OAL DKT. NO. EDU 09191-11

AGENCY DKT. NO. 203-7/11

**J.C. AND V.M. O/B/O N.C. AND Z.C.,
MINOR CHILDREN,**

PetitionerS,

v.

**FORT LEE BOARD OF EDUCATION,
BERGEN COUNTY,**

Respondent.

Dennis A. Maycher, Esq., for petitioner

Yaacov Brisman, Esq., for respondent

Record Closed: November 18, 2011

Decided: November 23, 2011

BEFORE **SANDRA ANN ROBINSON, ALJ:**

This matter was transmitted to the Office of Administrative Law on August 4, 2011, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

Hearings were scheduled for November 1 and 2, 2011. During the pendency of the case at the OAL, the parties reached a tentative settlement. A **CONSENT ORDER** was prepared and executed indicating the terms of the agreement, which are incorporated herein by reference.

Having reviewed the contents of the attached **CONSENT ORDER** and the certified true and exact copy of the Board Resolution, which was approved by a majority vote of the members of the Fort Lee Board of Education on November 7, 2011, I **FIND**:

1. The parties have voluntarily agreed to the **CONSENT ORDER** as evidenced by the vote of the Board members and the certification of the actual Resolution in favor of the **CONSENT ORDER**, which was duly signed by the Business Administrator and Board Secretary.
2. The **CONSENT ORDER SETTLEMENT** fully disposes of all issues in controversy and is consistent with the law.

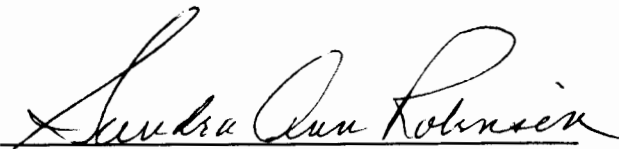
I **CONCLUDE** that this **CONSENT ORDER SETTLEMENT** meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 23, 2011

DATE


SANDRA ANN ROBINSON, ALJ

Date Received at Agency:

11-28-11

NOV 28 2011

DATE

Ir

attachment

Mailed to Parties:


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

J.C. and V.M.. o/b/o N.C. and Z.C., minor
children,

Petitioners,

v.

FORT LEE BOARD OF EDUCATION

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No.: EDU 09191-2011-N
Agency Reference No.: 203-7/11

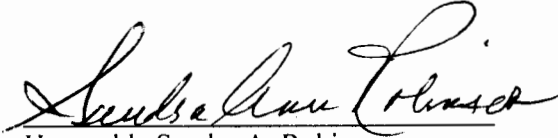
CONSENT ORDER

THIS MATTER having been opened to the Court by the Law Offices Dennis A. Maycher, P.C., attorneys for Petitioners J.C. and V.M., o/b/o N.C. and Z.C. (Dennis A. Maycher, Esq., appearing), seeking to challenge Respondent Fort Lee Board of Education's (Yaacov Brisman, Esq., appearing) residency determination for said minor children, and the parties having reached an amicable resolution of this matter, and good cause having been shown;

IT IS on this 18 day of November, 2011, ordered that:

1. The Consent Order entered by the Hon. Harold C. Hollenbeck, J.S.C., on June 5, 2008, granted residency for purposes of education to remain in Fort Lee only so long as the mother of Z.C. and N.C. resided in Fort Lee. As Z.C.'s and N.C.'s mother no longer resides in Fort Lee, the residency of the custodial parent, J.C., residing at 4 Seventh Street, Englewood Cliffs, New Jersey, is the district of residency for the purposes of Z.C.'s and N.C.'s education.
2. Z.C. shall continue to attend Fort Lee Middle School through the completion of 8th grade. The Fort Lee Board of Education shall not seek compensation and/or reimbursement from Petitioners with regard to Z.C.'s attendance at Fort Lee Middle School.
3. In order for Z.C. to attend the Fort Lee High School, Z.C. must continue the current residency and visitation arrangement with Petitioners. As such, Z.C. must continue to reside with her aunt, V.M., who resides at 524 Bluff Road, Fort Lee, New Jersey.
4. N.C. will be enrolled in the Englewood Cliffs School District, effective July 1, 2011, pursuant to this Consent Order.

5. The District will provide all reasonable assistance with respect to enforcing N.C.'s current IEP and placement, which will be prepared by the Fort Lee Board of Education within five (5) days of the entry of this Order.
6. The District and Petitioner shall split the costs of N.C.'s out-of-district residential placement from October 1, 2010 to June 30, 2011, with the District reimbursing \$50,000.00 to Petitioner J.C.
7. The Honorable Sandra A. Robinson, shall retain jurisdiction of this matter in the event a dispute arises with respect to Z.C.'s and N.C.'s district of residency.
8. This Consent Order shall be subject to the Fort Lee Board of Education duly ratifying the terms of this Order at the next meeting of the Fort Lee Board of Education.
9. The parties shall be responsible for the payment of their own counsel fees and costs associated with the prosecution and defense of this matter. Neither Petitioners nor Respondent shall seek reimbursement and/or contribution from the other party relative to same.


Honorable Sandra A. Robinson

November 18, 2011

SETTLEMENT AGREEMENT – RESIDENCY ISSUE

BE IT RESOLVED, that upon the recommendation of the Acting Superintendent of Schools, the Board of Education agrees to a settlement in the matter of **JC and MV v. FLBOE** and authorizes the Business Administrator to disburse the monies as indicated in the confidential agreement.

DATED: November 7, 2011

*Please note that Mr. John Bang, Mrs. Linda McCue and Mrs. Angela Napolitano abstained.

*I hereby certify that this is a true and exact copy of resolution #24593 approved by the Fort Lee Board of Education on November 7, 2011.


Cheryl Balletto
Business Administrator/Board Secretary

Motion by: Mrs. Linda McCue

Seconded by: Mrs. Angela Napolitano

☒ Motion Passed

☐ Motion Failed

ROLL CALL	AYES	NAYS	ABSENT	ABSTAINED
MR. JOHN BANG	X			
MR. CARMELO LUPPINO	X			
MRS. LINDA McCUE	X			
MRS. ANGELA NAPOLITANO	X			
MR. YUSANG PARK	X			
MR. PETER SUH			X	
MR. JOSEPH SURACE	X			
MS. HELEN YOON	X			
MR. ARTHUR LEVINE	X			

OAL DKT. NO. EDU 7916-11
AGENCY DKT. NO. 114-5/11

H.T. on behalf of minor child T.A., :

PETITIONER, :

COMMISSIONER OF EDUCATION

V. :

DECISION

BOARD OF EDUCATION OF THE :
CITY OF ORANGE, ESSEX COUNTY, :

RESPONDENT. :

The controversy in this case arose after H.T., the mother of T.A., moved out of respondent's district – where she and her children had been living with her mother, C.T. – and left T.A. behind to continue residing with C.T. In April of 2011, after learning of petitioner's move, respondent notified petitioner that T.A. was ineligible to receive a free public education in Orange. On May 11, 2011 petitioner filed an appeal challenging this determination.¹

The Commissioner has reviewed the record and Initial Decision of the Office of Administrative Law (OAL).² Upon consideration of same, the Commissioner adopts the Initial Decision for the reasons articulated therein. Accordingly, T.A. is hereby disenrolled from respondent's school district and no back tuition is awarded – none having been demanded by way of counterclaim.

IT IS SO ORDERED.³



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/17/12
Date of Mailing: 1/18/12

¹ Because it is C.T. who resides in respondent's district, it is C.T. who should have filed the petition. See *N.J.A.C. 6A:3-8.1(b)*. In this case, however, the identity of the petitioner does not affect the outcome recommended by the Administrative Law Judge (ALJ). More specifically, the ALJ recommends that the disenrollment of T.A. from respondent's school district be upheld. Further, since no counterclaim for back tuition was filed, neither H.T. nor C.T. will be liable for same.

² No exceptions were filed.

³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)

H.T. on behalf of minor child T.A.,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
CITY OF ORANGE, ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the April 2011 determination of the respondent Board that her daughter, T.A., was not eligible for a free public education in the City of Orange school district. Petitioner claimed that when she moved from her mother's apartment in Orange in June 2009, T.A. remained living with her grandmother, C.T., for financial reasons. The respondent Board requested dismissal of the petition, but did not file a counterclaim for tuition.

The ALJ found that: the testimony of H.T. and her mother, C.T., was candid and credible; there is no real dispute as to the underlying facts of the matter; although C.T. is undisputedly domiciled within the Orange school district and intends to support T.A. for a longer time than through the school term, T.A. does not meet all of the requirements for enrollment as an affidavit student pursuant to *N.J.S.A. 18A:38-1(b)* because there is no documented family or economic hardship that makes it necessary for her to attend school in Orange as opposed to East Orange, where petitioner is now domiciled. The ALJ concluded that H.T. and C.T. do not satisfy all of the requirements for T.A. to receive a free public education in respondent's school district, and accordingly dismissed the petition.

Upon a full and independent review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. In so doing, the Commissioner noted that C.T. should have filed the petition as she is the party who is domiciled in the City of Orange. In this case, however, the identity of the petitioner does not change the outcome recommended by the ALJ. Accordingly, the Commissioner ordered that T.A. be disenrolled from the respondent's school district.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 07916-11

AGENCY DKT. NO. 114-5/11

H.T. ON BEHALF OF MINOR CHILD, T.A.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY
OF ORANGE, ESSEX COUNTY,**

Respondent.

H.T., pro se

Melvin C. Randall, Esq., for respondent (Love & Randall, attorneys)

Record Closed: October 20, 2011

Decided: November 30, 2011

BEFORE RICHARD McGILL, ALJ:

H.T. (hereinafter sometimes "petitioner") filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the City of Orange (hereinafter "respondent") in regard to her daughter, T.A. Respondent's Answer requests dismissal of the petitioner but does not include a counterclaim for tuition reimbursement.

PROCEDURAL HISTORY

Petitioner filed her petition on May 11, 2011, invoking the Commissioner's authority to hear and determine controversies arising under the school laws pursuant to N.J.S.A. 18A:6-9. As a result of the timely filing of the petition, T.A. has continued to attend school in respondent's district. On July 6, 2011, respondent filed its Answer.

The matter was transmitted to the Office of Administrative Law on July 8, 2011, for determination as a contested case. The hearing was conducted on October 20, 2011, at the Office of Administrative Law in Newark, New Jersey.

ISSUE

The issue in this proceeding is whether T.A. meets the requirements to receive a free education in respondent's public schools pursuant to N.J.S.A. 18A:38-1(b)(1), which relates to situations where the pupil is living in the home of a person who is domiciled within the school district.

FACTS

H.T. testified on her own behalf, and she called her mother, C.T., as a witness. Respondent did not call any witnesses in this proceeding. H.T. and C.T. testified candidly, and their testimony is accepted as true.

There is no real dispute as to the underlying facts in this matter, and I **FIND** as follows:

1. Prior to June 2009, H.T. and her children lived with her mother, C.T., in Orange, New Jersey.
2. C.T. was the tenant in the apartment with the lease in her name.

3. H.T. and C.T. registered T.A. in respondent's public schools.
4. In or about June 2009, H.T. and her two younger children moved to an apartment in East Orange, New Jersey.
5. H.T. registered her second oldest child, J.A., in the public schools of East Orange.
6. H.T.'s youngest child is pre-school age.
7. T.A., who is H.T.'s oldest child, remained with C.T. in Orange and continued to attend respondent's Heywood Avenue School.
8. T.A. continued to live with her grandmother, C.T., to the present.
9. C.T. has lived at her address for six years.
10. C.T. received extensions on her lease for 2010 and 2011.
11. T.A.'s father is fifty-five years of age and is living in a nursing home in Florida, because he is legally blind from diabetes.
12. In recent years, H.T. has attended Bloomfield College, and in June 2011, she graduated with a bachelor's degree in nursing.
13. H.T. works at Park Manor Nursing Home in Bloomfield, New Jersey.
14. H.T.'s net pay is \$3,000 per month.
15. T.A. receives \$179 per month in Social Security benefits as the result of her father's condition.

16. The funds go directly into an account in the names of both T.A. and H.T.
17. H.T. uses these funds for clothing for T.A. and other needs such as school supplies.
18. Another child receives the same amount in Social Security benefits.
19. The rent for H.T.'s apartment in East Orange is \$1,125 per month. The utilities and cable television service amount to \$200 per month.
20. Because of various debts, H.T. went through a bankruptcy proceeding which was discharged in 2010.
21. H.T. owns a home in Georgia. H.T. was allowed to keep the property, but she pays \$2,000 per month on the mortgage.
22. H.T. has a tenant who pays \$700 per month in rent.
23. H.T. pays \$699 per month to creditors.
24. H.T. does not give any money to C.T.
25. H.T. intends to return to her home in Georgia as soon as she takes the examination to be a registered nurse and receives a license. H.T. plans to take T.A. with her.
26. H.T. believes that her income will increase significantly at that point.
27. C.T. is employed by a nursing home and works five days per week.
28. T.A. is residing with C.T. because of H.T.'s financial difficulties.

29. C.T. provides food and shelter for T.A.
30. H.T. purchases clothing and toys for T.A.
31. All three of H.T.'s children including T.A. are covered under H.T.'s health plan.
32. H.T. visits C.T. and T.A. almost every day.
33. On the weekend, T.A. goes to church with H.T.
34. Mail from the school is sent to C.T.'s address.
35. H.T. goes to the school to speak with the teachers or the principal.
36. C.T. picks up T.A. after school.
37. At the hearing, C.T. could not remember the name of T.A.'s school or her teacher.
38. C.T. received a letter from the school district, and she gave it to H.T. C.T. did not read the letter.
39. H.T. read the letter which stated that it was necessary to update T.A.'s registration with the school district.
40. H.T. could not find time to re-register T.A. and the deadline passed.
41. Someone from the school district visited C.T.'s home.

LAW AND ANALYSIS

A person over five and under twenty years of age has a right to a free public education in a school district in which he is domiciled. N.J.S.A. 18A:38-1(a). A person who is not domiciled within a particular school district may be eligible for a free public education therein provided that he satisfies requirements related to both the person with whom he is living and his parents. N.J.S.A. 18A:38-1(b).

With respect to the person with whom the pupil is living, the requirements are as follows: (1) the pupil is kept in the home of another person domiciled within the school district; (2) the pupil is supported by the other person gratis as if he were the other person's own child; (3) the person domiciled within the school district assumes all personal obligations for the child relative to school requirements; (4) the person domiciled within the school district intends to keep and support the child gratuitously for a longer time than merely through the school term; and (5) the person domiciled within the school district provides a copy of his lease or a sworn statement from the landlord acknowledging the tenancy. N.J.S.A. 18A:38-1(b)(1). In regard to the parent, the requirements are as follows: (1) the parent is not capable of supporting or providing care for the child due to a family or economic hardship; and (2) the child is not residing with the resident of the school district solely for the purpose of receiving a free public education within the district. N.J.S.A. 18A:38-1(b)(1).

With respect to the requirements that pertain to C.T., it is disputed that she is domiciled within the school district, as she provided a copy of her lease at the hearing. Additionally, it is evident that C.T. intends to support T.A. for a longer time than merely through the school term, as T.A. has lived with C.T. since H.T. moved out in or about June 2009. Likewise, C.T. is supporting T.A. gratis with respect to food and shelter, although H.T. pays for T.A.'s clothing and school supplies and provides health coverage. On the other hand, aside from the fact that C.T. picks up T.A. after school, it is evident that H.T. handles all school requirements related to T.A. It follows that C.T. does not satisfy all of the requirements related to the person who is domiciled within the school district.

With regard to the requirements that pertain to the parent, the circumstances clearly indicate that T.A. is not residing with C.T. solely for the purpose of receiving a free public education within the district. Rather, the arrangement is intended as a means for C.T. to contribute to the support of T.A.

On the other hand, H.T. has not established that she is not capable of supporting or providing care for T.A. due to a family or economic hardship. First, H.T. has net income of \$3,000 per month from employment, and she receives Social Security benefits of \$179 per month for T.A. and the same amount for another child. These amounts should be sufficient to support H.T.'s family without economic hardship. Second, H.T.'s economic difficulties stem from the fact that she is maintaining two homes. H.T. pays rent in the amount of \$1,125 per month for an apartment in East Orange, and she makes a mortgage payment of \$2,000 per month for a home in Georgia. H.T. could extricate herself from this position by giving up the apartment in East Orange or the home in Georgia. The fact that H.T. has difficulty maintaining two homes does not mean that she is not capable of supporting T.A. Finally, T.A. could simply attend school in East Orange where H.T. lives, while continuing to live with C.T. in Orange. It follows that there is no family or economic hardship that makes it necessary for T.A. to attend school in Orange as opposed to East Orange.

Based upon the above, I **CONCLUDE** that C.T. and H.T. do not satisfy all of the requirements for T.A. to receive a free public education in respondent's school district. Accordingly, it is **ORDERED** that H.T.'s petition in this matter is dismissed.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 30, 2011
DATE

Richard McGill
RICHARD MCGILL, ALJ

Date Received at Agency:

November 30, 2011
John P. Barker

Date Mailed to Parties:

DEC - 1 2011

Ir

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESS LIST

For petitioner:

C.T.

H.T.

For respondent:

None

EXHIBIT LIST

None

SONJA MC KENNA AND
MARGARET MAC MURREN,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE ANDOVER
REGIONAL HIGH SCHOOL DISTRICT,
SUSSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners – formerly tenured members of the respondent Board's child study team (CST) – challenged the Board's abolishment of the CST and its decision to enter into an agreement with the Sussex County Educational Services Commission (Commission) to provide CST services. Petitioners alleged that the agreement contains no maximum cost and is in violation of applicable statutes and regulations. The petitioners further alleged that these defects rendered the abolition of their positions invalid. Respondent filed a motion for summary decision, alleging that the petition was time-barred and that petitioners lack standing to bring this action.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact, and the matter is ripe for summary judgment; the facts giving rise to the petitioners' cause of action are the terms of the Board's agreement with the Commission, final notice of which was not received until July 15, 2010; the petition was therefore filed within the 90-day statutory period; however, to establish standing, a litigant must demonstrate a sufficient stake in the outcome of the proceedings; petitioners in this case have not shown that they have a sufficient stake, or would be directly affected by the outcome of this controversy; courts have consistently ruled that a RIF, if done for reasons of economy, is entirely within the authority of the board; petitioners here have not alleged that the RIF was instituted in bad faith, and without such an allegation, a RIF will not be invalidated. Accordingly, the ALJ determined to grant respondent's motion for summary judgment; and denied petitioners' appeal for lack of standing.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. Accordingly, the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 9672-10
 AGENCY DKT. NO. 405-8/10

SONJA MC KENNA AND
 MARGARET MAC MURREN,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE ANDOVER
 REGIONAL HIGH SCHOOL DISTRICT,
 SUSSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Board's reply thereto – filed in accordance with the provisions of *N.J.A.C. 1:1-18.4* – were fully considered by the Commissioner in reaching his determination here.

Petitioners' exceptions essentially replicate their arguments advanced before the Administrative Law Judge (ALJ) below. In that it is determined that the ALJ fully considered and addressed these arguments in her decision, they merit no further discussion here.

Upon his review, the Commissioner initially agrees with the ALJ that the facts giving rise to petitioners' cause of action in this matter are the terms of the Board's Shared Services Agreement Contract with the Sussex County Educational Services Commission and, as such – for the reasons presented on pages 9-10 of her decision – he concludes that the instant petition of appeal was timely filed. This said, the Commissioner further concurs with the ALJ – for the reasons comprehensively articulated in her Initial Decision – that summary decision is appropriately granted to the Board as the petitioners here lack standing to bring their claims.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/17/12

Date of Mailing: 1/18/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 09672-10

AGENCY DKT. NO. 405-8/10

**SONJA McKENNA AND MARGARET
MacMURREN,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE ANDOVER
REGIONAL HIGH SCHOOL DISTRICT,
SUSSEX COUNTY,**

Respondent.

Gregory T. Syrek, Esq., for petitioners (Bucceri & Pincus, attorneys)

Allan D. Dzwilewski, Esq., for respondent (Schwartz, Simon, Edelstein, & Celso,
attorneys)

Record Closed: October 17, 2011

Decided: November 30, 2011

BEFORE **LESLIE Z. CELENTANO, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners Sonja McKenna and Margaret MacMurren were tenured members of respondent Andover Regional High School District's child study team (CST). They

challenge respondent's abolishment of the team and its decision to enter into an agreement with the Sussex County Educational Services Commission (SCEC or Commission), alleging that the agreement contains no maximum cost and provides for CST services in a manner that violates N.J.S.A. 18A:46-5 et seq. and N.J.A.C. 6A:14-3.1 et seq. The matter was transmitted to the Office of Administrative Law (OAL) on August 31, 2010, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Respondent has moved for summary decision, alleging that the petition is time-barred and that petitioners lack standing to bring the within action.

STATEMENT OF FACTS

1. Margaret MacMurren¹ and Sonja McKenna² (petitioners), were tenured employees of respondent, Andover Regional Board of Education (respondent or Board), as members of the CST.

2. On or about March 30, 2010, petitioner MacMurren gave notice to Bernard T. Baggs, superintendent of schools, of her intent to retire effective June 30, 2010.

3. On or about April 15, 2010, the Board accepted petitioner MacMurren's retirement effective July 1, 2010.

4. On or about May 4, 2010, the Board adopted a resolution abolishing the CST and thereby terminating petitioner McKenna's employment.

5. On or about May 5, 2010, the Board, by letter, provided petitioner McKenna with notice of same.

¹ Learning consultant/coordinator of CST

² School psychologist

6. On or about June 1, 2010, the Board adopted a resolution approving the Shared Services Agreement (Agreement) between the Board and the SCEC.

7. On or about June 7, 2010, the Board finalized the Agreement with the Commission. The Agreement covered the period from July 1, 2010, until June 30, 2011.

8. After the Board approved the Agreement, the New Jersey Education Association's field representative, Kim Cowing, reached out to the Commission for purposes of inquiring into the staffing arrangement under the Agreement.

9. By letter dated July 15, 2010, Ms. Cowing was notified that under the Agreement, CST positions would be filled by employees of the Commission as well as individuals who worked as third-party consultants for the Commission.

10. On or about August 9, 2010, petitioners filed a verified petition with the Commissioner of Education. The matter was transmitted to the Office of Administrative Law (OAL) and assigned docket number EDU 09672-10.

11. On September 7, 2011, a motion for summary decision was filed by respondent on grounds of timeliness and standing. Petitioners filed opposition papers and respondent thereafter filed reply papers.

ANALYSIS AND DISCUSSION

90-Day Rule

The New Jersey Administrative Code establishes procedural ground rules for filing petitions with the Commissioner of Education. Among them, N.J.A.C. 6A:3-1.3(i) provides that "[t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing."

Although N.J.A.C. 6A:3-1.3 does not address what constitutes “adequate notice,” the New Jersey Supreme Court has offered guidance, stating that “[a]dequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate.” Kaprow v. Berkeley Twp. Bd. of Educ., 131 N.J. 572, 587 (1993).³ Specifically, the 90-day⁴ limitations period for commencing an action begins to run when a petitioner learns of facts that would enable him to file a timely claim. Ibid. (“the notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the tenured teachers have been alerted to the existence of facts that may equate in law with a post-[reduction in force] cause of action”); Eisenberg v. Fort Lee Bd. of Educ., EDU 9451-01, Initial Decision (September 10, 2002), rev’d, Comm’r (October 3, 2002), rev’d, State Bd. (November 5, 2003) <<http://lawlibrary.rutgers.edu/oal/search.html>>; see also Meyer v. Wayne Twp. Bd. of Educ., 1986 S.L.D. 3094, 3098 (“[I]n the absence of actual knowledge, the cause of action accrues only upon notice sufficient to alert the teaching staff member who has been adversely affected”); Beshaw v. Bd. of Educ. of Oakland, 97 N.J.A.R.2d (EDU) 494 (Although the tenured teacher was subjected to a reduction in force (RIF) in May, the 90-day limitations period was not triggered until the teacher read a copy of the curriculum being taught by a newly employed non-tenured teacher. It was at this point that the petitioner knew or should have known that she had a claim to teach the course in question).

The State Board of Education clarified the importance of receiving notice of the final decision or “knowing of facts that enable[s] [the petitioner] to file a timely claim.” Eisenberg, supra, EDU 9451-01. In Eisenberg, the petitioner received notice on April 3,

³ It must also be sufficient to further the purpose of the 90-day limitations period, which is twofold. The rule is intended “to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims,” and “to penalize dilatoriness and serve as a measure of repose’ by giving security and stability to human affairs.” Kaprow, supra, 131 N.J. at 587 (citations omitted).

⁴ Although the Commissioner has the authority to relax the 90-day rule, such authority is rarely invoked. Relaxation or waiver of the rule is reserved for cases presenting compelling reasons or exceptional circumstances such that strict adherence would be inappropriate or unnecessary or may result in injustice. Specifically, the 90-day rule will be relaxed “only where there is some compelling reason for the same, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties themselves.” Polanco-Gomez v. Englewood Cliffs Bd. of Educ., EDU 2116-11, Initial Decision (May 4, 2011), 2011 N.J. Agen. Lexis 238 (citation omitted), adopted, Comm’r (June 15, 2011) <<http://lawlibrary.rutgers.edu/oal/search.html>>.

2001, that the board of education decided not to renew his employment contract. In response, Eisenberg requested a statement of reasons for his non-renewal, which he received on May 1, 2001. On May 10, 2001, Eisenberg requested a public meeting with the board of education to discuss his non-renewal, and said meeting was held on July 2, 2001. Thereafter, on July 3, 2001, Eisenberg was informed that the board determined to uphold its decision not to renew his contract. Subsequently, on September 29, 2001, Eisenberg filed a petition of appeal. Id. at State Bd. Decision.

At the OAL, the board contended that the “final action” took place on April 3, 2001, and therefore, the 90-day limitations period started to run at that point. The administrative law judge (ALJ) disagreed and held that the 90-day limitations period began on July 3, 2001, when Eisenberg was informed by the board of its “final determination regarding your employment status.” Id. at Initial Decision. On appeal, the Commissioner reversed the ALJ’s determination, agreeing with the board of education that the “Superintendent’s letter of April 3, 2001, had alerted Eisenberg to the existence of facts that might equate in law with a cause of action.” Id. at Comm’r Decision. Thereafter, Eisenberg appealed said decision to the State Board of Education, which reversed the Commissioner’s decision.

In coming to its conclusion, the State Board stressed that although the April 3, 2001, letter provided petitioner with notice of the Board’s action denying him reemployment, the information that alerted the petitioner to the existence of an allegation of wrongdoing was not known to him until early July. Specifically, petitioner complained that “he had learned only days before his July 2, 2001, appearance . . . that the school’s former principal had told another teacher that he had received instructions from the Superintendent to make sure that he ‘papered’ the petitioner’s personnel file to justify the decision not to renew his employment.” Ibid. This new information alerted Eisenberg to the existence of an allegation not known to him until early July and, therefore, “[t]he petitioner could not have made the same allegations prior to his becoming aware of such information.” Ibid. (citing Nissman v. Bd. of Educ. of Long Beach Island, 272 N.J. Super. 373 (App. Div.), certif. denied, 137 N.J. 315 (1994)); see also Charapova v. Edison Twp. Bd. of Educ., EDU 6722-05, Initial Decision (April 3, 2006), rev’d, Comm’r (June 20, 2006), rev’d, State Bd. (August 3, 2007)

<<http://lawlibrary.rutgers.edu/oal/search.html>>, aff'd, No. A-0259-07T2 (App. Div. July 21, 2008), certif. denied, 196 N.J. 598 (2008) (non-tenured teacher was privy to alleged discrimination prior to her notice of non-reemployment). Accordingly, the 90-day period was tolled until the petitioner became privy to facts that made him or should have made him aware that his rights were violated.

In Carteret Education Association v. Carteret Board of Education, EDU 2998-05, Initial Decision (April 19, 2006), rev'd, Comm'r (May 25, 2006) <<http://lawlibrary.rutgers.edu/oal/search.html>>, aff'd, State Bd. (November 1, 2006) <<http://www.nj.gov/education/legal/sboe/2006/nov/sb28-06.pdf>>, petitioner, the Carteret Education Association (CEA), challenged the validity of a contract offered to the school business administrator by the board of education. Specifically, the petitioner contended that the contract was void *ab initio* because it provided for extra sick days in violation of N.J.S.A. 18A:30-3.2.

Procedurally, the board of education approved the contract on November 12, 2003, and it was undisputed that petitioner's president, Robert Cowan, was present at the meeting. Based on these facts, the respondent contended that this date triggered the 90-day limitations period, making the petitioner's March 24, 2005, filing untimely. The ALJ agreed, finding that "the November 12, 2003, public board meeting attended by CEA President Robert Cowan [was] the triggering event for the 90 day period." Carteret, supra, EDU 2998-05, at Initial Decision.

On review, however, the Commissioner of Education agreed with the petitioner and reversed the ALJ's ruling. The Commissioner, citing the petitioner's argument, stressed that although Mr. Cowan attended the board meeting, the resolution only addressed the salary to be paid and the effective date of the contract. Id. at Comm'r Decision. Accordingly, "neither Mr. [Cowan] nor petitioner had any reason to believe—nor did the Board's action provide any reason to suggest—that [the] contract accorded sick leave benefits over and above those granted to all other District employees." Ibid. Rather, "given the absence of any indication to the contrary, petitioner had every reason to rely on the Board's compliance with statutory requirements surrounding all aspects of [the] employment contract." Ibid. Relying on this premise, the Commissioner held that

the 90-day limitations period was triggered when the petitioner, on or about February 2005, read the contents of the contract and became privy to the sick-leave benefits accorded to the administrator.⁵ The Commissioner's decision was ultimately affirmed by the State Board of Education.

Most recently, indeed, only a few months ago, counsel for both parties to this dispute were involved in a contested matter with almost identical facts and claims. Although the case ultimately settled, the issue pertaining to the 90-day rule was adjudicated by the ALJ in favor of the petitioners. In Meltz and Liebow v. Bd. of Educ. of the Warren County Tech. Sch., EDU 12487-10, Order (June 22, 2011) <<http://lawlibrary.rutgers.edu/oal/search.html>>, the petitioners, a school psychologist and a social worker, were tenured employees of the respondent, the Warren County Board of Education, as members of its CST. The relevant timeline is as follows:

- 1) On March 17, 2010, the respondent adopted a resolution abolishing the CST;
- 2) On May 12, 2010, the respondent terminated the petitioners from employment;
- 3) On May 13, 2010, the respondent informed the petitioners of the RIF and their subsequent termination;
- 4) On July 8, 2010, the New Jersey Education Association's field representative submitted a Government Records Request Form to the board;
- 5) On July 14, 2010, the board adopted a resolution approving a joint services agreement with the Warren County Special Services District (WCSSD) for CST services. The resolution noted the per diem salaries of the CST team, but left out all other details.

⁵The Commissioner emphasized that his decision only dealt with the procedural issue of timeliness and is not a reflection, either good or bad, on the merits of the case. Ibid.

- 6) On August 24, 2010, the contract between the board and the WCSSD was finalized;
- 7) On August 27, 2010, pursuant to a prior Government Records Request, the representative received a copy of said contract;
- 8) On October 29, 2010, the petitioners filed an appeal, alleging that the board's decision to abolish the CST and enter into a contract with the WCSSD was arbitrary, capricious, unreasonable and in violation of their tenure rights.

Specifically, and identical to the dispute at hand, the petitioners' arguments were premised on the fact that the contract contained no maximum costs, provided services in a manner in violation of N.J.S.A. 18A:46-5.1 and N.J.A.C. 6A:14-3.1, and employed independent contractors in violation of the applicable statutes and regulations.

The respondent filed a summary decision motion contending that the petition of appeal was not filed within the 90-day period enumerated in N.J.A.C. 6A:3-1.3(i). In support of its motion, the board argued that the March 17, 2010, resolution abolishing the CST triggered the 90-day period of limitations. In the alternative, the board contended that even if the July 14, 2010, date was used, the petitioners' October 12 filing was still late. In response, the petitioners argued that the proper triggering date was either August 24, 2010, the date the contract was finalized, or August 27, 2010, the date the contract was received by the field representative. In support of their arguments, the petitioners maintained that the facts giving rise to their cause of action were not contained in the resolutions, but rather the contract. On review, the ALJ agreed with the petitioners and denied the respondent's motion for summary decision. In coming to her conclusion, the ALJ emphasized that the petitioners' allegations stemmed from the language of the contract itself, and the petitioners could not have made these allegations until they received notice of same. The ALJ succinctly stated, contrary to the respondent's position, that "the resolution could not have alerted petitioners to the 'existence of facts that may equate in law with a post-RIF cause of action.'" Meltz, supra, EDU 12487-10, Order (June 22, 2011) (citation omitted)

<<http://lawlibrary.rutgers.edu/oal/search.html>>. Accordingly, the trigger date was determined to be either August 24 or August 27, rendering the October 12 filing timely.

In the case at hand, the crux of petitioners' argument is premised on the contention that the abolition of the CST was arbitrary, capricious, and unreasonable. As a caveat best suited for the prologue, it must be emphasized that the issue at hand is procedural and not substantive. Accordingly, this tribunal's sole task is to determine at what point in time petitioners became apprised of facts that form the basis of their cause of action.

Respondent's briefs aver that the Board took action to abolish the CST and terminate Ms. McKenna on May 4, 2010. Notice of same was provided to Ms. McKenna on May 5, 2010. According to respondent, either date may be used to trigger the 90-day rule, making petitioners' August 10, 2010, filing late. Petitioners disagree. Petitioners emphasize that "the facts giving rise to the cause of action are not the initial action to abolish, but the terms of the contract (Shared Services Agreement) establishing how replacement [CST] services would be provided in the Board's school district."⁶ Procedurally, petitioners are contending that they could not have made these allegations prior to becoming aware of the provisions in the Agreement. See Nissman, supra, 272 N.J. Super. 373; Eisenberg, supra, EDU 9451-01 <<http://lawlibrary.rutgers.edu/oal/search.html>>. According to petitioners, this information could not have become available prior to June 1, 2010, the date the Agreement was signed by the Board; June 7, 2010, the date the agreement was finalized; or July 15, 2010, the date petitioners' field representative was notified that third-party consultants would be used. Consequently, this tribunal must pinpoint the precise event that triggered the commencement of the 90-day limitations period.

It is undisputed that the CST was abolished on May 4, 2010, and petitioners were notified of same a day later. At these junctures, however, petitioners could not have made the allegations that form the basis of their petition, namely, the allegations that the provisions of the contract violate N.J.S.A. 18A:46-5.1 and N.J.A.C. 6A:14-3.1, provide

⁶ (Petitioners' opposition brief, page 4.)

for employment of independent contractors, and fail to establish maximum costs. Such is the case because the Agreement did not exist in any capacity until June 1, 2010, when the board adopted a resolution adopting same. Indeed, similar to Eisenberg and Carteret and Meltz, petitioners did not know that a cause of action existed at the time the resolutions were adopted. Similar to Kaprow and Meltz, the resolution could not have alerted petitioners to the "existence of facts that may equate in law with a post-RIF cause of action." Kaprow, supra, 131 N.J. 587; Meltz, supra, EDU 12487-10, Order (June 22, 2011) (citation omitted) <<http://lawlibrary.rutgers.edu/oal/search.html>>. Furthermore, given the absence of any indication of foul play, petitioners had every reason to rely on the Board's compliance with the statutory requirements surrounding all aspects of the Agreement. See Carteret, supra, EDU 2998-05, Comm'r (May 25, 2006) <<http://lawlibrary.rutgers.edu/oal/search.html>>. Accordingly, I **FIND** that May 4 and May 5 are not the triggering dates.

Notice must be received to be adequate. Further, notice, for purposes of N.J.A.C. 6A:3-1.3, must relate to a final action. Here, the agreement was not finalized until June 7, 2010. For this reason, June 7, 2010, would represent the earliest triggering date. The use of this date, however, would be purely speculative. For all intents and purposes, notice was received on July 15, 2010, when the Commission notified Ms. Cowing that the Agreement provided for the use of independent contractors. Accordingly, the 90-day limitations period did not commence until July 15, 2010, and as such I **CONCLUDE** that petitioners' filing fell squarely within the 90-day statutory period.

Standing

The jurisdictional concept of standing requires that "a particular litigant must have sufficient interest in the subject of the litigation so that a genuine clash between opposing viewpoints will be presented." U.K. & G.K. ex rel D.K. v. Clifton Bd. of Educ., 93 N.J.A.R.2d (EDU) 71 (citing Kenwood v. Montclair Bd. of Educ., EDU 8858-81, Initial Decision (Apr. 23, 1982), adopted, Comm'r (June 14, 1982)). To establish standing, a litigant must show that: 1) he has "a sufficient stake in the outcome of the proceedings"; and 2) his position is "truly adverse to the opposing party." Ibid. (citing Home Builders

League of S. Jersey v. Berlin Twp., 81 N.J. 127, 132 (1979)). Restrictions on standing also apply to those who initiate administrative proceedings before the Commissioner. For such proceedings, the Commissioner has clarified through regulation as well as case law that only an "interested person," one who "will be substantially, specifically and directly affected by the outcome of [the] controversy," may initiate such proceedings. N.J.A.C. 6A:3-1.2; Bedminster Educ. Ass'n v. Bedminster Twp. Bd. of Educ., EDU 6720-05, Comm'r (June 16, 2006) <<http://lawlibrary.rutgers.edu/oal/search.shtml>>; U.K., supra, 93 N.J.A.R.2d (EDU) 71.⁷ Consequently, petitioners must show that they will "be affected by the outcome in a direct and meaningful way" before they may proceed in a contested case. U.K., supra, 93 N.J.A.R.2d (EDU) 71; Kenwood, supra, EDU 8858-81, Initial Decision (Apr. 23, 1982), adopted, Comm'r (June 14, 1982).

In the case at hand, respondent maintains that petitioners lack standing. Specifically, "[p]etitioners lack a stake in the outcome of the proceedings because even assuming, arguendo, that the Agreement has any deficiencies, the Board will correct those deficiencies in future agreements, rather than reinstating the CST."⁸ Stated differently, respondent maintains that petitioners' allegations, even if substantiated, do not entitle them to the relief of reinstatement. In response, petitioners maintain that respondent's argument fails to state the nature of their claims and must be rejected. Additionally, petitioners cite cases where the Commissioner has ordered remedies, including reinstatement, when CST members were terminated in a manner contrary to law or regulation. See Elson v. Hudson County Area Vocational-Technical Sch. Bd. of Educ., 96 N.J.A.R.2d (EDU) 229 (holding that a board of education may contract for CST services to supplement existing local district services, not to supplant them); Parise v. Butler Bd. of Educ., EDU 5953-03, Initial Decision (April 28, 2005), aff'd, Comm'r (June 9, 2005) <<http://lawlibrary.rutgers.edu/oal/search.html>> (a district board of

⁷ The term "interested person" is defined at N.J.A.C. 6A:3-1.2 but is not used in N.J.A.C. 6A:3-1.3 with regard to who may initiate a contested case. However, the term is used in N.J.A.C. 6A:3-2.1 with regard to who may petition for a declaratory ruling. Although the term appears in N.J.A.C. 6A:3-2.1 and not N.J.A.C. 6A:3-1.2, the term has been applied to determine whether a person has standing in a dispute and controversy under the education laws as far back as 1979. See Ricciardelli v. Kittrels, EDU 1894-79, Initial Decision (Sept. 26, 1979), adopted, Comm'r (Nov. 16, 1979) (ruling that non-taxpayer with no child in district schools had no standing to bring dispute over validity and legality of board's action because that individual did not meet the definition of "interested person").

⁸ (Respondent's brief in support of summary decision, page 12.)

education may not eliminate the position of one CST member while maintaining its own CST).

Elson's holding, however, has been superseded by N.J.A.C. 6A:14-5.1(a)(1), which authorizes agreements for the provisions of CST services through an educational services commission. Becton Educ. Ass'n v. Bd. of Educ. of Carlstadt-East Rutherford Reg'l Sch. Dist., EDU 7061-01, Initial Decision (November 3, 2004), aff'd, Comm'r of Educ. (December 20, 2004), aff'd, State Bd. (May 6, 2005) <<http://lawlibrary.rutgers.edu/oal/search.html>>. Furthermore, the factual backgrounds in Elson and Parise involve the replacement of a single CST position rather than an entire team. Indeed, "although a district board of education may not eliminate the position of one CST member while maintaining its own CST, the board may abolish its entire CST and enter into a proper multi-district arrangement for such services." Id. at Initial Decision. In the case at hand, the entire CST team was abolished and respondent contracted out those services to the Commission.

A local board of education has authority to reduce its teaching staff so long as it is genuinely "for reasons of economy." Klinger v. Cranbury Bd. of Educ., 190 N.J. Super. 354, 357 (App. Div. 1982), certif. denied, 93 N.J. 277 (1983). N.J.S.A. 18A:28-9, the controlling statute, provides:

Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

Furthermore, "[d]ismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board." N.J.S.A. 18A:28-10. Indeed, courts have consistently recognized that a RIF, "whether of tenured or non-tenured teachers, if

done for reasons of economy, is entirely within the authority of the board.” Maywood Bd. of Educ. v. Maywood Educ. Ass’n, 168 N.J. Super. 45, 55 (App. Div. 1979). A RIF, however, is subject to review to determine whether any positions have been eliminated in violation of tenure statutes. A petitioner has the burden of proving that the RIF was undertaken in bad faith, or was arbitrary and capricious, or was in any other way contrary to the dictates of N.J.S.A. 18A:28-9. Parise, supra, EDU 5953-03, Initial Decision (April 28, 2005), aff’d, Comm’r (June 9, 2005) <<http://lawlibrary.rutgers.edu/oal/search.html>>.

In the within matter, petitioners allege “that the abolition of the [CST] was arbitrary, capricious and/or unreasonable because [the] [A]greement contains provisions in violation of applicable statutes and regulations and contains no total cost information.”⁹ Petitioners further allege that these defects render the abolition of their positions equally invalid. First and foremost, it was the Board’s decision to abolish the CST, and not its decision to contract out said services, which actually affected petitioners’ status as employees with the district. See Angel v. Englewood Bd. of Educ., 94 N.J.A.R.2d (EDU) 423 (“In essence, it was the Board’s decision to subcontract, not its determination of which bidder would be awarded the contract, that had affected petitioners.”) Notably, however, petitioners do not allege that the RIF was instituted in bad faith or for reasons other than economy. Nor do petitioners allege that their positions were abolished for similar unscrupulous reasons. Compare Parise, supra, EDU 5953-03, Initial Decision (April 28, 2005), aff’d, Comm’r (June 9, 2005) <<http://lawlibrary.rutgers.edu/oal/search.html>> (petitioners contended that the RIF was related to the respondent’s desire to remove a tenured employee, whom it deemed unsatisfactory), with Angel, supra, 94 N.J.A.R.2d (EDU) 423 (petitioners alleged that the Board’s decision to subcontract custodial services was made in bad faith). As has been discussed above, courts have consistently recognized that a RIF, whether of tenured or non-tenured teachers, if done for reasons of economy, is entirely within the authority of the board. Maywood, supra, 168 N.J. Super. at 55.

⁹ (Petitioners’ opposition brief, page 4).

Petitioners “allege that the agreement is fundamentally flawed to the point of being arbitrary and should be set aside.” Additionally, petitioners stress that “[t]his invalid replacement of their services renders the elimination of their employment a violation of their tenure status.”¹⁰ Missing, however, are any allegations of bad faith. Most notably, although petitioners point out that the contract has no total costs, they do not allege that this omission is indicative of the Board’s desire to restructure the CST for reasons other than economy. Rather, petitioners contend that contractual flaws, in and of themselves, render the abolition of the CST arbitrary and capricious. A similar argument is made for the use of independent contractors. Petitioners’ argument flies in the face of N.J.S.A. 18A:28-9. Respondent is correct in asserting that if errors exist in the language of the Agreement, the appropriate remedy, especially in light of the severability clause, is revision, not reinstatement.

To reiterate, to establish standing, a litigant must show that he has a sufficient stake in the outcome of the proceedings. Further, the Commissioner has indicated that an interested party must be substantially, specifically, and directly affected by the outcome of the controversy. In the case at hand, I **FIND** that petitioners have not demonstrated that they have a sufficient stake in the outcome of the proceedings or would be directly affected by the outcome of the controversy. Specifically, petitioners are not alleging that the RIF, as evidenced by the language in the Agreement, was instituted in bad faith. Without such allegations, a RIF will not be invalidated and petitioners will not be reinstated. Accordingly, I **CONCLUDE** that any remedy rendered if this matter proceeds to a hearing will not directly or substantially affect petitioners, and, as such, they lack standing.

STANDARD FOR SUMMARY DECISION

Under the New Jersey Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, summary decision may be rendered if

¹⁰ (Petitioners’ opposition brief, page 10.)

the papers and discovery which have been filed, together with the affidavits, if any, show that there is no **genuine issue as to any material fact challenged** and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. . . . If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

[N.J.A.C. 1:1-12.5(b) (emphasis added).]

The summary judgment procedure is

designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.

[Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74 (1954).]

As explained by the Court in Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995) (citations omitted):

[A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment.

Since the underlying facts are not in dispute, this matter is ripe for summary decision.

CONCLUSION

Based upon all of the foregoing, I **CONCLUDE** that summary decision should be granted because petitioners lack standing to bring their claims.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 30, 2011

DATE

LESLIE Z. CELENTANO
LESLIE Z. CELENTANO, ALJ

Date Received at Agency:

12-1-11
Aura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:
dr

DEC - 5 2011

OAL DKT. NO. EDU 6740-11
AGENCY DKT. NO. 150-6/11

NICHOLAS BROPHY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF GLOUCESTER,	:	
CAMDEN COUNTY,	:	
	:	
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter and the Initial Decision of the Office of Administrative Law (OAL) on the Board's motion for summary decision. No exceptions were filed by either party as provided by *N.J.A.C. 1:1-18.4*.

Upon his considered review, the Commissioner has determined that this matter is not ripe for for summary decision since there are material facts still in dispute. Further, in the interest of fundamental fairness, he has also decided to relax the 90-day timeframe in which to file the within petition. Consequently, the Commissioner hereby rejects the Initial Decision of the Administrative Law Judge and remands the matter to the OAL for adjudication.

Accordingly, the Commissioner hereby returns the matter to the OAL for a full hearing on the merits or other such proceedings to resolve the issues.

IT IS SO ORDERED.¹



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/18/12

Date of Mailing: 1/19/12

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).

NICHOLAS BROPHY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF GLOUCESTER,	:	
CAMDEN COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – now an adult – filed an appeal in June 2011 which sought a determination that he is eligible to graduate from high school. The Board asserted that petitioner failed to attain a 92% attendance rate for the 2009-2010 school year – which was required as part of his individualized program plan – and therefore does not have enough credits to graduate. The Board filed a motion for summary decision, contending that the petition was not timely filed pursuant to *N.J.A.C. 6A:3-1.3(i)*.

The ALJ found that: there are no genuine issues of material fact, and the matter is ripe for summary judgment; petitioner was notified in July 2010 that he would not be receiving any credit for the 2009-2010 academic year because he did not meet the attendance goal set forth in his individualized program plan for 2009-2010; petitioner did not file his appeal of this determination until June 2011, eleven months after he received notification that he did not have enough credits to graduate; petitioner has failed to show that the Board's decision was arbitrary, capricious or unreasonable; petitioner filed his appeal well beyond the ninety-day time period set forth in *N.J.A.C. 6A:3-1.3(i)*; and, therefore, the petition is time-barred. The ALJ granted the Board's motion for summary decision, and dismissed the petition.

The Commissioner rejected the Initial Decision of the ALJ and remanded the matter to the OAL for a full hearing on the merits or other such proceedings to resolve the issues. In so determining, the Commissioner relaxed the 90-day timeframe in the interest of fundamental fairness, and found that the matter is not ripe for summary decision as there are material facts still in dispute.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6740-11

AGENCY DKT. NO. 150-6/11

N.B.,

Petitioner,

v.

**BOARD OF EDUCATION OF
THE CITY OF GLOUCESTER,
CAMDEN COUNTY,**

Respondent.

Christopher M. Manganello, Esq., for petitioner

Frank P. Cavallo, Jr., Esq., for respondent (Parker McCay, attorneys)

BEFORE **DONALD J. STEIN, ALJ:**

Record Closed: November 29, 2011

Decided: December 2, 2011

STATEMENT OF THE CASE

N.B. (petitioner) seeks a determination that he is eligible to graduate from high school. The Gloucester City Board of Education (Board) asserts that the petitioner failed to attain a 92% attendance rate for the 2009-2010 school year and therefore does not have enough credits to graduate.

PROCEDURAL HISTORY

On June 11, 2011, petitioner filed an application for a petition and application for emergent relief with the New Jersey Department of Education, Office of Special Education Programs. On June 13, 2011, the matter was transmitted to the Office of Administrative Law (OAL) for an oral argument on the requested emergent relief on June 14, 2011, at 9:00 A.M. On that date, the case was heard in the OAL, Trenton (Hamilton Township), and the relief was denied.

On September 9, 2011, the Board filed a motion for summary decision. Petitioner's brief was due two weeks later. Numerous telephone calls were made to petitioner's attorney who indicated he would file the brief by October 19, 2011. It was not received on that date. Numerous follow-up calls were made, and on November 22, petitioner's attorney finally called back and said he had filed the brief a few weeks ago and that he would fax a copy of the brief. No fax was forthcoming, and finally, on November 29, 2011, petitioner's attorney was told that if the brief was not received by 12:00 p.m. on that day, the motion would be decided without his input.

On November 29, 2011 at 11:54 a.m., the brief was received. It was dated November 29, 2011.

STATEMENT OF FACTS

Some of the facts are undisputed. The petitioner is over eighteen years of age and was enrolled in the Gloucester City School District. In 2009, he was placed in an alternative at risk placement at the Highland Park Program for Success located in Highland Park.

The Board maintains an attendance policy pursuant to N.J.A.C. 6A:16-7.8, which requires the District to ensure expectations and consequences regarding attendance at school and classes, N.J.A.C. 6A:16-7.8(a)(2), and maintains a policy of requirements for high school graduation, pursuant to N.J.A.C. 6A:8-5.1. Students who attend the Highland Park School, an alternative educational program for at-risk students, are

generally exempted from the District's attendance policy. However, each student at the Highland Park School must meet an individual attendance goal agreed upon by the student, the student's parents, and the District.

The petitioner's individualized program plan specifies that the petitioner attend school 92% of the time (R-1). The Highland Park School Handbook states that all students must meet all attendance goals for graduation requirements, and that "any student who does not meet his/her attendance goal will not receive credit for that school year" (R-2, page 8 and 24). The petitioner signed a student contract in which he agreed to attend school "in order to reach my stated goal as noted in my Individualized Program Plan (R-3).

The parties agree that the petitioner had nineteen absences during the 2009-2010 school year, which is an attendance rate of 89.5%. Petitioner argues that eight of the absences were excused and should not count as absences, which would raise his attendance rate above the requirement to 94%.

Petitioner asserts that his family was not aware that he was having significant problems with his grades until the April 2010 progress report, and a meeting was requested. The meeting never took place.

No further communication was received from the school until July 7, 2010, when the petitioner was informed that the petitioner would not be receiving any credit for the academic year. In July 2010, the petitioner was notified of this decision as evidenced by his parents' letter dated July 11, 2010. On July 14, 2010, the parents of the petitioner wrote to the District about this situation and stated they would be open to an administrative meeting (P-1). On August 20, 2010, the attorney for the petitioner wrote to the District's attorney to discuss this situation (P-2). On June 11, 2011, the emergent application and petition were filed. The Board asserts that the petition was not timely filed. I **FIND** that the petitioner filed his petition eleven months after being notified of the decision.

It is undisputed that the petitioner did not meet the attendance goal set forth in his individualized attendance policy for the 2009-2010 school year. In his initial Certification in support of his Application for Emergent Relief, the petitioner admitted that his attendance goal was 92% and that his final attendance rate was 89.5%. Therefore, I **FIND** that the petitioner is not qualified to receive credit for that school year, and is therefore ineligible to graduate at this time.

The Board's policy as to high school graduation also requires each pupil to earn 120 credits. As of June 16, 2011, N.B. had ninety-nine credits. He has also not met this requirement.

CONCLUSIONS OF LAW

The essential facts involving this motion are not in dispute. Therefore, pursuant to N.J.A.C. 1:12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), I **FIND** that there are no genuine issues of material fact and that this matter is ripe for summary decision.

N.J.A.C. 6A:16-7.8 mandates that local school districts establish policies for student attendance, which include the consequences" for failure to comply with attendance requirements. The Board has established a policy, and students at the Highland Park School must meet an individual attendance goal agreed upon by the student, the student's parents, and the District, or not receive credit for the school year. Petitioner failed to meet his attendance goal.

The action of a Board of Education (BOE) which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. of Educ. 60 N.J. Super. 288, 294 (App. Div. 1960). As an administrative agency, BOE's decisions should be treated with deference by the appropriate reviewing judiciary. See Mutschler v. Envir. Protection, 337 N.J. Super. 1 (App. Div. 2001), DiMaria v. Bd. of Trs. Of Pub. Employees' Ret. Sys., 225 N.J. Super. 341, 351 (App. Div. 1988).

Local school boards have been expressly charged with protecting the health, safety and welfare of its students, and ensuring the orderly conduct of the academic process. In creating and enforcing an attendance policy mandated by state regulation, the school district's actions have a presumption of validity.

The applicable administrative code provisions require school districts to develop policies and procedures for student's attendance. In this case, the District established an attendance policy for Highland Park students, which requires them to meet the attendance goals in their individualized plans. The students are given the opportunity to discuss and agree to their required attendance with their parents and the District. The manual states that students must comply with their individualized attendance plans or they will not receive credit for the year. As a condition of attending the Highland Park School, the petitioner agreed to an individualized attendance plan.

Despite agreeing to an attendance rate, the petitioner failed to achieve the rate. He admitted that his attendance goal was 92% and his final attendance rate was 89.5%. Petitioner completed ninety-nine (99) of the required one-hundred-twenty (120) credits.

As stated above, the actions of boards of education have a presumption of validity. Therefore, I **FIND** that a specific attendance policy and consequence was established by the Board. The petitioner has not shown that the Board's decision was not patently arbitrary, without rational basis or induced by improper motives.

N.J.A.C. 6A:3-1.3(i) requires that a petition shall be filed no later than ninety days from the date of receipt of notice of final order, ruling, or other action by the District Board of Education, individual party, or agency. In July 2010, the petitioner was notified of this decision as evidenced by his parents' letter dated July 11, 2010. On June 11, 2011, the emergent application and petition were filed. The petitioner filed the appeal eleven months later, well over the ninety-day time period.

The ninety-day rule has been strictly followed and applied almost without exception. For example, in Dreher v. Jersey City Bd. of Educ., EDU 2777-87, Initial Decision (December 18, 1987), adopted Comm'r (February 2, 1988), aff'd St. Bd. of Educ. (July 8, 1988) <<http://lawlibrary.rutgers.edu/oal/search.html>>, petitioner filed his petition two days out of time, and the matter was dismissed as untimely. The board complies with statutory or administrative requirements, the petitioner is required to file the petition no later than ninety days after receipt of notice. Portee v. Newark Bd. of Educ., 94 N.J. Admin. 2d 381, 383.

The instant petition was filed well outside the ninety-day limitation period set forth in N.J.A.C. 6A:3-1.3(i), and the record provides no reason whatsoever for relaxation of this rule. Therefore, I **FIND** that the petition is time barred.

DECISION AND ORDER

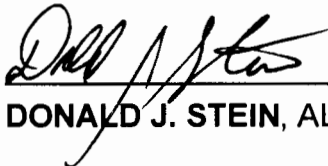
Based on the foregoing, the Board's motion for summary decision is **GRANTED**. Petitioner's appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 2, 2011
DATE


DONALD J. STEIN, ALJ

Date Received at Agency:

12/2/11

Date Mailed to Parties:

12/2/11

cmo

APPENDIX
EXHIBITS

For Petitioner:

- P-1 Letter from Parents
- P-2 Letter from Attorney

For Respondent:

- R-1 Individualized Program Plan
- R-2 Student Handbook
- R-3 Student Contract

**State of New Jersey**

DEPARTMENT OF EDUCATION

PO Box 500

TRENTON, NJ 08625-0500

CHRIS CHRISTIE
GovernorKIM GUADAGNO
Lt. GovernorCHRISTOPHER D. CERF
Acting Commissioner

January 23, 2012

Mark A. Berman, Esq.
Hartmann, Doherty, Rosa, Berman &
Bulbulia
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River Edge, NJ 07661

Richard E. Shapiro, Esq.
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Susan M. Huntley, DAG
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Division of Law
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Trenton, NJ 08625-0112

Dear Counsel:

I have reviewed the papers filed in connection with the Petition for Declaratory Ruling in the matter captioned *Learning Community Charter School, Soaring Heights Charter School, Ethical Community Charter School and Golden Door Charter School, Hudson County v. Board of Education of Jersey City, Hudson County and New Jersey Department of Education*, Agency Dkt. No. 343-11/11. Therein petitioners seek a declaration that they are entitled to receive 90% of the per pupil enrolled Adjustment Aid paid by the State to the Jersey City School District. Please be advised that even assuming, *arguendo*, that the Petitioners' request satisfied the requirements for a Declaratory Ruling pursuant to *N.J.A.C. 6A:3-2.1*, I have determined not to consider this matter as one for declaratory ruling, pursuant to my discretionary authority under *N.J.A.C. 6A:3-2.1(a)*. I find, instead, that this matter should proceed as a Petition of Appeal.

Accordingly, this matter will be transmitted to the Office of Administrative Law for hearing consistent with *N.J.A.C. 6A:3-1.1 et seq.*

Sincerely,

A handwritten signature in black ink, appearing to read "Cerf", written over a horizontal line.

Christopher D. Cerf
Acting Commissioner

CDC/MKD/MH
County Superintendent

JAMES SCOTT REID,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	
	:	DECISION
V.	:	
BOARD OF EDUCATION OF	:	
THE TOWNSHIP OF JEFFERSON,	:	
MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a physical education teacher and head lacrosse coach for respondent, who served as head soccer coach for the 2008-2009 and 2009-2010 school years – asserted that the Board voted to reappoint him to the position of head soccer coach for the 2010-2011 school year because four of the nine Board members voted in his favor and five members abstained from voting. Petitioner contends that to abstain is to not contest the votes in favor of his reappointment, and therefore the final vote with five abstentions must be considered as nine votes in favor of the soccer coach reappointment. The Board argued that the motion to reappoint failed because the appointment required the affirmative vote of five members of the Board of Education, which would be a majority vote of a board of nine members.

The ALJ found, *inter alia*, that: petitioner was employed by respondent as a tenured teaching staff member and head lacrosse coach when he was hired in 2008 as head soccer coach after the previous coach left the district and a replacement could not be found; petitioner had no prior soccer playing or coaching experience; *N.J.S.A.* 18A:27-4.1 requires the recommendation of the chief school administrator and a recorded roll call majority vote of the full membership of the board in order to reappoint a certificated or non-certificated employee; and the respondent Board's bylaws also provide that a majority vote of the full board is required for appointment of a staff member. The ALJ concluded that the affirmative vote of only four members of the nine-member board was not sufficient to reappoint petitioner to the position of soccer coach for the 2010-2011 school year, and the actions of the Board were not arbitrary and capricious. Accordingly, the ALJ affirmed the determination of the Board not to reappoint petitioner as soccer coach for the 2010-2011 school year.

Upon full consideration, the Commissioner accepted the findings and conclusions of the ALJ that petitioner is not entitled to reappointment as the head soccer coach based on applicable laws and regulations, and affirmed the Initial Decision. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

January 23, 2012

OAL DKT. NO. EDU 12521-10
 AGENCY DKT. NO. 603-10/10

JAMES SCOTT REID,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF	:	
THE TOWNSHIP OF JEFFERSON,	:	
MORRIS COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Neither party filed exceptions pursuant to *N.J.A.C.* 1:1-18.4.

Upon a careful and independent review, the Commissioner determines to accept the findings and conclusions of the ALJ that petitioner is not entitled to reappointment to the position of Head Soccer Coach based on the applicable laws and regulations which permit school districts to hire qualified, certified and non-certified applicants for its coaching positions.¹ The Commissioner observes that testimony during the hearing on the merits revealed that the petitioner's failure to take part in the programs and courses necessary to improve his knowledge and instruction in the sport, as directed, left him vulnerable to non-renewal.

Finally, the Commissioner concurs with the ALJ that the Board's actions were not arbitrary, capricious or unreasonable when it accepted the decision of the full membership and determined that four "yes" votes and five abstentions were insufficient to reappoint the petitioner to his former coaching position, resulting in his non-renewal.

¹ The Commissioner notes that the ALJ states that petitioner "...is already a tenured head Lacrosse [sic] coach, but is not a tenured soccer coach." (Initial Decision at 15) To clarify, coaches do not acquire tenure or seniority; consequently, they do not enjoy any superior rights over their successors.

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law and dismisses the within Petition of Appeal.

IT IS SO ORDERED.²



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/23/12

Date of Mailing: 1/24/12

² This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36*.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12521-10

AGENCY DKT. NO. 603-10/10

JAMES SCOTT REID,

Appellant,

v.

JEFFERSON TOWNSHIP BOARD OF EDUCATION

(MORRIS COUNTY),

Respondents.

Sanford R. Oxfeld, Esq., representing appellant (Law Offices of Oxfeld Cohen,
attorneys)

Joanne L. Butler, Esq., representing respondent (Schenk Price Smith and King,
attorneys)

Record Closed: October 31, 2011

Decided: December 9, 2011

BEFORE **SANDRA ANN ROBINSON, ALJ:**

STATEMENT OF THE CASE

James Scott Reid, appellant, argues that he was reappointed to the position of head soccer coach for the 2010/2011 school year because four (4) of the nine (9) members of the Jefferson Township Board of Education, voted in his favor and five (5)

members abstained from voting. Appellant contends that to abstain is to not contest the votes in favor; therefore the final vote with five abstentions must be considered as nine votes in favor of the soccer coach reappointment.

Respondent, Jefferson Township Board of Education, contends that the motion to reappoint failed because the appointment required the affirmative vote of five members of the Board of Education, which is the majority of the Board membership for a board of nine members.

ISSUES

Is the June 14, 2010, vote by the Jefferson Township Board of Education, with four members in favor and five members abstaining, an affirmative vote of the majority of the Board to pass the reappointment of appellant as the head soccer coach for the fall of 2010/2011 school year?

Was the decision to not reappoint appellant as head soccer coach arbitrary, capricious or unreasonable?

PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies and Disputes (Department) transmitted this matter to the Office of Administrative Law (OAL) on November 17, 2010, as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. The case was scheduled for a July 12-13, 2011, hearing at the OAL. Appellant's attorney requested that July 12 be postponed because appellant would be out-of-state. The parties request to submit post-hearing briefs was granted due to the need to analyze New Jersey Statutes and present case law pertaining to the issues. Unforeseen circumstance, including power outages during the period was taken into consideration and the requests for extending the time for post-hearing submissions granted. The record was closed on October 31, 2011.

CASE BACKGROUND

James Scott Reid, appellant, is a tenured employee and the head lacrosse coach, for respondent, Jefferson Township Board of Education, Morris County New Jersey. During the summer of 2008, appellant was hired as the head soccer coach because Jefferson Township's former head soccer coach left the school and a new coach could not be found. Appellant expressed his interest to serve as the soccer coach even though he had no playing or coaching experience.

During the 2008/2009 school year the soccer season was not good. School personnel and parents questioned how much appellant really knew about soccer and whether he possessed the interpersonal skills to advance the game. In the fall of 2008, Athletic Director John DiColo evaluated appellant and determined that most rankings were "satisfactory" in four substantive areas. DiColo also gave appellant several ratings of "outstanding." Yet in the areas of: (1) stays abreast of current trends and developments, and (2) knowledge of sport, appellant was rated "needs improvement." DiColo also recommended on the evaluation that appellant attend as many coaching clinics as possible to improve his knowledge of soccer.

On April 29, 2009, a meeting was held by respondent Board's Personnel and Policy Committee to discuss the head soccer coach appointment for the 2009/2010 school year. During the meeting it was disclosed that appellant had attended the NJSCA/Rutgers University Women's Soccer Staff Girls Soccer Coaches Clinic on April 24, 2009, and would be attending during the summer a course entitled "Fundamentals of Coaching Soccer." Dr. Kathaleen Fuchs, superintendent of schools Jefferson Township, expressed an interest in having appellant reappointed so he could illustrate his advancement in the field of soccer. The Committee supported the reappointment of appellant for the 2009/2010 school year. The members of the Board of Education voted to reappoint appellant as head soccer coach for the 2009/2010 soccer season.

The 2009/2010 soccer season was not a winning season. Numerous concerns were raised by parents and staff about appellant's knowledge of soccer and interpersonal

skills. The main issues brought to the athletic director about appellant focused on appellant's lack of knowledge about soccer and his inability to teach strategy and skills. Head Coach DiColo's evaluation and ratings of appellant for the 2009/2010 soccer season were mostly satisfactory and included several outstanding notations, such as: "He has a good working knowledge of the skills and strategies necessary to bring this program to the next level." The head coach recommended that appellant improve his knowledge base by completing the NFHS National Coach Certification Program for Soccer.

Dr. Fuchs disagreed with some segments of DiColo's 2009/2010 evaluation of appellant. On April 29, 2010, Dr. Fuchs and appellant met. Dr. Fuchs advised appellant that his lack of knowledge of soccer worked against him and many concerns remained about his ability to coach. Dr. Fuchs did not favor appellant's reappointment to the head soccer coach position for the 2010/2011 school year. On May 26, 2010, the Personnel and Policy Committee of the Board discussed the possibility of appellant being reappointed and wanted the members of the Board of Education to review the matter. On June 14, 2010, the Board held a meeting to consider appellant's re-appointment. Dr. Fuchs presented the following resolution to the Board at the meeting,

WHEREAS, the Chief School Administrator has not recommended the renewal/reappointment of the head soccer coach, Scott Reid, for the 2010/2011 school year; and

WHEREAS, notwithstanding the statutory authority of the Chief School Administrator regarding renewal/reappointment recommendations, the Chief School Administrator is willing to bring the issue to the Board of Education for consideration; and

WHEREAS, this decision, in this one instance, is not to be deemed or considered as a waiver or relinquishment of the Chief School Administrator's statutory responsibilities regarding appointment of any staff, nor is it to be deemed to establish a practice or precedent for such action in the future;

NOW, THEREFORE, BE IT RESOLVED that James Scott Reid be appointed Head Soccer Coach for fall of 2010-2011.

The minutes of the June 14, 2010, Board meeting indicate that after discussion and consultation with counsel, four board members voted in favor of the motion and five board members abstained. The Board counsel noted that the motion to reappoint had failed. Appellant's counsel advised respondent's counsel that a vote of four was sufficient for a reappointment as set forth in the Board's Bylaw 0164, Conduct of Board Meetings - Parliamentary Authority and Board's Policy 3125 at page 4, Employment of Teaching Staff Members - Athletic Coaches. The contention of respondent's counsel is that the motion failed because reappointment requires the affirmative vote of the majority of the full board, which in this case totals five members of a nine member board as set forth in N.J.S.A. 18A:27-4.1(a).

SUMMARY OF TESTIMONY

(RESPONDENT'S WITNESS)

Dr. Kathaleen Fuchs is the superintendent of schools and chief school administrator for Jefferson Township Board of Education. She has been superintendent for four and one-half years. For thirty-four years previously, she served as assistant superintendent of schools and an English teacher. Dr. Fuchs testified,

Appellant is a physical education teacher. However, during 2008/2009 he coached soccer. I recommended that he be hired because there was no other applicant for the position and appellant expressed an interest in helping out. The previous soccer coach left the school system. Appellant's year-end performance was not good and it was recommended that he attend clinics and take course to improve his knowledge of soccer. Appellant had never played or coached soccer. He did attend a girl's soccer clinic and received a certificate of completion dated April 24, 2009. If an employee is directed to take courses there is no limit to the number of courses or the payment for those courses. In May 2009, appellant was considered for reappointment as the soccer coach for the 2009/2010 school year. He was reappointed to the position for a second year with the understanding that the Athletic Director would work with appellant to assist appellant to improve instructional framework and coaching qualities.

During the spring and summer of 2009, an instructional guide was developed on Coaching Framework and Model of Good Coaching.

In December 2009, I was approached by parents of soccer players who wanted to meet with the Athletic Director to discuss their concerns about soccer. I was concerned with appellant's lack of skills and I did not agree with some of the evaluations on appellant, which the Athletic Director prepared in the fall of 2009.

In April 2010, the reappointment process for the 2010/2011 school year commenced. I was concerned that appellant's skill level in soccer had not improved from the past year. Appellant signed up for coaching conference and I told him to withdraw because I was not recommending him for reappointment and I did not want to spend the money on training he would not need. I met with appellant late in April 2010 to express my concerns. Appellant and I also exchanged correspondence related to the soccer coach position. The matter was brought before the Board Personnel and Policy Committee. The members questioned why I was going against the recommendation of the athletic director to reappoint appellant. The principal recommended reappointment for appellant. The Athletic Director has a supervisory certification and does know more about sports and soccer than I do. The Committee wanted a vote from the full Board. My position to not reappoint appellant never changed between the Committee meeting and the June Board meeting. The financial impact on appellant after no reappointment would mean that he no longer received a stipend to coach soccer.

When I did not recommend appellant for reappointment, I opened the position to receive applications from everyone and appellant applied again. The Athletic Director, principal and vice principal recommended to me that appellant be rehired. Three candidates applied. The person who was selected for the position during the 2010/2011 school year worked under appellant.

(APPELLANT'S WITNESS)

Appellant testified as follows,

I was first appointed soccer coach in August 2008. I went to a coaching clinic for three days before I started coaching

soccer. I asked Pat Brennon, the Newton High School coach to help me. I trained in drill techniques, strategy and curriculum. I have coached over sports forty matches. I have observed soccer games and participated in sixty to eighty practices and twenty games per year.

On cross-examination, appellant said that the Rutgers Girl's Soccer Clinic was the only NJSIAA training being offered in soccer. Appellant acknowledged that in December 2009 he had been told, via evaluations and discussions, that his knowledge base should be improved by completing the NFHS National Coach Certification Program for soccer.

FINDINGS OF FACTS

Based on the credible testimony and the supporting documentation accepted into evidence, I Find as Fact the following:

1. The testimony of all witnesses is credible;
2. Appellant is a tenured employee and the head Lacrosse coach, for respondent, Jefferson Township Board of Education;
3. Appellant was hired during the summer of 2008 as the head soccer coach for Jefferson Township's because the former head soccer coach left the school and a new soccer coach could not be found. Appellant expressed an interest to help out and the CSA hired him even though he had no playing or coaching experience;
4. The 2008/2009 soccer season was not good. School personnel and parents questioned appellant's ability to coach and his lack of interpersonal skills. Appellant's evaluation rankings prepared by the athletic director for the 2008/2009 year were "satisfactory" in four substantive areas. He received several ratings of "outstanding" in the areas of staying abreast of current trends and developments. In the area of knowledge of sport, he was rated "needs improvement." The athletic director recommended that appellant attend as many coaching clinics as possible to improve his skills and knowledge of soccer;
5. On April 29, 2009, the Board's Personnel and Policy Committee met to discuss the head soccer coach appointment for the 2009/2010 school year. During the

meeting it was disclosed that appellant attended one soccer clinic since the commencement of his soccer responsibilities. The CSA recommended appellant's reappointment so he could illustrate his advancement in the field of soccer. The Committee supported the reappointment of appellant for the 2009/2010 school year. The members of the Board of Education voted to reappoint appellant as head soccer coach for the 2009/2010 soccer season;

6. The 2009/2010 soccer season was not a winning season. Parents and staff questioned appellant's knowledge of soccer, interpersonal skills, and his inability to teach strategy and skills. The Athletic Director's evaluation and ratings of appellant for the 2009/2010 soccer season was mostly satisfactory and included several outstanding notations, such as having a good working knowledge of the skills and strategies necessary to bring this program to the next level. The Athletic Director recommended that appellant improve his knowledge base by completing the NFHS National Coach Certification Program for Soccer.
7. The CSA disagreed with some of the Athletic Director's 2009/2010 evaluation of appellant. The CSA and appellant met on April 29, 2010, to review concerns about appellant's lack of knowledge of soccer. The CSA did not favor appellant being reappointment to the head soccer coach position for the 2010/2011 school year;
8. On May 26, 2010, the Personnel and Policy Committee of the Board of Education discussed the possibility of appellant being reappointment and wanted the members of the Board of Education to review the matter;
9. On June 14, 2010, the Board held a meeting to consider appellant's reappointment. The CSA presented a resolution to the Board at the meeting, which set forth that she did not support reappointment and the preparation and presentation of the resolution is based on a request of the Board. Also noted in the resolution that a decision, in this one instance, is not to be deemed or considered as a waiver or relinquishment of the CSA's statutory responsibilities regarding appointment of any staff, nor is it to be deemed to establish a practice or precedent for such action in the future. Finally the resolution read: "NOW, THEREFORE, BE IT RESOLVED that James Scott Reid be appointed head soccer coach for fall of 2010-2011";
10. The Board members discussed the resolution and consulted with counsel before voting. The vote count was four (4) board members in favor of the

- motion on the resolution and five (5) board members abstaining;
11. The Jefferson Township Board of Education Bylaws (0165 - Voting) requires a majority vote of the full Board for appointment or transfer of a teaching staff member, N.J.S.A. 18A: 25-1, and N.J.S.A. 18A: 27-1. Abstentions shall not be counted as votes but shall be recorded; a member who abstains from voting is deemed to acquiesce in the outcome of the vote;
 12. The Jefferson Township Board of Education Governance Manual (Policy 3125) establishes that athletic coaches are considered employment of teaching staff members;
 13. The Jefferson Township Board of Education Board Bylaws also read that all motions shall require for adoption the majority vote of Board members present and voting, except as provided by the statutes of the State of New Jersey;
 14. N.J.S.A. 18A:27-4.1 establishes the Board of Education, procedure for certain personnel actions; recommendation of chief school administrator, as follows, notwithstanding the provisions of any law, rule or regulation to the contrary, a. A board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons;
 15. The recorded roll-call majority vote of the full board membership of nine persons on July 14, 2010, totaled four votes for reappointment and five persons abstaining, causing the motion on the resolution to fail because appellant's reappointment required an affirmative vote of the majority of the full board, which in this case totals five members of a nine member board as set described in N.J.S.A. 18A:27-4.1(a);
 16. There is no evidence that respondent's determination not to reappoint appellant was arbitrary, capricious or unreasonable.

LEGAL DISCUSSION AND ANALYSIS

(ROBERT'S RULE OF ORDER)

In regard to the Jefferson Board of Education, the parliamentary authority for governance of all board meeting is by Robert's Rule of Order, except for when Robert's Rules of Order shall not be applied, as in accordance with Jefferson Board of Education Board's Bylaw 0164, Parliamentary Authority,

Robert's Rule of Order, Newly Revised and these rules shall govern the Board of Education in its deliberations and acts in all cases in which it is not inconsistent with statutes of the State of New Jersey, rules of the State Board of Education, or these bylaws.

The Board Bylaws also read that all motions shall require for adoption the majority vote of Board members present and voting, except as provided by the statutes of the State of New Jersey.

(THE VOTE TO NOT REAPPOINT WAS ARBITRARY, CAPRICIOUS OR UNREASONABLE)

In the instant matter, respondent acknowledges that the July 20, 2009, vote for the annual appointments of certain individuals was improper because the affirmative vote of the full board did not total the majority of those board members present and voting. There were only five board members present for that meeting and one board member had to abstain on one vote for an employee that was a relative. On the votes for other employees, the same board member should have voted, but did not, and continued to cast an abstention vote for everyone in the classification.

In the matter at hand, appellant desires to prove that if a mistake was made with the vote on July 20, 2009, and persons were hired with less than a majority then he should also have been hired. Thus, appellant argues that to act for one group—even though there was an error—and not to act for him is arbitrary, capricious and

unreasonable. It is noted that the persons reappointed on July 20, 2009, ended their employment contracts on June 30, 2010. The error in voting at the July 20 meeting was discovered more than one year before the instant matter commenced. An argument suggesting that respondent did not perfect the error is not relevant to the issue in the current case since respondent can correct the error at any time. Of importance is recognizing the intent of the Board to want to reappoint individuals it voted in on July 20, 2009, and that the majority of the board members present and voting, voted for reappointment; four in favor and one abstention.

(WAS THERE A VOTE TO REAPPOINT APPELLANT ON JULY 14, 2010?)

The Jefferson Township Board of Education Bylaws require "A recorded roll-call majority vote of the full membership of the board" is needed to appoint or renew the employment of a certificated or non-certificated staff member. N.J.S.A. 18A:27-4.1(a) and (b). In the instant case, four members of the nine-member Board voted in favor of appointing appellant and five members abstained from voting. There was no majority of the full membership of the board that voted to reappoint appellant. Appellant argues that the abstentions must be "deemed to acquiesce in the outcome of the vote" since no members of the Board voted against his reappointment; therefore his contract should be deemed renewed.

The Jefferson Township Board of Education, Board Policy 0165 establishes,

Abstentions shall not be counted as votes but shall be recorded; a member who abstains from voting is deemed to acquiesce in the outcome of the vote.

Also set forth in Policy 0165 at paragraph (3)(e),

A majority vote of the full Board is required for:
Appointment or transfer of a teaching staff member,
N.J.S.A. 18A:25-1, and N.J.S.A. 18A:27-4.1.

N.J.S.A. 18A:27-4.1 specifically requires the inclusion of non-certified staff to also

receive the majority vote of the full Board. N.J.S.A. 18A: 27-4.1, when enacted in 1995 effectively repealed or pre-empted N.J.S.A. 34:13A-23 that had been enacted five years earlier. The appointment of coaches takes on the same process as the appointment of certified staff. The newer statute N.J.S.A. 18A:27-4.1 provides in pertinent part:

Notwithstanding the provisions of any law, rule or regulation to the contrary,

a. A board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll-call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons.

b. A board of education shall renew the employment contract of a certificated or non-certificated officer or employee only upon the recommendation of the chief school (CSA) administrator and by a recorded roll-call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons. A non-tenured officer or employee who is not recommended for renewal by the CSA shall be deemed non-renewed. Prior to notifying the officer or employee of the nonrenewal, the CSA shall notify the board of the recommendation not to renew the officer's or employee's contract and the reasons for the recommendation. An officer or employee whose employment contract is not renewed shall have the right to a written statement of reasons for nonrenewal . . . and to an informal appearance before the board. The purpose of the appearance shall be to permit the staff member to convince the members of the board to offer reemployment. The CSA shall notify the officer or employee of the nonrenewal

In Rotondo v. Carlstadt-East Rutherford Regional High School District, 276 N.J. Super. 36 (App. Div. 1994), the CSA had recommended to the board of education that a non-tenured music teacher's contract not be renewed. The board renewed the contract despite the recommendation. The Commissioner of Education and the State Board of Education ruled that the local board had no power to employ a teacher who was not recommended by the CSA. The Appellate Division reversed the determination of the Commissioner and the State Board of Education, by relying on N.J.S.A. 18A:27-1: "No teaching staff member shall be appointed, except by a recorded roll-call majority vote of the full membership of the board of education appointing him." There was nothing in the

statutes that afforded the CSA a veto or other controlling role in the process of appointing teaching staff members. Rotondo, supra, 276 N.J. Super. at 39. The Appellate court noted that there was nothing in the statutes about the local board's authority to appoint being restricted to persons sponsored by the CSA. Id. at 44-45. The enactment of N.J.S.A. 18A:27-4.1 was a result of Rotondo.

N.J.S.A. 18A:27-4.1 provides that a board may renew an employee's contract only if the CSA so recommends, and that it may decline to follow a CSA's recommendation for renewal but may not do so arbitrarily and capriciously. N.J.S.A. 18A:27-4.1(b). Although the statute speaks in terms of renewal of an employee's employment contract, it is undisputed that it applies not only to teachers' regular duties but also to extracurricular and other assignments.

In Mann v. Housing Authority of the City of Paterson, 20 N.J. Super. 276 (Law Div. 1952), plaintiff's former counsel filed an action for restoration to his three-year appointment as counsel for the housing authority. Defendants, new counsel and housing authority, made reference in their answers to two resolutions passed by the housing authority, one which removed plaintiff and the other which appointed defendant new counsel. Plaintiff moved to strike the answers on the ground that the resolutions were not legally passed. The court granted plaintiff's motion because N.J.S.A. 55:14A-6 required that actions taken by the housing authority be based upon an affirmative vote of the majority, not less than three. When passing the resolutions, only three commissioners voted in the affirmative. The other three abstained. The court concluded that the three abstentions were not affirmative votes necessary for a majority. Therefore, the resolutions were invalid.

(NON-TENURED EVALUATIONS)

N.J.S.A. 18A:27-3.1 describes the evaluation process for non-tenured teachers. The boards of education in New Jersey shall cause each employed non-tenure teaching staff member to be observed and evaluated in the performance of their duties at least three times during each school year but not less than once during each semester. All evaluations must take place before April 30 of each year. The evaluations may cover

that period between April 30 of one year and April 30 of the succeeding year excepting in the case of the first year of employment where the three evaluations must have been completed prior to April 30. The number of required observations and evaluations may be reduced proportionately when an individual teaching staff member's term of service is less than one academic year. Each evaluation shall be followed by a conference between that teaching staff member and the teacher's superior or superiors. The purpose of this procedure is to recommend as to re-employment, identify any deficiencies, extend assistance for their correction and improve professional competence. Local boards of education have an almost complete right to terminate the services of a teacher who has no tenure, even if the recommended procedures to be followed for evaluating the teacher are not adhered to. N.J.S.A. 18A: 27-3.1 does not provide a penalty against the school board if it fails to follow the proscribed evaluation procedures.

In accord with N.J.S.A. 18A:27-3.2, a teacher may request the reason for non-renewal after receiving notice that a teaching contract for the succeeding school year will not be offered. The request may be made in writing within fifteen days after receipt of the non-renewal notice. A written response from the board should be issued within thirty days after the receipt of the request. N.J.S.A. 18A:27-3.2 urges local boards of education to give reasons to employees who are being terminated. The current legislation does not provide a penalty against the board should it not disclose reasons for not renewing a non-tenured teachers contract. Nor, is the board compelled to reinstate a non-tenured teacher because of not providing a reason for no contract renewal.

(NON-TENURED TERMINATIONS)

An agency determination should not be vacated in the absence of a showing that the decision is arbitrary or capricious, that it lacks support in the record or that it violates legislative policies expressed or fairly to be implied in the statutory scheme administered by the agency. In re Grossman, 127 N.J. Super. 13, 22-23 (App. Div. 1977); Campbell v. Civil Service Dep't, 39 N.J. 556, 562 (1963).

The decision of Dore v. Board of Education of the Township of Bedminster, 185 N.J. Super. 447 (App. Div. 1982), is similar to the case at hand. It is noted that in the case at hand appellant is already a tenured head Lacrosse coach, but is not a tenured soccer coach. In Dore, appellant, a non-tenured teacher, did not receive a third-year contract renewal. Appellant argued that since he did not have three evaluations during the 1975/1976 school year, it was unlawful and arbitrary and capricious for the board not to re-employ him. Appellant asked for the reasons the board voted not to renew his contract and was told non-renewal was due to insufficient positive evidence of teaching effectiveness; particularly poor teaching methods as evidenced by poor grading procedures, lack of structured classroom and not providing student materials (textbooks, homework assignments); and lack of continued assessment of student progress. These criticisms were not contained in appellant's formal evaluations, but were articulated by board members as the basis for their dissatisfaction with appellant and were based on the personal observations of board members, knowledge acquired through having a child in appellant's class or acquired from members of the public and parents of appellant's pupils. Appellant appeared before the board to argue his case, but the board did not change the decision to not renew. A plenary hearing was conducted and the hearing examiner's report ordered appellant's reinstatement after determining that the reasons for non-renewal were not related to the evaluations of his performance in the classroom, but was due to his perceived abrasiveness to the board at public meetings.

The Commissioner ordered reinstatement because the reasons for non-renewal were not supported by the evaluations and no other reasons were given to him to explain the board's decision. The State Board reversed the Commissioner's decision and dismissed appellant's petition on appeal because the State Board determined that the local board had sufficient information to support both its decision not to re-employ appellant and its statement of reasons for doing so. The State Board emphasized the considerable discretion afforded to local boards in employing teaching staff members. The State Board concluded that the local board's action was not so arbitrary and capricious as to warrant the extraordinary remedy of overriding the managerial prerogative of a local board and requiring it to employ a teacher it does not want on its staff. In conclusion, the court in Dore said,

The State Board's decision properly recognized the board's right to reach its conclusion about a non-tenured teacher on a broad base of input received from a variety of people, including members of the public, parents of students and a board member's own knowledge of a teacher even if that knowledge is acquired through having a child in the teacher's class.

[Id. at 453-54.]

(DONALDSON HEARING)

In Donaldson v. North Wildwood Board of Education, 65 N.J. 236 (1974), Justice Jacobs, said,

It appears evident to us that on balance the arguments supporting the teacher's request for a statement of reasons overwhelm any arguments to the contrary. The teacher is a professional who has spent years in the course of attaining the necessary education and training. When he is engaged as a teacher he is fully aware that he is serving a probationary period and may or may not ultimately attain tenure. If he is not reengaged and tenure is thus precluded he is surely interested in knowing why and every human consideration along with all thoughts of elemental fairness and justice suggest that, when he asks, he be told why. Perhaps the statement of reasons will disclose correctible deficiencies and be of service in guiding his future conduct; perhaps it will disclose that the non-retention was due to factors unrelated to his professional or classroom performance and its availability may aid him in obtaining future teaching employment; perhaps it will serve other purposes fairly helpful to him as suggested in Drown v. Portsmouth School District, 435 F.2d 1182; and perhaps the very requirement that reasons be stated would, as suggested in Monks v. N.J. State Parole Board, 58 N.J. 238 (1971), serve as a significant discipline on the board itself against arbitrary or abusive exercise of its broad discretionary powers.

In the instant case, appellant is already a tenured teaching staff member employed by respondent, Jefferson Township Board of Education. He is the head La crosse coach. There is no evidence that appellant requested a Donaldson Hearing on

his non-tenured soccer coach position. Appellant did not dispute respondent's assertions about meeting with him to discuss deficiencies and the need to enroll in as many educational courses as possible to remedy the deficiencies. Appellant did not dispute having discussions with respondent about the lack of inter-personal skills.

(CREDIBILITY)

Credibility is a factor that must be considered in a determination as to which party's version of a situation has the reasonable probability of the truth. The interest, motive, bias or prejudice of a witness may affect credibility and justify the trier whose province it is to pass upon the credibility of an interested witness in disbelieving that testimony. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. In this matter, the testimony of all the witnesses was taken into thorough consideration and I found the testimony of all witnesses to be credible.

CONCLUSION

Based on the law, the credible testimonial and documentary evidence, I **CONCLUDE** that the affirmative vote of only four board members on a nine-member board was insufficient to reappoint appellant to the position of soccer coach for the 2010/2011 school year.

I also **CONCLUDE** that respondent adhered to the requirements of the New Jersey State Statue in determining that a recorded roll-call majority vote of the full membership of the board was needed to appoint or renew the employment of a certificated or non-certificated staff member, which included appellant as a non-certified soccer coach.

Finally, I **CONCLUDE** that the totality of facts and circumstances in this case do not substantiate appellant's contention that respondent's vote to not reappoint him was arbitrary and capricious.

ORDER

Based on all of the foregoing, I **ORDER** that the determination of respondent to not reappoint appellant as soccer coach for the 2010/2011 school year because a majority of the full board did not vote in favor of reappointment, be **AFFIRMED**.

I hereby FILE this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 9, 2011

DATE



SANDRA ANN ROBINSON, ALJ

Date Received by Agency:

December 9, 2011

Date Mailed to Parties:

DEC 12 2011



**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

APPENDIX

WITNESSES

For Appellant:

James Scott Reid

For Respondent:

Dr. Kathaleen Fuchs, Superintendent of Schools

EXHIBITS

Joint:

- J-1 Athletic/Activity Conditions of Employment Form
- J-2 Coach's Evaluation Fall 2008
- J-3 Workshops, conferences, clinics and other professional meetings
- J-4 Board Committee Report
- J-5 Jefferson Township Public Schools - Introduction
- J-6 Notes of December meeting with parents
- J-7 Coach's Evaluation - fall 2009
- J-8 Memo from Scott Reid to Dr. Fuchs, April 23, 2010
- J-9 Dr. Fuchs Response to Scott Reid's Memo, dated April 23, 2010
- J-10 Notes from April 29 meeting
- J-11 E-mail to Dr. Fuchs from Scott Reid, dated May 21, 2010
- J-12 Board Committee Report, dated May 26, 2010
- J-13 Regular Meeting Minutes, dated June 14, 2010
- J-14 Governance Manual - Bylaw 0165 - Voting
- J-15 Governance Manual - Policy 3125 - Employment of Teaching Staff Members
- J-16 Governance Manual - Bylaw 0164 - Conduct of Board Meetings
- J-17 Correspondence from Sanford R. Oxfeld, Esq., to Joanne L. Butler, Esq., dated June 17, 2010
- J-18 Correspondence from Joanne L. Butler, Esq., to Sanford R. Oxford, Esq., dated

June 24, 2010

J-19 Regular Meeting Minutes, dated July 20, 2009

J-20 Regular Meeting Minutes, dated May 10, 2010

For Appellant:

None

For Respondent:

R-1 National Federation of State High School Associations (NFHS) Learning Center
Course Information

E.Z. on behalf of minor children B.J.C. :
 and E.J.C., :
 PETITIONER, : COMMISSIONER OF EDUCATION
 :
 V. : DECISION
 :
 BOARD OF EDUCATION OF THE CITY :
 OF BAYONNE, HUDSON COUNTY :

SYNOPSIS

Petitioner filed a *Pro Se* residency appeal in March 2011, challenging the respondent Board's determination that her sons, B.J.C. and E.J.C., are not entitled to a free public education in Bayonne schools. Petitioner sought to have her sons finish the school year in Bayonne schools and asserted that she was temporarily residing in Newark for financial reasons, but intended to move back to Bayonne. The respondent Board filed a counterclaim seeking payment of tuition for the period of B.J.C. and E.J.C.'s ineligible attendance in the district's schools, between January 31, 2011 and June 22, 2011.

The ALJ identified the issues in this case to be whether petitioner and her sons were domiciled in Bayonne from January 31, 2011 to the end of the 2010-2011 school year and, if not, what amount of tuition reimbursement would be due from petitioner to respondent for the period of ineligible attendance. The ALJ found that: the weight of the evidence – including petitioner's statements to teachers, to the superintendent of schools, and to the Commissioner in her *pro se* residency appeal – indicates that petitioner and her two sons were not domiciled in Bayonne during the 2010-2011 school year. Accordingly, the ALJ recommended upholding the determination of the respondent Board to remove the children from the school system and ordering petitioner to reimburse the Board for 94 days each of tuition at the rate of \$50 per day per child.

Upon review of the record and the Initial Decision, the Commissioner concurred with the ALJ that subsequent to January 31, 2011, petitioner and her children have not been domiciled in Bayonne and are consequently not eligible for a free public education in the district's schools. The Commissioner concluded that the petitioner must reimburse respondent for back tuition as itemized in the un rebutted affidavit of Bayonne's District Superintendent, Patricia L. McGeehan, in the amount of \$9400. The Commissioner also clarified that contrary to the account of this case's procedural history set forth in the Initial Decision, he had not upheld the determination of the respondent Board prior to sending the case to the OAL, but had simply sent the case to the OAL for fact-finding and recommendations.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

January 23, 2012

OAL DKT. NO. EDU 3860-11
 AGENCY DKT. NO. 66-3/11

E.Z. on behalf of minor children B.J.C.	:	
and E.J.C.,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	
	:	DECISION
V.	:	
	:	
BOARD OF EDUCATION OF THE CITY	:	
OF BAYONNE, HUDSON COUNTY	:	

This matter came to the Commissioner as an appeal of respondent's determination that petitioner's children were not entitled to receive a free public education in its school district. The Commissioner has reviewed the record and Initial Decision of the Office of Administrative Law (OAL)¹ and, at the outset, wishes to clarify a portion of the procedural history set forth in the Initial Decision.

More specifically, the Initial Decision appears to suggest that upon receipt of the petition challenging respondent's residency determination, the Commissioner found in favor of respondent and – upon petitioner's request – sent the matter to the OAL for further review. (Initial Decision at 2 and 5) The sequence of events, however, was as follows. The Petition was filed with the Commissioner on March 22, 2011. The Commissioner made no determination at that time, but rather sent the case to the OAL for fact-finding and legal recommendations. Having received the OAL's findings and recommendations by way of the December 7, 2011 Initial Decision, the Commissioner now issues his findings, conclusions and order.

¹ Neither party filed exceptions.

Upon consideration of the record, the Commissioner concurs with the Administrative Law Judge (ALJ) that subsequent to January 31, 2011, petitioner's minor children have not been domiciled in respondent's district and have consequently not been eligible for a free public education in respondent's schools. Because respondent filed a counterclaim for back tuition, the Commissioner must determine the amount of tuition, if any, that is due.

In the record is an un rebutted affidavit from respondent's District Superintendent, Patricia L. McGeehan, averring that the daily cost for educating petitioner's two children from January 31, 2011 through the end of the 2010-2011 school year was \$100.00 (for both). (Respondent's Exhibit R-7, Paragraph 6) McGeehan further alleged in the affidavit that there were 94 school days from January 31, 2011 to the end of the school year, bringing the total cost of the children's education during the period of ineligibility to \$9400. (*Ibid.*)

Accordingly, the petition is dismissed, respondent's disenrollment of petitioner's children is upheld, and petitioner shall reimburse respondent for back tuition in the amount of \$9400.

IT IS SO ORDERED.²



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/23/12

Date of Mailing: 1/24/12

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 03860-11

AGENCY DKT. NO. 66-3/11

E.Z. ON BEHALF OF B.J.C. AND E.J.C.,

Petitioners,

v.

**BOARD OF EDUCATION OF THE CITY
OF BAYONNE, HUDSON COUNTY,**

Respondent.

E.Z., petitioner, pro se

Maria P. Vallejo, Esq., representing respondent (Chasan, Leyner & Lamparello,
attorneys)

Record Closed: November 17, 2011

Decided: December 7, 2011

BEFORE **SANDRA ANN ROBINSON, ALJ:**

STATEMENT OF THE CASE

On October 21, 2010, petitioner E.Z. met with two teachers in the Bayonne School System; namely, C. Aceti and S. Chrapkowski. During discussions petitioner stated that she no longer lived in Bayonne, New Jersey and was living in Newark, New Jersey but did not want her children to attend school in Newark. On November 17,

2010, petitioner attended a Bayonne Board of Education (BOE) meeting and when questioned about her residency she reiterated that she lived in Newark but did not want her children to attend the Newark Public Schools. Petitioner also advised Bayonne School System Assistant Superintendent of Schools Robert C. Craig about her residency in Newark.

On February 10, 2011, respondent's counsel wrote petitioner to provide notice that her children would be removed from the Bayonne School System because she was not domiciled in Bayonne. The notice provided information about petitioner's right to contest the removal before the Bayonne BOE; calculation of prorated tuition to the time of ineligibility and how tuition is computed to determine the amount petitioner owes respondent. A hearing before the BOE was scheduled for February 24, 2011.

A BOE hearing was conducted by the BOE Attendance Committee and after determining that petitioner was not properly domiciled in the City of Bayonne, the BOE voted to remove the children from the Bayonne School System. In respondent's letter, dated February 28, 2011, petitioner was advised of her right to appeal the BOE decision to the Commissioner of Education (Commissioner) within twenty-one days of receiving the letter. Petitioner was also advised that her children could not remain in the Bayonne School System beyond twenty-one days if an appeal was not filed. Should she file an appeal the children could remain pending the outcome of the Commissioner's determination.

On March 22, 2011, the Commissioner received petitioner's "Pro Se Residency Appeal." The Commissioner upheld the determination of the Bayonne BOE to remove the children from the School System. Petitioner was advised that she could contest the BOE residency determination by appealing to the Office of Administrative Law (OAL).

PROCEDURAL HISTORY

The Department of Education Bureau of Controversies and Disputes transmitted this case to the Office of Administrative Law (OAL) on March 30, 2011, for a hearing

pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14 F-1 et seq. A prehearing conference was scheduled for June 1, 2011, before The Honorable James A. Geraghty, ALJ. The prehearing was postponed due to a need to reassign the case. The undersigned assumed responsibility for the case on June 3, 2011. A prehearing conference was completed on June 30, 2011. A de novo hearing was completed on August 18, 2011. The exhibits appearing in the Appendix were marked into evidence. The record remained open for the parties to discuss the need for additional testimony to resolve the issue of what date petitioner was told to remove her children. The parties also wanted to discuss the possibility of a payment plan if the first issue could be resolved. On August 29, 2011, OAL received a letter from respondent (copied to the petitioner), dated August 25, 2011, that had attached a revised Affidavit from the superintendent of schools. The Affidavit includes the per diem amount owed by petitioner from January 31, 2011, to the end of the 2010/2011 school year (SY). The letter also set forth that respondent would accept a proposed payment plan offered by petitioner and forward the plan to the BOE for review and a vote for approval.

A telephone hearing was scheduled for August 30, 2011, but petitioner was unavailable. Several unsuccessful attempts were made by OAL to set up a telephone conference with petitioner and respondent. A peremptory status conference was scheduled for October 17, 2011, and took place. Petitioner was asked if she would commit to a payment plan with the information appearing on the revised Affidavit or whether she intended to withdraw her case. Petitioner advised that she did not have the money to pay.

The record remained open for thirty days without any further contact or a decision regarding a payment plan from petitioner. The record was closed on November 17, 2011.

ISSUE

Did petitioner and her two sons reside in Bayonne, New Jersey from January 31, 2011, to the end of the 2010/2011 SY? If residency is not established, what is the amount of the tuition reimbursement due from petitioner to respondent?

SUMMARY OF TESTIMONY

E.Z., petitioner, testified,

I temporarily reside in Newark because of financial concerns. I am saving money to pay the security and rent to return to Bayonne. I was evicted from my residence, however I recently found a job in Jersey City. When I pay off my old debt I want to move back to Bayonne. I am a single parent of three children and it is hard to make ends meet. I do not want my children to go to school in Newark, it will be best for them if I can find a place in Bayonne and return.

The Assistant Superintendent spoke with me in November 2010, but I was not told to remove my children. I explained my situation to him. I was never questioned about paying tuition. On a separate occasion the Vice Principal, Patricia Dziubek, told me to move back to Bayonne or take my children out of school by January 31, 2011.

Ms. Christina Mercun, principal of Midtown Community School, the school that petitioner's children attended, testified under sworn oath via telephone, "I am not certain of the content of the conversation between the Vice Principal Dziubek and petitioner."

FINDINGS OF FACT

Based on the law, the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. On October 21, 2010, petitioner informed her son's school teacher that she and her sons were living in Newark, N.J.;

2. On November 17, 2010, petitioner attended a Bayonne Board of Education meeting and informed teachers that she resided in Newark, N.J.;
3. Petitioner also informed the superintendent of schools that she resided in Newark, N.J.;
4. Respondent held a Board Attendance Committee meeting on February 24, 2011, and the Committee determined that petitioner did not reside in Bayonne. The Committee presented the case to the full-board membership of Bayonne BOE and the BOE voted to remove petitioner's children from the Bayonne School System;
5. On February 28, 2011, respondent wrote to petitioner to provide formal notice of the determination of the BOE to remove the children and to advise petitioner of her right to contest the determination by appealing to the Commissioner of Education within twenty-one days;
6. Petitioner's appeal to the Commissioner was unsuccessful. The Commissioner upheld the determination of the Bayonne BOE;
7. Petitioner requested an appeal before the OAL;
8. Petitioner did not provide evidence that her residency was in Bayonne during the 2010/2011 SY;
9. Petitioner did not provide evidence of a temporary residency;
10. Petitioner did not dispute or refute respondent's presentation in regard to the entire matter; except for the date she was told her children had to leave the Bayonne School System.

LEGAL DISCUSSION AND ANALYSIS

A student is eligible to attend a school free of charge if the student is domiciled within the school district. A student is domiciled in the school district when he or she is living with a parent or legal guardian whose permanent home is located within the district. A home is permanent when the parent or guardian intends to return to it after being absent from the home and has no present intent of moving from the home, notwithstanding the existence of homes or residences elsewhere. N.J.A.C. 6A:22-3.1(a)(1). Domicile may also be defined as a residence. N.J.S.A. 18A:1-1.

In accord with N.J.A.C. 6A:22-3.1(a)(1)(i), where a student's parents are domiciled within different school districts, and where there is no court order or written agreement between the parents designating the school district for school attendance, the student's domicile is the school district with whom the student lives for the majority of the school year, regardless of which parent has legal custody.

Consideration in proving residency for purposes of establishing eligibility for school district placement is found at N.J.A.C. 6A:22-3.4(a),

(a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:

1. Property tax bills, deeds, contracts of sale, leases, mortgages, signed letters from landlords and other evidence of property ownership, tenancy or residency;

2. Voter registrations, licenses, permits, financial account information, utility bills, delivery receipts, and other evidence of personal attachment to a particular location;

...

4. Receipts, bills, cancelled checks, insurance claims or payments, and other evidence of expenditures demonstrating personal attachment to a particular location, or, where applicable, to support of the student;

...

6. Affidavits, certifications and sworn attestations pertaining to statutory criteria for school attendance, from the parent, guardian, person keeping an "affidavit student," adult student, person(s) with whom a family is living, or others as appropriate;

...

8. Any other business record or document issued by a governmental entity.

(b) A district board of education may accept forms of documentation not listed in (a) above, and shall not exclude from consideration any documentation or information presented by a person seeking to enroll a student.

(c) Information and documentation offered by an applicant, shall not be deny enrollment based on failure to provide a particular form of documentation, or a particular subset of documents, without regard to other evidence presented.

N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a) sets forth the right of a student to a free public education, which in pertinent parts states:

Public schools shall be free to the following persons over five and under 20 years of age:

a. Any person who is domiciled within the school district[.]

...

(a) A student over five and under 20 years of age pursuant to N.J.S.A. 18A:38-1, or such younger or older student as is otherwise entitled by law to free public education, is eligible to attend school in a school district if the student is domiciled within the district.

CONCLUSION

Based on all of the foregoing, I **CONCLUDE** that the weight of the evidence including petitioner's statements to teachers, the superintendent of schools, and the Commissioner of Education, on the application for appeal, indicates that petitioner and her two sons were not domiciled in Bayonne, New Jersey, during the 2010/2011 SY.

ORDER

It is **ORDERED** that the determination of the Bayonne Board of Education that E.Z. was not domiciled in the Bayonne School District for the 2010/2011 SY, is **AFFIRMED**.

It is further **ORDERED** that the Bayonne Board of Education be entitled to tuition reimbursement from petitioner for the 2010/2011 SY in the amounts of:

\$4,700 for B.J.C. at 94 days in 2010/2011 SY @ \$50 per day

and

\$4,700 for E.J.C. at 94 days in the 2010/2011 SY @ \$50 per day.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 7, 2011

DATE


SANDRA ANN ROBINSON, ALJ

Date Received at Agency:

December 7, 2011

Date Mailed to Parties:

DEC - 8 2011


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Ir

APPENDIX

WITNESSES

For Petitioner:

E.Z., petitioner

For Respondent:

Maria P. Vallejo, Esq., representing respondent

EXHIBITS

For Petitioner:

P-1 Letter to Bayonne BOE requesting appeal, dated March 22, 2011

P-2 Pro Se Residency Appeal Application, dated March 22, 2011

For Respondent:

R-1 Letter from principal to the parent of B.J.C. and E.J.C., dated January 6, 2011

R-2 Letter from Bayonne BOE attorney to parent of B.J.C. and E.J.C., dated February 10, 2011

R-3 Letter from Bayonne BOE attorney to parent of B.J.C. and E.J.C., dated February 28, 2011

R-4 Respondent's letter and answer to petition mailed to the Director of the Bureau of Controversies and Disputes, dated March 22, 2011

R-5 Letter from Bayonne BOE attorney to petitioner and the ALJ, dated August 25, 2011

R-6 Affidavit of superintendent of schools, dated August 16, 2011

R-7 Revised Affidavit of superintendent of schools, dated August 24, 2011

DONNA TRISUZZI, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

BOROUGH OF KINNELON, :

MORRIS COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, a non-tenured special education teacher formerly employed by respondent's school district, appealed the Board's determination not to offer her a teaching contract for the 2010-2011 school year. Petitioner asserted that the action of the respondent Board were arbitrary, capricious and unreasonable, citing, *inter alia*, an email inadvertently sent to petitioner by the principal in which a vice principal was directed to revise petitioner's evaluation to make it "more negative". Respondent Board contended that petitioner was not offered a contract for a fourth year of employment because her performance in her first three years did not rise to the level expected for tenure candidates in the Kinnelon school district.

The ALJ found, *inter alia*, that: petitioner was employed by respondent for three consecutive academic years; petitioner received timely notice that she was not being recommended for a fourth consecutive contract; the evidence presented by both parties indicated a factual basis for respondent's determination to non-renew petitioner for a fourth year, which would have allowed her to achieve tenure; changes made in petitioner's evaluations subsequent to the email exchange between the principal and vice principal are consistent with petitioner's earlier evaluations; the decision not to offer petitioner a contract for a fourth year was based on the consensus of eight administrators who met in January 2010 to discuss candidates for tenure in the next school year; petitioner was not tenured pursuant to *N.J.S.A. 18A:28-5* at the time of her non-renewal; and local boards of education have an almost complete right to terminate the services of a non-tenured teacher. The ALJ concluded that petitioner failed to meet her burden to prove that respondent's reasons for not offering her a contract for the 2010-2011 school year were arbitrary, capricious or in bad faith. Accordingly, the ALJ denied petitioner's appeal.

Upon a full and independent review, the Commissioner concurred with the Administrative Law Judge that petitioner failed to meet her burden to show that respondent acted in an arbitrary, capricious or unreasonable manner, and dismissed the petition. In so doing, the Commissioner noted that respondent did not assert that petitioner was a substandard employee, but rather that she did not rise to the level it expected for tenure candidates.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 9477-10
 AGENCY DKT. NO. 314-8/10

DONNA TRISUZZI,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF KINNELON,	:	
MORRIS COUNTY,	:	
	:	
RESPONDENT.	:	

Before the Commissioner is an appeal of respondent's decision not to rehire petitioner for a fourth year of employment as a special education teacher. After review of the record, Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions and respondent's reply thereto, the Commissioner concurs with the Administrative Law Judge's (ALJ) conclusion that petitioner failed to meet her burden to show that respondent acted arbitrarily, capriciously, or unreasonably.

At the outset, the Commissioner notes that respondent has not asserted that petitioner was a substandard employee. Rather, respondent explains that petitioner did not rise to the level that it expected for tenure candidates. A review of petitioner's evaluations reveals that throughout her three contract years she consistently received average ratings – by six different evaluators. In regular evaluations that included 16 to 22 performance categories, petitioner only once received more than three ratings of the highest level: "Masters District Standard." Her annual evaluations were also average. The testimony of respondent's high school principal,

Wayne Merckling, indicated that when deciding whether to allow an employee to achieve tenure – a more permanent status in the district – the administration would usually recommend teachers who had achieved more of the higher level ratings. (T1 at 230¹) Also manifest in the record is evidence that petitioner was informed on multiple occasions both verbally and in writing that specific aspects of her performance needed improvement.

Some of respondent's concerns about petitioner were unresolved when it was time to decide whether to recommend her for a fourth year – and tenure. Such concerns have been held to be sufficient grounds for the nonrenewal of non-tenured employees, which nonrenewal is not subject to the same level of scrutiny as is applicable when districts decide to end the employment of tenured individuals:

[A]bsent constitutional constraints or legislation affecting the tenure rights of a teacher, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board.

Dore v. Bedminster Town Bd. of Educ., 185 N.J. 447, 456 (1982).

Further, the allowable reasons relied upon by local boards are not limited to those set forth in the evaluations of subject employees. *Id.* at 454. Local boards have the right to reach conclusions about non-tenured teachers based upon a broad range of input received from a variety of people, including members of the public, parents of students and board members' own knowledge of teachers. *Ibid.* Ultimately, the standard by which to evaluate a local board's approval of the chief school administrator's recommendation not to renew an employment contract is found in *N.J.S.A.* 18A:27-4.1 (b). That statute instructs simply that "[t]he board shall not withhold its approval for arbitrary and capricious reasons." The Commissioner is satisfied

¹ T1 represents the transcript of the first day – February 3, 2011 – of the hearing in this matter.

that enough evidence exists in the record to support the proposition that 1) respondent had ongoing concerns about petitioner and 2) did not arbitrarily decline to renew her.

Petitioner's exceptions rely heavily on her contention that emails from Principal Merckling to Vice Principal Matthew Scalon concerning the drafting and redrafting of her Spring 2010 tenure recommendation forms – which emails were inadvertently copied to her – revealed “arbitrary and capricious acts such as lying and manufactured reasons by the Board.” (Petitioner's Exceptions at 4) Petitioner urges that the two referenced emails – Petitioner's Exhibits P-G and P-J – in which Merckling asked Scalon to “make [the drafts] more negative,” signified malicious intent which, petitioner maintains, must be regarded as the kind of arbitrariness that necessarily invalidates respondent's action of declining to renew her contract.

One can understand how the unexpected receipt of copies of Merckling's negative and cryptic emails to Scalon could have caused petitioner distress. The emails were erroneously transmitted, and signaled that – contrary to petitioner's expectations – her employment might be at risk. However, the Commissioner finds no basis in the record to accept petitioner's suggestion that the emails and altered drafts denoted bad faith.

Both Merckling and respondent's Superintendent, James Opiekun, testified that the decision not to rehire petitioner had been made months before the April 2010 emails. In January 2010, a meeting of district administrators (“Administrator's Table” as per Merckling on T1 at 171) had been held to discuss the six district teachers who were then up for tenure, at which a consensus had been manifest that petitioner and three other teachers should not be recommended for rehire.² Merckling testified that his April 8, 2010 emails to Scalon – a former

² The ALJ found this testimony to be credible, and the Commissioner must accept the ALJ's credibility determinations unless the record blatantly contradicts same, which it does not in the instant case,. See, e.g., *N.J.S.A. 52:14B-10(c)*; *D.L. and Z.Y. on behalf of minor children, T.L. and K.L. v. Board of Education of the Princeton Regional School District*, 366 N.J. Super. 269, 273 (App. Div. 2004).

English teacher who was assisting with drafts of petitioner's summary evaluation and tenure recommendation – were not intended to fabricate deficiencies, but rather were ill-worded attempts to better incorporate the concerns that had been expressed at the January "Administrator's Table". (T1 at 205-208)

Further, as the respondent alleges, the changes that were actually made to the drafts of petitioner's summary evaluation/tenure recommendation were not extensive. (T1 at 121) There were few changes to the multiple choice sections of the evaluation (some for the better). Also, the narratives added to the fifth and sixth pages of the revised draft were not inconsistent with notations in previous evaluations and other notices to petitioner addressing issues concerning her performance.

Thus, the Commissioner finds that the emails between Merckling and Scalon resulted in an evaluation which was consistent with previously expressed concerns about petitioner's performance level. Similarly, the reasons for petitioner's non-renewal – provided to her in a letter dated May 20, 2010 from Superintendent Opiekun, *see* Petitioner's Exhibit B, page 2 – corresponded to issues about which petitioner had been previously advised.

In summary, petitioner has not shown that respondent's action in declining to renew her employment was arbitrary, capricious or unreasonable. The petition is accordingly dismissed.

IT IS SO ORDERED.³


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/23/12
Date of Mailing: 1/24/12

³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to P.L. 2008, c. 36. (N.J.S.A. 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 09477-10

AGENCY DKT. NO. 314-8/10

DONNA TRISUZZI,

Petitioner,

v.

**BOARD OF EDUCATION OF THE BOROUGH
OF KINNELON, MORRIS COUNTY,**

Respondent.

William J. Koy, Esq., for petitioner (Law Firm of William F. Koy, attorney)

James L. Plosia, Jr., Esq., for respondent (Apruzzese, McDermott, Mastro &
Murphy, attorneys)

Record Closed: May 31, 2011

Decided: December 6, 2011

BEFORE **EVELYN J. MAROSE, ALJ:**

STATEMENT OF THE CASE

Petitioner, Donna Trisuzzi, appeals the decision of the Kinnelon Board of Education (Kinnelon) not to offer her a teaching contract for the 2010-2011, which contract was essential for her to receive tenure in the fall of September 2010. The New

Jersey State Department of Education transmitted the the matter to the Office of Administrative Law, where it was filed on September 3, 2010. Hearings were held on February 3, 2011, and February 4, 2011. The record was held open for post-hearing submissions and reply submissions until May 31, 2011, at which time the record closed. Due to a voluminous caseload, the time for the issuance of this Initial Decision was extended to January 12, 2012.

FACTUAL DISCUSSION AND FINDINGS

Petitioner was employed as a special education teacher at Kinnelon High School for three-consecutive academic years. She was not offered an employment contract for the fourth consecutive year. Petitioner challenges the failure of the Kinnelon to renew her contract. Petitioner testified on her own behalf. Wayne Merckling, principal and James Opiekun, district superintendent, testified on behalf of Kinnelon.

PETITIONER'S EVIDENCE

Petitioner became a teacher in 1979, and worked in several school districts before being hired by Kinnelon, where she worked as a special education teacher, from September 2007 to June 2010. The classroom evaluations that petitioner received during her employment included many positive comments, and some suggestions for improvement. One area in which petitioner was told that she had to improve was punctuality. Petitioner was rarely late to sign in the school office, but more frequently late to her first-assigned classroom. At the OAL hearing, petitioner submitted an "Evaluation Commentary of Evaluators."¹ In addition to numerous specific comments, the summary includes the kind of evaluation, the date of the evaluation, the name of the evaluator and rating that was received by petitioner, as follows:

- 1.) Observation Report, January 9, 2008, Dr. Wayne Merckling (principal - evaluator); 16 out of 16 teaching indicators were noted to be met and/or mastered.

¹ This document was also provided to the Board of Education members for her tenure hearing on June 24, 2010.

- 2.) Observation Report, April 10, 2008, Matthew Scanlon (vice principal - evaluator); 16 out of 16 teaching indicators were noted to be met and/or mastered.
- 3.) Annual Evaluation Narrative, June 9, 2008, Dr. Richard Maizell (director of special education - evaluator); 6 out of 6 teaching indicators were noted to be met and/or mastered.
- 4.) Observation Report, November 14, 2008, Dr. Richard Maizell (evaluator); 22 out of 22 teaching indicators were noted to be met and/or mastered.
- 5.) Observation Report, January 13, 2009, Dr. Wayne Merckling (evaluator); 19 out of 21 teaching indicators were noted to be met and/or mastered, 2 indicators approach district standards.
- 6.) Observation Report, March 12, 2009, Dr. Martha Croley (supervisor of mathematics - evaluator); 16 out of 17 teaching indicators were noted to be met and/or mastered.
- 7.) Annual Evaluation Narrative, May 21, 2009, Dr. Richard Maizell (evaluator); 6 out of 6 teaching areas were noted to be met and/or mastered.
- 8.) Observation Report, October 26, 2009, Dr. Richard Maizell (evaluator); 19 out of 22 teaching indicators were noted to be met and/or mastered, 3 indicators were listed as "approaches district standards."
- 9.) Observation Report, February 9, 2010, Scott Rosenberg, (assistant principal for athletics and student activities - evaluator); 16 out of 16 teaching indicators were noted to be met and/or mastered.
- 10.) Observation Report, April 30, 2010, Meredith Charles (evaluator); 14 out of 17 teaching indicators were noted to be met and/or mastered, 3 indicators were labeled as "approaches district standards."
- 11.) Components of Professional Practice, April 8, 2010, Dr. Wayne Merckling, (evaluator); 43 of 61 indicators were noted to be exemplary and consistent levels of instructions, 17 indicators were noted as not consistently evident, and 1 as lacking. (P-F.)

12.) Annual Staff Summary, 2009-10, Dr. Wayne Merckling (evaluator).
(P-E.)

In addition to her classroom responsibilities, during her employment, petitioner served as cheerleading advisor. For several contract years, she served as moderator of the Trust Club. Petitioner is particularly proud of her work with the the Trust Club, which provides social opportunities for special needs children at the elementary level to interact with high school students, both with and without special needs. Though the idea for the Trust Club originated with a parent group, petitioner was its first moderator. The Club was one of twelve entries, out of fifty-three programs, that were selected for recognition by the New Jersey School Boards Association in April 2010. (P-I.) During her employment, petitioner also served as the Keys to Literacy Coach, a program designed to help low-achieving students do better on standardized tests. She was also involved in Adventure, a special education department program designed to help control behavior issues of special education children. She served as head appraiser for Challenge D, in the Destination Imagination competition that was held in Robbinsville High School. Petitioner also created her own program to assist special needs students having difficulty eating in the cafeteria. She transitioned the students from a small-group-classroom eating experience to the larger cafeteria environment. For a period of time, petitioner was also appointed by Principal Merckling to function as a lead teacher for several other staff.

Upon cross-examination, petitioner acknowledged that she received some negative feedback on issues relating to her employment. However, she was adamant that substantially all of the feedback that she received was above satisfactory and better; that she used less-than above-satisfactory feedback to perform at even higher levels; and that she received no indication she would not achieve tenure. On April 8, 2010, she was shocked when she received an e-mail that was inadvertently sent to her by Principal Merckling, but was meant for Matthew Scalon, vice principal. She was the subject of the e-mail, which stated:

Matt:

Tomorrow, try to make this more negative, also.

Wayne

Petitioner did not feel safe after reading the e-mail, which directed the vice principal to revise her evaluation to be more negative. (P-G, P-J.) She was stressed and nervous all of the time. She began to "second guess" herself. On April 30, 2011, petitioner received official notice that she would not be offered a contract for the 2010-11 school term. The letter also advised her of her procedural rights, relating to the decision not to offer her a contract. (P-A.) Had petitioner received a contract for the 2010-2011 school term, and worked one day, petitioner would have earned tenure.

On May 6, 2010, petitioner drafted a letter to James Opiekun, Kinnelon's superintendent of schools. She requested the written, specific, and detailed reasons that she was not offered a contract for the 2010-11 school term.² (P-B.) By letter dated May 20, 2010, Superintendent Opiekun advised petitioner of the following:

A review of your observations and evaluations does not demonstrate adequate progress towards meeting district standards. There are concerns around:

- Teacher interaction with students
- Performance of non-instructional duties
- Management of instructional groups
- Communicating directions and procedures
- Engaging students in the learning process
- Providing accurate and timely feedback to students
- Adequate supervision of students during extra-curriculum activities
- Punctuality

² On May 13, 2010, and May 17, 2010, petitioner also inadvertently received e-mails, relating to the evaluation of her performance that were meant for other staff and not petitioner. (P-K, P-L.)

[(P-B.)]

Petitioner stated that she was shocked by the detailed reasons that allegedly supported her failure to receive a contract. However, when subject to cross-examination, petitioner's testimony indicates that she has knowledge of certain incidents that could be viewed as supporting Kinnelon's concerns. When she held the position of Junior Variety Cheerleading Coach, petitioner acknowledged that she was spoken to, by Athletic Director Rosenberg, about the impropriety of the cheerleaders practicing unsupervised in the gym. Although she denied the veracity of the accusation, petitioner also acknowledged that two girls on the cheerleading squad complained to the administration that she called them "retards." (R-22.)

Petitioner acknowledged that Richard Maizell, the Director of Special Education and petitioner's direct supervisor, spoke to her about several incidents, that Kinnelon characterized as concerns that were considered when determining whether to offer petitioner a fourth year contract. Director Maizell expressed his concerns, in writing, about her duty to compile a summer reading list and about the misspelled items on the list after it was compiled. He spoke to her about her lesson plans not being done in a timely manner and without prompting from him. Director Maizell spoke to petitioner about a change in an IEP that he believed she had made without the consent of a parent (R-23.) He also spoke to her about the manner in which petitioner made arrangements and obtained approval for home instruction, which was not in accordance with District procedure. (R-24.)

Petitioner acknowledged that she had been spoken to by Principal Merckling about being late for her classroom on several occasions and about the number of sick days that she used in the 2009-10 school term. Principal Merckling also spoke to petitioner about Trust Club students going to a grammar school to work on a Trust Club activity, without her supervision.

In accordance with her statutory rights, after receiving the May 1, 2010 letter wherein Kinnelon provided petitioner with written, specific and detailed reasons that she was not offered a contract for the 2010-11 year, by letter dated May 27, 2010, petitioner

requested an informal hearing before the Board of Education. Her request was granted. She was informed, by letter dated June 1, 2010, that her hearing would be June 24, 2010, immediately after the regular board meeting. (P-C., R-3.)

By letter dated June 17, 2010, petitioner advised Kinnelon that she had retained legal representation. (R-4.) In response, Kinnelon's legal counsel advised petitioner's attorney that petitioner would be allotted fifteen minutes to make a presentation at the Board of Education meeting. (R-4.) As part of their presentation to the Board, petitioner and her attorney provided Board of Education members with selected comments from petitioner's evaluations, that counsel argued clearly proved petitioner should be offered a fourth year contract. (P-E.) By letter dated July 1, 2010, the Business Administrator/Board Secretary informed petitioner that, "after deliberation and review of the complete record, the Board decided to uphold the Superintendent's recommendation for non-renewal of her contract." (P-D, R-5.)

Subsequent to being advised she would not be rehired for the 2010-11 school term, petitioner received letters of recommendation from certain parents and members of the Kinnelon staff. She submitted some of the letters as exhibits at the hearing. (P-H.) Petitioner is presently employed as a special education teacher at Bridges Academy, which is part of Bloomfield High School. However, should her appeal prevail, she would return to Kinnelon.

RESPONDENT'S EVIDENCE

Principal Merckling described Kinnelon as a prestigious school district, with stringent requirements for tenure. The goal is to offer tenure to only the best candidates for a teaching position. He stated that in January 2010, he met with Kinnelon administrators to review the six candidates who would become tenured teachers, if they were offered a contract for the 2010-11 school term and worked one day in September 2010. Four of the six teachers were not offered a fourth contract. Like petitioner, the other three teachers not offered tenure also had numerous positive comments in their evaluations.

Not every administrator at the January meeting had conducted a classroom observation of each candidate. However, Principal Merckling stated that he had observed petitioner for a sufficient amount of time to evaluate her as a candidate for tenure. While written evaluations were not reviewed at the meeting, copies of the evaluations of the teachers being considered for tenure were available for review by the meeting participants prior to the meeting. The decision regarding the candidates was characterized as a consensus, rather than the result of a vote. Every administrator had the opportunity to give his or her verbal input on each candidate. Principal Merckling stated that the consensus of the group was unanimous not to offer tenure to petitioner. Among the topics discussed relating to petitioner were her tardiness, numerous incidents where she failed to supervise students involved in extra-curricular activities that she moderated or coached, and the complaints of parents of two cheerleaders that petitioner had referred to their daughters as "retards."

Principal Merckling admitted that petitioner had received several e-mails relating to her evaluation in April and May that should have been sent to an administrator and not sent to petitioner. The substance of the e-mails was the drafting of petitioner's evaluation. Principal Merckling stated that his goal in requesting the evaluation revision was to make the evaluation more accurate in rating and performance comments and consistent with the group consensus at the January 2010 meeting. He acknowledged that saying that his word choice, "Try to make this more negative, also." was a poor word choice. Dr. Merckling adamantly stated that petitioner's spring evaluation was not the determining factor that prevented petitioner from obtaining tenure. The decision not to offer petitioner a fourth contract, for the 2010-11 school term, had been made three-to-four months earlier, in January 2010, when she and other teachers "up for tenure" considered for a fourth year contract.

Upon cross-examination, Principal Merckling answered numerous questions about petitioner's evaluations. As noted by the principal, the evaluations include many positive comments, and some areas where improvement is recommended. The evaluations, which speak for themselves, were produced by respondents in their entirety, as the following exhibits:

- 1.) Observation Report, dated October 24, 2007 (R-6.)
- 2.) Observation Report, January 9, 2008 (R-7.)
- 3.) Observation Report, April 10, 2008 (R-8.)
- 4.) Annual Evaluation Narrative, June 9, 2008 (R-9.)
- 5.) Observation Report, November 14, 2008 (R-10.)
- 6.) Observation Report, January 13, 2009 (R-11.)
- 7.) Observation Report, March 12, 2009 (R-12.)
- 8.) Annual Evaluation Narrative, May 21, 2009 (R-13.)
- 9.) Observation Report, October 26, 2009 (R-14.)
- 10.) Observation Report, February 9, 2010 (R-15.)
- 11.) Observation Report, April 30, 2010 (R-16.)
- 12.) Components of Professional Practice, April 8, 2010 (R-17.)
- 13.) Annual Staff Summary, May 2009-10 (R-17.)

Kinnelon also submitted petitioner's rebuttal to Kinnelon's Components of Professional Practice and Annual Staff Summary, dated June 3, 2010. Some rebuttal comments submitted by petitioner indicate that a problem existed. For example, petitioner agrees that some of the student grades that she entered were not correct, but states that the online grading program was new. Other rebuttal comments reflect a denial of the problem. For example, petitioner was rated as not "consistently organizing" classroom physical space for safety through the arrangement of furniture. In her rebuttal, petitioner states that no safety issues were ever brought to her attention. She also states that she taught in three different rooms that are used by other teachers and their students, as well as, petitioner and her students. (R-18.)

A letter from Principal Merckling to petitioner, dated January 7, 2010, was also introduced into evidence. In the letter, he advised petitioner that he had once again observed her students waiting for petitioner after the first-period bell had rung. Principal

Merckling noted his disappointment that petitioner had not ended what he characterized as a pattern of lateness. He emphasized that petitioner had to not only be in the office by 7:25 a.m., but she needed to be in her classroom for the first block by 7:30 a.m. (R-21.) Kinnelon also introduced into evidence an e-mail exchange between a parent and petitioner (with carbon copies to others). The parent expressed concern that her daughter's grade went from a B to a D-, without her knowledge. Regardless of petitioner's reply, the letter evidences a complaint that petitioner did not provide accurate and timely feedback, one of Kinnelon's stated reasons for not offering petitioner a fourth-year contract. (R-20.)

Superintendent James Opiekun testified as to the tenure procedure. He stated that of the 165 teachers that he hired, 93 were recommended for tenure, 45 did not receive tenure and 27 were not yet at the point that they were being considered for a fourth contract. He noted that Kinnelon was rated as 21st in New Jersey. Since Superintendent Opiekun believes that teachers who receive tenure basically receive a lifetime-employment contract, his goal is to only recommend to the board of education those teachers who can be recommended without any reservation. He came to have "reservations" about petitioner.

Superintendent Opiekun's first experience with petitioner was learning of the parental complaint that petitioner used the word "retards" toward her cheerleading squad, and that the squad was practicing unsupervised. Upon cross-examination, he did acknowledge that the students' allegation of the use of the word "retards" was uncorroborated by staff. However, he noted that incidents of unsupervised cheerleading practice were corroborated. R-22.)

Superintendent Opiekun became aware of other negative comments relating to petitioner, including reports that she was arriving late to her classes, which left her students unsupervised until she arrived. He characterized her tardiness as particularly egregious since it left special education children unsupervised. (R-13, R-21.) Superintendent Opiekun also learned that her work contained typographic errors (R-10.), that she had failed to report a child's absence after lunch in a timely manner (R-12.), that her students were observed "drifting off" (R-6, R-9.), and that the subject

matter that she was presenting was not being sequentially presented and/or organized. (R-11, R-14.)

Superintendent Opiekun, like Principal Merckling, stated that the tenure decisions were made in a January 2010 meeting, where the Kinnelon administrators provided verbal feedback as to all of the candidates, including petitioner. The decision not to offer petitioner a fourth-year contract was a consensus decision of all the administrators. It was not based upon one evaluation, one comment, one incident, or one administrator's opinion. Superintendent Opiekun agreed with the consensus and made that recommendation to the school board. He affirmed that petitioner did not lose her position for budgetary reasons. Though other teachers were not re-hired in connection with budgetary restrictions—petitioner was replaced.

Superintendent Opiekun acknowledged that Principal Merckling told him that e-mails regarding petitioner's evaluations had inadvertently been sent to her, rather than to an intended staff member. While he felt the misdirected e-mails could become a union issue or legal matter, their transmittal did not change his intended recommendation that petitioner not receive a fourth-year contract. The administrative team (including the director of curriculum, supervisor of language arts, supervisor of mathematics, director of guidance, athletic director, director of special education, vice principal and principal), in a meeting in January 2010 concluded that they could not recommend petitioner for tenure. Petitioner's receipt of a poorly worded e-mail regarding how her evaluation was being revised for accuracy was unfortunate and unintended, but would not result in the reversal of the superintendent's recommendation.

Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses, I **FIND** the following pertinent **FACTS**:

Petitioner was employed by Kinnelon for three school terms as a special education teacher. During those years she received numerous evaluations, which reflect many positive comments and some areas where improvement is recommended.

Many of her evaluations memorialized a specific classroom observation. On January 2010, the Kinnelon administrators met to consider whether or not they would recommend six teachers for a fourth contract, essential to qualify for tenure. Verbal input was exchanged beyond classroom observations and written evaluations and included, among other things, parental feedback, extra-curricular activities, and non-instructional performance. The consensus among the administrators was not to recommend petitioner for a fourth-year contract. Petitioner was not advised in January 2010 that a decision had been made not to recommend her for tenure. Petitioner believed that the feedback she had received at Kinnelon indicated that she would be offered a fourth contract.

In April and May 2010, petitioner received three e-mails relating to revisions in the evaluation of her performance. In one e-mail, the school principal was directing the vice principal to make the evaluation "more negative, too." (P-G, P-K, P-L.) Based upon the wording of one e-mail and the negative changes in her evaluations after circulation of a first draft, petitioner came to feel that she was evaluated in "bad faith." When she was told of the decision not to offer her a fourth-year contract, she was convinced.

The documentary evidence presented does indicate that Petitioner's Renewal Profile somewhat changed negatively from one circulated draft to another. The earlier drafted version of petitioner's Renewal Profile indicates only one "mark" in the no column, under attendance/punctuality. In the revised version, petitioner received one more mark in the no column of the second version, under the category; professional dress, responsiveness to administrative suggestions, and initiatives, willingness to respond to district and building needs.³ In addition, the following two sentences are added under the two horizontal columns:

I am unable to recommend Donna Trisuzzi for tenure because of her continued inability to arrive at school on time, resulting in her students waiting unattended outside her door or having a colleague watch them until she arrives. In addition, failure to take advantage of small groups of

³ A check in yes column for this category also remained.

students for trying less formal teaching strategies as well as insufficient use of technology was disappointing.

The first sentence, relating to her mark in the punctuality column is not viewed as a change of evaluation, but rather a more detailed explanation. The second sentence, which was not included in the first version, is certainly additional negative feedback, as is the added information that petitioner will be not be receiving tenure. (P-F; R-25.)

Petitioner's Components of Professional Practice also changed, somewhat for the negative, from one circulated version to another. As to the first four pages where petitioner's rating is indicated with an X, an earlier drafted version of petitioner's Components of Professional Practice, when compared to a later version, indicates three changes. She received a lower rate in the second version going from a "consistently evident" to "not consistently evident" in the category "Communicating Clearly and Accurately—Directions and Procedures." However, petitioner was actually rated higher in the later version in two categories. She was changed from a "not consistently evident" to a "consistently evident" in the category "Managing Student Behavior, Response to Student Behavior." And again "not consistently evident" was changed to a "consistently evident" in the category "Reflecting on Teaching—Use in Future Teaching". The following additional sentences reflecting negative comments were also added to the two-page narrative portion of the Components of Professional Practice:

At times reported student grades have been inaccurate.
Discussion and written concerns about arriving to school on time have not led to improvement.

Concerns have been raised by administrators of other buildings about supervision of students when visiting other buildings and notification of younger students of the planned activities.

[(P-J; R-17.)]

While the drafted evaluations changed in substance, petitioner had notice of the negative issues contained in the revisions prior to the April 8, 2010, the date when an instruction to try to make an evaluation more negative was given. (P-G.) For example, Kinnelon recommended, in writing, that petitioner take advantage of and use technology

in her January 9, 2008, and June 9, 2008, evaluations. (R-7.) Petitioner's tardiness was addressed in her May 2008 evaluation. Her continued tardiness was characterized as an uncorrected pattern in a letter, dated January 7, 2010, sent to her by Principal Merckling. (R-13, R-21.) Petitioner acknowledged that some of her entries of student grades were inaccurate. (R-18.) It was agreed in testimony taken at the OAL hearing that some of the Trust Club students arrived at another school building to work on a project on a day that petitioner did not believe was scheduled for a Trust Club activity; and accordingly she was not in attendance to supervise them. Thus, while several negative comments were added to a later version of petitioner's Renewal Profile and Components of Professional Practice, I **FIND** that the evidence presented by both parties indicates a factual basis for Kinnelon to assert that it had concerns recommending petitioner for a fourth contract that would have allowed her to achieve tenure and that the changes in petitioner's post-April 8, 2010 evaluations, are consistent with her pre-April evaluations and the feedback that she received supplementing those evaluations.

LEGAL ANALYSIS AND CONCLUSIONS

"The teacher is a professional who has spent years in the course of attaining the necessary education and training." Yet, "when he is engaged as a teacher he is fully aware that he is serving a probationary period and may or may not ultimately attain tenure." Donaldson v. Bd. of Educ. of Wildwood, 65 N.J. 235, 245 (1974). To acquire tenure, the precise conditions in the statute must be met. A teaching staff member must: (1) work in a position for which a teaching certificate is required; (2) hold the appropriate certificate; and serve the required probationary period. The teaching staff member must hold employment in the district for three calendar years (unless a shorter period has been fixed by the employing board); or three-consecutive academic years, plus employment at the beginning of the next succeeding academic year; or the equivalent of more than three academic years within a period of any four-consecutive academic years. N.J.S.A. 18A:28-5.

The board shall not withhold its approval for arbitrary and capricious reasons. N.J.S.A. 18A:27-4.1. Yet, "absent constitutional constraints or legislation affecting the

tenure rights of teacher, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board.” Dore v. Bedminister Town Bd. of Educ., 185 N.J. 447, 456 (182). The board has a right to reach its conclusion about a non-tenured teacher on a broad base of input received from a variety of people, including members of the public, parents of students and board member’s own knowledge of a teacher even if that knowledge is acquired through having a child in the teacher’s class. Id. at 454.

As argued by Kinnelon, indeed, the standard of review is actually much more stringent than “merely” arbitrary and capricious. The Commissioner of Education has held that “a non-tenured teaching staff member challenging a Board’s decision to terminate his employment on the grounds that the reasons given by the Board are not supported by the facts is entitled to litigate that question only if he facts he alleges, if true would constitute a violation of constitutional or legislatively conferred rights.” Adams v. Trenton Bd. of Educ., EDU 8237-07, Initial Decision (July 3, 2008), <http://lawlibrary.rutgers.edu/oal/search> (citing Guerriero v. Bd. of Educ. of the Borough of Glen Rock, State Board (February 5, 1986), aff’d, A-3316-85T6 (App. Div. 1986). A non-tenured employee challenging his or her non-renewal has to “demonstrate that the Board’s decision not to renew her contract was so far afield, so outside of the realm of rational, evidentially based decision-making as to fail to even stand as a reasonable determination.” Kondratick v. Hamburg Borough Bd. of Educ., EDU 11195-07, Initial Decision (June 29, 2009), <http://lawlibrary.rutgers.edu/oal/search>. The inquiry is whether petitioner has met her substantial burden of proof that the Board of Education “acted improperly to the exclusion of all of the bona fide reasons” that were asserted. Ibid. (quoting Bigart v. Paramus Bd. of Educ., 1979 S.L.D. 123, 133).

Petitioner was employed by Kinnelon for three-consecutive academic years. She received timely notice that she was not being recommended for a fourth-consecutive contract of employment. Upon request, Kinnelon advised her in writing of the reasons that she was not being recommended for a fourth contract, and scheduled fifteen minutes for petitioner’s attorney and petitioner to make a presentation to the board of education in rebuttal of the recommendation of the superintendent. After deliberation the board of education decided to uphold the recommendation of the superintendent.

At the OAL hearing, Kinnelon presented testamentary and documentary evidence as to the reasons why petitioner was not recommended for tenure. The decision not to offer petitioner a fourth-year contract was based upon the consensus of eight administrators who met in January 2010. They considered a broad base of input including their own in-classroom and out-of-classroom observations and the input of other administrators and parents in making their decision.

Though petitioner presented evidence that an initial draft of her spring 2010 evaluation was made more negative while it was being revised between the principal and vice principal, other evidence presented indicates that petitioner had prior notice of the negative concerns and the factual basis for the negative concerns contained in the final version of her Renewal Profile and Components of Professional Practice. I **CONCLUDE** that petitioner has failed to meet her burden and prove that Kinnelon's reasons for not offering her a contract for the 2010-11 school year was arbitrary, capricious, and in bad faith.

ORDER

It is **ORDERED** that petitioner's challenge of the non-renewal of her employment contract is hereby **DENIED**.,

I hereby **FILE** my Initial Decision with **the DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **DIRECTOR OF THE DEPARTMENT OF EDUCATION**, which by law is authorized to make a final decision in this matter. If the Director of the Division of Medical Assistance and Health Services does not adopt, modify or reject the decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR OF THE DEPARTMENT OF EDUCATION, Mail Code #3, P.O. Box 712, Trenton, New Jersey 08625-0712**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 6, 2011

DATE



EVELYN J. MAROSE, ALJ

Date Received at Agency:

12/6/11

Date Mailed to Parties:

12/6/11

sej

APPENDIX

WITNESSES

For Petitioner:

Donna Trisuzzi

For Respondent:

Wayne Merckling

James Opiekun

EXHIBITS

For Petitioner:

- P-A March 30, 2010, Letter of Non-Renewal
- P-B June 5, 2010, Letter from Trisuzzi, requesting reasons for non-renewal and June 20 2010, Letter from Opiekun, detailing reasons for non-renewal
- P-C May 27, 2010, Letter requesting hearing before Board and June 1, 2010, Letter providing notice of hearing date
- P-D June 1, 2010, Letter advising of decision of Board to affirm non-renewal (identical to R-5)
- P-E Observation Abstracts (same as R-6)
- P-F April 8, 2010, Renewal Profile and Attendance Calendar 2009-10 School Term
- P-G April 8, 2010, e-mail from Merckling, as to making evaluation more negative
- P-H Letters and e-mails of recommendation
- P-I Documents relating to awards and recognitions
- P-J April 8, 2010, e-mail from Merckling to Trisuzzi, with attached Components of Professional Practice, dated April 8, 2010
- P-K May 13, 2010, e-mail, with attachment revised Components of Professional Practice & Renewal Profile
- P-L May 17, 2010, e-mail, with attached Annual Staff Summary, School Year 2009-10 & Professional Responsibilities standard

For Respondent:

- R-1 January 23, 2009, Letter from Opiekun to Trisuzzi, rescinding lead teacher appointment
- R-2 May 29, 2009, Letter from Opiekun to Trisuzzi, regarding 2009-10 contract
- R-3 June 1, 2010, Letter from Robinson to Trisuzzi, regarding June 24, 2010 hearing
- R-4 June 17, 2010, Letter from James L. Ploisia Jr., Esq. to William Koy, Esq., with attachment, regarding attendance and procedure for June 24, 2010, meeting
- R-5 July 1, 2010, Letter from Robinson to Trisuzzi, regarding June 24, 2010, meeting decision (identical to P-D)
- R-6 October 24, 2007, Observation Report (same as P-E)
- R-7 January 9, 2008, Observation Report
- R-8 April 10, 2008, Observation Report
- R-9 June 9, 2008, Annual Evaluation Narrative
- R-10 November 14, 2008, Observation Report
- R-11 January 13, 2009, Observation Report
- R-12 March 12, 2009, Observation Report
- R-13 May 21, 2009, Annual Evaluation Narrative
- R-14 October 26, 2009, Observation Report
- R-15 February 9, 2010, Observation Report
- R-16 April 30, 2010, Observation Report
- R-17 June 2010 Annual Staff Summary
- R-18 June 3, 2010, Trisuzzi Rebuttal to Annual Staff Summary
- R-19 July 2, 2010, Unemployment Application
- R-20 November 17, 2009, E-mail regarding student
- R-21 January 7, 2010, Letter from Merckling to Trisuzzi, regarding lateness
- R-22 Undated memo from Rosenberg to Opiekun, regarding lateness and word choice
- R-23 November 2009 e-mails regarding additions to IEPs and Santa Party Flyer
- R-24 December 2009 e-mails regarding procedure for home instruction
- R-25 April 8, 2010, Evaluation as to Components of Professional Practice

#26-12

R.W. on behalf of minor child J.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF WASHINGTON,	:	
GLOUCESTER COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

In May 2011, the petitioner filed an appeal challenging her son's suspension from general education classes and his assignment to an alternative school. Petitioner also sought homebound instruction for J.W. pending a determination on the suspension. The parties executed a settlement agreement in June 2011 which disposed of the homebound instruction issue. At an October 2011 hearing regarding the issue of suspension, petitioner moved to rescind the settlement and litigate homebound instruction; the motion was opposed by the respondent Board. The ALJ issued an order in November 2011 denying the motion. A second hearing date on the suspension issue was set for December 5, 2011. Petitioner received appropriate notice of the hearing, but failed to appear and offered no explanation for her non-appearance. Accordingly, the ALJ dismissed the petition.

Upon review of the file, the Commissioner noted that petitioner filed hand-written exceptions to the ALJ's decision dismissing the matter, in which she explained that her failure to appear was beyond her control and that she was waiting for an attorney to assist her. Accordingly, the Commissioner determined to remand the matter to the OAL for further disposition pursuant to *N.J.A.C. 1:1-3.3(b)*.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

January 23, 2012

OAL DKT. NO. EDU 5274-11
AGENCY DKT. NO. 115-5/11

R.W. on behalf of minor child J.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF WASHINGTON,	:	
GLOUCESTER COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) advising of petitioner's failure to attend the second day of the scheduled hearing on December 5, 2011 have been reviewed.

Petitioner filed hand-written exceptions, which have also been thoroughly reviewed and considered. In her exceptions, the petitioner explains that her failure to appear was beyond her control and that she was waiting for an attorney to assist her. She also asserts that she has been cooperative when the respondent needed to change a date during the pendency of the case.

Given that R.W. has provided an explanation for her nonappearance, this matter is being returned to the OAL for further disposition, pursuant to *N.J.A.C. 1:1-3.3(b)*.

Accordingly, this matter is hereby remanded to the OAL for further disposition as indicated herein.

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/23/12

Date of Mailing: 1/24/12

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36*.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 5274-11

AGENCY REF. NO. 115-5/11

R.W. ON BEHALF OF J.W.,

Petitioner,

v.

**BOARD OF EDUCATION OF
WASHINGTON TOWNSHIP,
GLOUSTER COUNTY,**

Respondent.

R.W., petitioner, pro se

**John B. Comegno, Esq., for respondent (Comegno Law Group,
attorneys)**

Record Closed: December 5, 2011

Decided: December 7, 2011

BEFORE ROBERT BINGHAM II, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter is presented on respondent's motion. By way of background, R.W. appealed the Board's suspension and assignment of J.W. to an alternative school and requested homebound instruction. The Commissioner of Education transmitted the appeal as an emergent matter, pending a plenary hearing on the suspension, to the Office of Administrative Law (OAL), where it was filed as a contested case on May 12, 2011.

On June 1, 2011, the parties executed a settlement agreement which disposed of the emergent matter, namely, homebound instruction for J.W. On July 18, 2011, the agreement was approved by the Board. On October 19, 2011, at the plenary hearing regarding the issue of suspension, R.W. moved to rescind the settlement and litigate homebound instruction, which respondent opposed. At that time, the parties were notified of the next hearing date, December 5, 2011. On October 26, 2011, OAL issued to the parties a written notice of hearing dates, including December 5, 2011. On November 10, 2011, the undersigned ALJ issued an Order denying petitioner's motion to rescind settlement.

On December 5, 2011, petitioner failed to appear at the scheduled hearing. Petitioner did not communicate with the OAL regarding the nonappearance and she also failed to do so within twenty-four hours thereafter. Furthermore, she did not communicate with counsel for respondent, who moved to dismiss petitioner's appeal with prejudice and for sanctions. Petitioner telephoned the OAL on December 7, 2011, stating that she had an emergency, and was directed to supply a written explanation for her nonappearance. No written explanation has been received.

LEGAL ANALYSIS AND CONCLUSION

Pursuant to N.J.A.C. 1:1-14.4, if no explanation for a nonappearance is received within one day the ALJ shall return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c) (emphasis added). Petitioner failed to appear as scheduled and failed to communicate a satisfactory explanation for her nonappearance within the required time period. Although petitioner called the OAL on December 7, 2011, she has not supplied any written explanation as requested.

I therefore **CONCLUDE** that this matter should be dismissed with prejudice. I decline to impose sanctions at this time.

ORDER

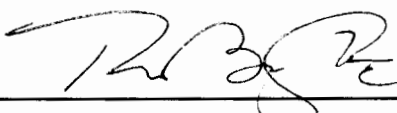
Accordingly, it is hereby **ORDERED** that the above-captioned matter be and is hereby **DISMISSED** with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 7, 2011
DATE



ROBERT BINGHAM II, ALJ

Date Received at Agency:

12/7/11

Date Mailed to Parties:

12/9/11

cmo

#27-12

IN THE MATTER OF THE TENURE	:	
HEARING OF DEREK V. HILDRETH,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF LAWRENCE	:	DECISION
TOWNSHIP, CUMBERLAND COUNTY.	:	

SYNOPSIS

Petitioning Board filed tenure charges of conduct unbecoming a public employee and other just cause against respondent, a tenured social studies teacher, and sought to terminate his employment. Neither respondent nor any attorney acting on his behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that the allegations – which respondent has chosen not to deny, and which specify that in November 2011, the respondent was indicted on 33 counts of Aggravated Sexual Assault, Sexual Assault and Endangering the Welfare of a Child for incidents involving students at his school – may be deemed admitted and are sufficient to warrant termination of the respondent from his tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from his tenured position, and forwarded a copy of this decision to the State Board of Examiners for action against respondent's certificate as that body deems appropriate.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
--

January 23, 2012

IN THE MATTER OF THE TENURE	:	
HEARING OF DEREK V. HILDRETH,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF LAWRENCE	:	DECISION
TOWNSHIP, CUMBERLAND COUNTY.	:	

For the School District of Lawrence Township, Jane B. Capasso, Esq.

No appearance by or on behalf of Derek V. Hildreth

This matter was opened before the Commissioner of Education on November 28, 2011 through the certification of tenure charges of conduct unbecoming a public employee and other just cause by the School District of Lawrence Township, Cumberland County, against Derek V. Hildreth, a tenured social studies teacher. The District seeks Mr. Hildreth's dismissal from his position.

By notice dated December 12, 2011¹, the Commissioner directed respondent, via both certified and regular mail² – both of the certified green cards, signifying delivery, having been returned to the Department on December 15, 2011 – to file an Answer to the tenure charges against him. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C. 6A:3-5.3* and *6A:3-5.4*, an individual against whom tenure charges are certified “*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*” and that failure to answer within the prescribed period would, absent granting of an extension for good cause shown, result in the charges being deemed admitted by the charged employee. Because no reply has been

¹ Respondent District was notified on November 29, 2011 that this matter would not move forward until the District provided proof of service of the charges certified to the Commissioner on the respondent and/or his counsel. Such proof of service was received December 12, 2011 and respondent was directed to submit an answer to the charges.

² Because respondent has been incarcerated in the Gloucester County jail since his arrest on May 26, 2011, this notice was mailed to him at both his home address and that of the jail.

received from respondent – or any attorney on his behalf – in response to the District’s charges, such charges against respondent are deemed to be admitted.

The Commissioner has reviewed the tenure charges certified against respondent by the District and the statement of evidence in support of those charges, which specify that on November 2, 2011 the Grand Jury of the State of New Jersey, Cumberland County, indicted respondent on 33 counts of Aggravated Sexual Assault, Sexual Assault and Endangering the Welfare of a Child for incidents involving young children who were students at his school. The District maintains that this Grand Jury Indictment evidences unbecoming conduct and warrants respondent’s dismissal as a public school teacher.

Noting that respondent has failed to respond to the allegations against him, the Commissioner finds that the District has demonstrated that respondent is guilty of conduct unbecoming and other just cause warranting the District’s requested penalty of respondent’s termination from his position.

Accordingly, summary decision is hereby granted to the District, and respondent Derek V. Hildreth is hereby terminated from his position with the School District of Lawrence Township, Cumberland County, effective with the filing date of this decision,³ a copy of which shall be forwarded to the State Board of Examiners for action against respondent’s certificate(s) as it deems appropriate.

IT IS SO ORDERED.⁴


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/23/12
Date of Mailing: 1/24/12

³ Pursuant to *N.J.A.C. 6A:3-1.14(c)*, Commissioner decisions are deemed filed three days after the date of mailing to the parties.

⁴ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*).



State of New Jersey

DEPARTMENT OF EDUCATION

PO Box 500

TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHRISTOPHER D. CERF
Acting Commissioner

January 24, 2012

Gail Oxford Kanef, Esq.
Oxfeld Cohen
60 Park Place, Suite 600
Newark, NJ 07102

Board of Education
Essex County Vocational School District
300 North 13th Street
Newark, NJ 07107

Dear Parties:

Upon review of the petition of appeal filed in connection with the matter entitled *Finesia Walker v. Board of Education of the Essex County Vocational School District, Essex County*, Agency Dkt. No. 259-8/11, and based upon the board's failure to submit an answer to the petition, I have determined to grant summary decision in favor of petitioner.

On August 25, 2011, petitioner filed a petition of appeal pursuant to *N.J.A.C. 6A:3-8.1 et seq.* claiming that she was entitled to the restoration to her "sick bank" of all sick days utilized in connection with injuries caused by a work-related fall suffered by petitioner on September 18, 2006. A copy of the petition of appeal was served upon respondent's business administrator via facsimile on August 25, 2011. On October 27, 2011, after receipt of a copy of the applicable Workers Compensation settlement – approved by the Court on May 31, 2011 – the Bureau of Controversies and Disputes (Bureau) sent the parties notice that an answer to the petition was due within 20 days. *N.J.A.C. 6A:3-1.5*.

Because the board failed to respond to the initial notice, a second notice was sent on November 18, 2011 to respondent's board secretary – via certified and regular mail – clearly indicating that, absent receipt of an answer to the petition of appeal within 10 days, each count in the petition could be deemed admitted and this matter could be decided on a summary basis, *N.J.A.C. 6A:3-1.5(e)*. An employee in respondent's office signed for the notice. Having received no response to the second notice, the Bureau sent out one more, final notice on December 6, 2011, which was accepted by an employee of respondent.

To date, no answer has been filed on behalf of respondent. Accordingly, petitioner's claim is deemed admitted by respondent, and respondent is hereby ordered to restore to petitioner's sick bank all days of absence flowing from petitioner's September 18, 2006 work related fall – up to one calendar year, consistent with *N.J.S.A. 18A:30-2.1*.¹

Sincerely,

Christopher D. Cerf
Acting Commissioner

C: Essex County Superintendent

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)

OAL DKT. NO EDU 11458-11
AGENCY DKT. NO. 268-9/11

IN THE MATTER OF THE TENURE	:	
HEARING OF ALAN J. MEEKER,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF OLD BRIDGE, MIDDLESEX COUNTY.	:	DECISION

The record of this matter, the parties' Settlement Agreement and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C. 1:1-19.1*.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. In so concluding, however, the Commissioner observes that Term 1 requires effectuation prior to final agency approval, contrary to *N.J.A.C. 1:1-19.1*. The parties herein – and all litigants in controverted matters – are accordingly reminded that parties to proposed settlements act at their peril when including terms requiring effectuation prior to the Commissioner's approval, since the Commissioner may ultimately disapprove the term(s) in question.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/23/12
Date of Mailing: 1/24/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11458-11

AGENCY DKT. NO. 268-9/11

**IN THE MATTER OF THE TENURE
HEARING OF ALAN J. MEEKER, SCHOOL
DISTRICT OF THE TOWNSHIP OF OLD BRIDGE,
MIDDLESEX COUNTY,**

Christopher B. Parton, Esq., for petitioner, the Board of Education (Kenney, Gross, Kovats & Parton, attorneys)

Sanford R. Oxfeld, Esq., for respondent Alan J. Meeker (Oxfeld Cohen, attorneys)

Record Closed: December 2, 2011

Decided: December 5, 2011

BEFORE JESSE H. STRAUSS, ALJ:

On September 16, 2011, the School District of the Township of Old Bridge (District) charged tenured teacher Alan J. Meeker with unbecoming conduct and sought his removal or reduction in salary under N.J.S.A. 18A:6-10 et seq. The Bureau of Controversies and Disputes of the New Jersey Department of Education referred the matter to the Office of Administrative Law (OAL) on September 26, 2011, as a contested case after having reviewed the Tenure Charges and having deemed them

sufficient, if true, to warrant dismissal or reduction in salary. N.J.S.A. 52:14F-1 to F-13. Before the commencement of a hearing scheduled for December 16, 2011, the parties participated in settlement discussions, which successfully concluded with the execution of the attached Settlement Agreement, which the District's Board of Education approved by the attached Resolution of November 22, 2011.

The allegations which gave rise to the Tenure charges were that, on or about June 23, 2011, Meeker, a teacher of instrumental music at one of the District's middle schools, posted a statement on Facebook which falsely suggested an inappropriate relationship between another member of the District's teaching staff and a member of the District's Board of Education.

Based upon a review of the record as well as the proposed Settlement Agreement, and the representations therein, and the attached Board Resolution, I **FIND** that the nature of the charges has been documented by the submission of a Statement of Charges and Certificate of Determination.

I **CONCLUDE** that this Settlement Agreement, by its expressed terms, meets the requirements of N.J.A.C. 6A:3-5.6 and that approval of it is in the public interest. See, In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

December 5, 2011
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency:

Date Mailed to Parties:

DEC - 7 2011

12-7-11
John P. Dardis
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

KENNEY, GROSS, KOVATS & PARTON
The Courts of Red Bank
130 Maple Avenue, Building 8
Red Bank, New Jersey 07701
(732) 530-7500 fax (732) 530-1739
Counsel for the Old Bridge Board of Education

**IN THE MATTER OF
TENURE CHARGES FILED BY
THE BOARD OF EDUCATION OF THE
TOWNSHIP OF OLD BRIDGE,
MIDDLESEX COUNTY,
AGAINST
ALAN J. MEEKER**

**BEFORE THE
COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY**

ADMINISTRATIVE ACTION

**AGENCY REF NO. 268-9/11
OAL DOCKET NO. EDU-11458-2001N**

**SETTLEMENT
AGREEMENT**

The above-captioned matter having been filed with the Commissioner of Education and transferred to the Office of Administrative Law for a hearing on Tenure Charges filed by Petitioner, the Old Bridge Board of Education against Respondent, Alan J. Meeker, and the parties to this matter having discussed the amicable resolution of this litigation without the allocation of further time and expense, the parties are hereby agreed as follows:

1. Respondent has been suspended without pay for the period of September 16, 2011 through October 31, 2011. He will be reinstated and shall return to work effective November 1, 2011;
2. Upon his reinstatement, Respondent will be assigned to any position within his professional certifications, endorsements and qualifications, at any school in the district, in the discretion of the Board and administration;
3. Respondent shall not be reimbursed for any lost pay, benefits or other consideration during the period of unpaid suspension, and upon his reinstatement, he shall not receive, nor shall he be eligible for, the stipends for Middle School activities that he received during the 2010-2011 school year and previously;

4. Respondent shall submit, on or before November 4, 2011, a written, signed letter of apology to Mr. and Mrs. Eugene Donofrio regarding Respondent's statements posted on Facebook in June 2011 in this matter, and a copy of said letter shall be attached to this agreement;
5. Respondent waives any and all claims, in any forum, arising out of his reinstatement, transfer and reassignment as set forth herein, including but not limited to contract claims, Grievances, Unfair Labor Practice Charges and Contested Transfer Petitions, as the result of his transfer, his suspension without pay and his loss of stipends;
6. The Board, via counsel, shall withdraw and dismiss with prejudice the Tenure Charges pending before the Commissioner of Education and the Office of Administrative Law under Docket Number EDU-11458-2100N and Agency Reference Number 268-9/11 upon approval of this Agreement;
7. The terms set forth herein constitute the parties' entire agreement with regard to this matter. No other terms shall be implied or included. In the event that the Commissioner of Education does not approve this Agreement, it shall become null and void, and the parties shall resume the litigation of this matter;
8. This Agreement shall not create any binding precedent for or against either party, and shall be used only for the enforcement of its own terms.
9. The parties acknowledge that all terms of this Agreement are subject to the review and approval of the Commissioner of Education pursuant to N.J.A.C. 6A:3-5.6. As required by that regulation and in accordance with the standards established by the State Board of Education in In re Cardonick, the parties submit the following information in support of their mutual decision to resolve this matter:
 - a. The Tenure Charges allege, and the employee's Answer acknowledges, that during June 2011, Respondent, a tenured teaching staff member, made certain untrue and defamatory statements about another teaching staff member as well as the President of the Board of Education, in violation of certain Board Policies and Regulations, which comments violated Board Policies, reflected negatively on school officials and employees, and adversely affected the sound operation of the school district;
 - b. The parties, through counsel and with the assistance of Administrative Law Judge Jesse Strauss, have identified terms of settlement which will have the effect of adequately punishing Respondent for the conduct at issue and return him to work, allowing both parties to move forward without allocation of further time or expense involved in tenure litigation;
 - c. Both parties, having had the opportunity to review this matter with their respective legal counsel, consent to this Agreement voluntarily and with the mutual interests of closure and moving forward;
 - d. Respondent, in entering this Agreement, represents that he does so with a full understanding of his rights and the effects and implications of all

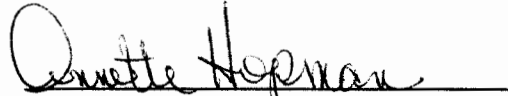
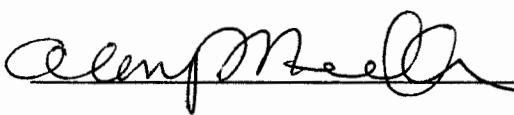
terms of this Agreement, and that he does so having thoroughly reviewed this matter with legal counsel;

- e. The parties represent that this Agreement is in the public interest, as it adequately punishes Respondent for his actions, and resolves this matter and allows both parties to move forward without any payment to Respondent, and without any further expenditure of public monies for the discovery, hearing, review, and possible appellate components of the litigation of tenure charges;
- f. Respondent, in entering this Agreement, acknowledges that he has been advised of the Commissioner of Education's duty to refer tenure determinations to the State Board of Examiners in certain instances.

WHEREFORE, the parties to this matter are so agreed, and set their signatures on this _____ day of November, 2011.

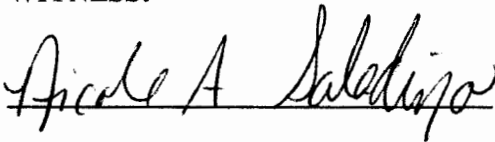
ALAN J. MEEKER

OLD BRIDGE BOARD OF EDUCATION



**ANNETTE HOPMAN,
VICE PRESIDENT**

WITNESS:



**NANCY M. MONGON,
SECRETARY**

To: Mr. and Mrs. Eugene Donofrio and family
c/o Old Bridge Township Public Schools Board Office
4207 Route 516
Matawan, NJ 07747

From: Alan J. Meeker

Dear Mr. and Mrs. Donofrio,

As I said in my Certified Letter to you of June 26, 2011, I beg you accept my most heartfelt apology over the comment I made to what I thought was my friend's private message account, but in reality was her Face Book wall. Even though I used the euphemism "literally in bed with" I in no way meant to suggest an improper relationship. I had intended only to state, in a crude way, that you work closely with Miss Bolger and are a big supporter of her program and of the Old Bridge Marching Knights. I suppose I was a bit jealous that the High School gets what I thought, wrongly, was more attention than the Middle School. I am ashamed, terribly embarrassed, and so very, very sorry of any hurt that I have caused you, your wife and your family.

Without knowing what I had meant, the posting appears to be a vicious, slanderous, untrue attack on your character. I certainly can understand the anger you must be feeling and it is most justified. I would be livid if the same were said of me.

I am not writing you simply to apologize as per the terms of the agreement. I feel terrible over the hurt my words may have caused you, Mrs. Donofrio and your children. I swear on my life that I never intended to infer any wrongdoing. I know there is not a person in Administration or on the Board that believes that, but it's true. Upon hearing that someone other than my friend had read the posting, I immediately took it down. In addition to writing you an apology in a Certified Letter, I wrote an open letter of apology to everyone on Face Book. If there were a way to apologize to everyone who read the posting, I would.

I accept full responsibility for the posting, for the hurt and embarrassment caused, and the punishment given.

I can only once again, beg that you and your family please accept my most heartfelt apology.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Alan J. Meeker', with a long horizontal flourish extending to the right.

Alan J. Meeker

**KENNEY
GROSS
KOVATS
& PARTON**

♦
ATTORNEYS AT LAW

THE COURTS OF RED BANK, BUILDING 8
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RED BANK, NEW JERSEY 07701
(732) 530-7500
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**FACSIMILE
TRANSMISSION**

CHRISTOPHER B. PARTON, ESQ.

cbparton@kenneygross.com

DATE: DECEMBER 2, 2011

TO: HON. JESSE STRAUSS, ALJ 609-648-6124
SANFORD R. OXFELD, ESQ. 973-802-1055

PAGES: 2 (INCL. COVER PAGE)

RE: OLD BRIDGE BOE I/M/O TENURE CHARGES V. ALAN J.
MEEKER—SETTLEMENT AGREEMENT / CERTIFIED
BOARD RESOLUTION

COMMENTS:

Attached at your request is the certified Board Resolution by which the Board approved the Settlement Agreement in this matter on November 22, 2011. The original, signed Settlement Agreement has previously been provided to the Court via regular mail on November 28.

—CONFIDENTIALITY NOTE—

The documents accompanying this fax transmission contain information from the law offices of KENNEY, GROSS, KOVATS & PARTON, which is confidential and/or legally privileged. The information is intended only for the use of the individual or entity named on this transmission sheet. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of the enclosed documents is strictly prohibited. If you received this fax in error, please notify us by telephone so that we may arrange for the return of the original documents to us at no cost to you.

**OLD BRIDGE TOWNSHIP BOARD OF EDUCATION
CERTIFIED BOARD RESOLUTION**

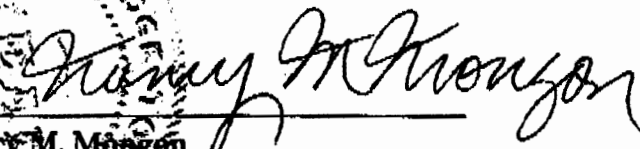
CERTIFICATED

Dunn moved, seconded by Colabella the following motions:

the Board of Education approve the agreement between the Old Bridge Board of Education and employee # 5114.

VOTE: Dunn, Gonzalez, Hopman, Sulikowski, Weber, Andriani, Colabella, Donofrio – YES.
MOTIONS CARRIED.

I HEREBY CERTIFY that the foregoing is a true copy of
the motion adopted by the Old Bridge Township Board of
Education at its Regular Meeting of November 22, 2011.



Nancy M. Morgan

School Business Administrator/Board Secretary

OAL DKT. NO. EDU 9444-11
AGENCY DKT. NO. 188-7/11

GERASIMOS SPANOS, :
 :
 PETITIONER, :
 : COMMISSIONER OF EDUCATION
 V. :
 :
 : DECISION
 BOARD OF EDUCATION OF THE CITY :
 OF ELIZABETH, UNION COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter, the proposed "Settlement Agreement and General Release" (Agreement), and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon such review, the Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A. 18A:4-33* – approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.


DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 1/26/12

Date of Mailing: 1/30/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09444-11

AGENCY DOCKET NO. 188-7/11

GERASIMOS SPANOS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF

ELIZABETH, UNION COUNTY,

Respondent.

Thomas R. Smith, Esq. for petitioner (Caruso Smith Edell Picini)

Karen A. Murray, Esq., for respondent (Elizabeth Board of Education)

Record Closed: December 1, 2011

Decided: December 7, 2011

BEFORE JOANN LaSALA CANDIDO, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 13, 2011, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was scheduled and conducted on September 9, 2011 during which time the parties reached a tentative settlement. A control hearing date was scheduled for November 30, 2011. However, prior to the hearing respondent's counsel submitted a copy of the fully executed Settlement

Agreement, via fax. The original agreement was received by OAL on December 1, 2011 which is attached hereto for reference.

Having reviewed the contents of the attached Stipulation of Settlement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

December 7, 2011
DATE

Date Received at Agency:

Date Mailed to Parties: **DEC - 9 2011**

ljb

Joanna Lasala Candido
JOANNA LASALA CANDIDO, ALJ
12-9-11
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

KAREN A. MURRAY, ESQ.
Elizabeth Board of Education
500 North Broad Street
Elizabeth, New Jersey 07208
(908) 436-5031
Attorneys for Respondent,
ELIZABETH BOARD OF EDUCATION

NOV 29 12:26
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

GERASIMOS SPANOS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF
ELIZABETH, UNION COUNTY,

Respondent.

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

Agency Docket No.: 188-7/11

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release is made by and between the Elizabeth Board of Education (the "Board") whose administrative offices are located at: 500 North Broad Street, Elizabeth, New Jersey 07208 and the law offices of CARUSO SMITH EDELL PICINI, PC whose offices are located at 60 Route 46 East, Fairfield, NJ 07004 for the New Jersey Education Association ("NJEA"), which incurred legal expenses on behalf of its member GERASIMOS SPANOS ("SPANOS"). In consideration of mutual promises and undertakings contained in this Settlement Agreement and General Release and for good and valuable consideration the receipt of which is hereby acknowledged, and the undersigned parties state:

WHEREAS, on March 11, 2009, Spanos was employed as a Security Guard by the Board; and

WHEREAS, on that date, a Citizen Complaint was issued for certain acts alleged to have occurred while Spanos was an employee of the Board. A copy of the Elizabeth Complaint No. 2004-G-045825 is attached hereto, (Exhibit 1); and

WHEREAS, on March 25, 2009, the Elizabeth Municipal Court dismissed the above-referenced Complaint against Spanos. A copy of the disposition reflecting said dismissal is attached hereto, (Exhibit 2).

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Spanos defense counsel sought reimbursement from the Board's for attorney's fees and costs associated with his legal defense relative to the Elizabeth Complaint No. 2004-G-045825; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Settlement Agreement and General Release in order to avoid the need for further litigation; and

NOW, THEREFORE, in consideration of mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the NJEA the sum of One thousand two hundred sixteen dollars and twenty eight Cents (\$1,216.28). The aforementioned amount represents full and complete indemnification of the attorney's fees and costs incurred by Spanos in relation to Elizabeth Complaint No. 2004-G-045825. A check for this amount shall be drawn to CARUSO SMITH EDELL PICINI, PC, and sent to their office at 60 Route 46 East, Fairfield, NJ 07004.

2. For and in consideration of the Indemnification set forth in paragraph One (1) above, Spanos and his heirs, executors, administrators, successors and assigns, hereby forever release and discharge the Elizabeth Board of Education, its members, successors and assigns and

all of its or their past or future members, offices, agents, employees, administrators, attorneys, fiduciaries, successors and assigns (whether acting as agents for the Board, its affiliates or its related entities or in their individual capacities) from any and all claims, demands, causes of action, fees and liabilities of any kind whatsoever (upon any legal or equitable theory, whether contractual, common-law, statutory, federal, state, local, or otherwise), whether known or unknown, which Spanos ever had, now has or hereafter may have against the Board by reason of any actual or alleged act, omission, transaction, practice, conduct, occurrence or other matter relating to any and all allegations contained in Elizabeth Complaint No. 2004-G-045825.

3. For and in consideration of the Indemnification set forth in Paragraph One (1) above, Spanos shall withdraw his petition of Appeal, Agency Dkt. No. 188-77.1.

4. The parties agree that if any of the provisions, terms, clauses, waivers and releases of claims and rights contained in this Settlement Agreement and General Release are declared illegal, unenforceable, or ineffective in a legal forum of competent jurisdiction, such provisions, terms, clauses, waivers and releases of claims or rights shall be modified, if possible, in order to achieve, to the extent possible, the intentions of the parties. If any such provisions, terms, clauses, waivers and releases of claims and rights contained in this Settlement and General Release cannot be modified, the remaining provisions, terms, clauses, waivers and releases of claims and rights contained in this Agreement shall remain in full force and effect.

5. This Settlement Agreement and General Release set forth the entire terms between the parties and fully supersede any and all prior Agreements or understanding between them pertaining to the subject matter thereof.

6. Nothing contained in this Settlement Agreement and General Release constitutes an admission of any wrongdoing by either party and neither party shall be considered a prevailing party in this matter.

7. All terms of this Settlement Agreement and General Release are deemed material. The parties agree that this Settlement Agreement and General Release may not be altered, amended, modified, superseded, cancelled or terminated except by an express written Agreement duly executed by all the parties or their attorneys on their behalf, which makes specific reference to this Settlement Agreement and General Release.

8. Spanos agrees that she has been fully and fairly represented by legal counsel throughout this proceeding.

9. This Settlement Agreement and Release contains the entire Agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

10. This Settlement Agreement and General Release is an Agreement that shall be construed in accordance with the laws of the State of New Jersey.

11. All parties hereby agree that the terms of this Settlement Agreement and General Release are binding upon all parties, their heirs and their assigns.

GERASIMOS SPANOS


Gerasimos Spanos

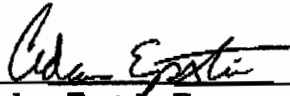
Dated:

ELIZABETH BOARD OF EDUCATION


Harold E. Kennedy, Jr.
Board Secretary/School Business Administrator

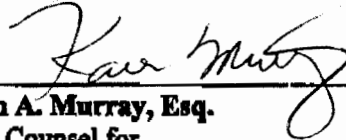
Dated:

CARUSO SMITH EDELL PICINI, PC



Adam Epstein, Esq.
Attorney for Gerasimos Spanos

Dated:



Karen A. Murray, Esq.
Labor Counsel for
the Elizabeth Board of Education

Dated:

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BOARD OF EDUCATION

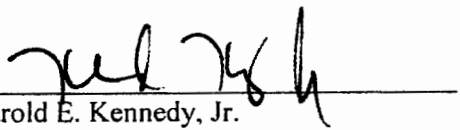
RESOLUTION

WHEREAS, the Elizabeth Board of Education and Gerasimo Spanos (G.S.) have discussed a resolution of OAL Docket No. EDU 09444-2011N; and

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreement on file in the Office of the School Business Administrator/Board Secretary.

TRUE COPY APPROVED AND ADOPTED AT
THE ELIZABETH BOARD OF EDUCATION MEETING
HELD ON **October 13, 2011**



Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

OAL DKT. NO. EDU 8375-11
 AGENCY DKT. NO. 167-6/11

CHRISTINE MCQUILKEN, :
 PETITIONER, : COMMISSIONER OF EDUCATION
 V. : DECISION
 NEW JERSEY STATE BOARD :
 OF EXAMINERS, :
 RESPONDENT. :
 _____ :

Upon review of the record and Initial Decision of the Office of Administrative Law concerning petitioner's challenge to respondent's determination that she has not met the requirements for a "Teacher of Students with Disabilities" endorsement to her instructional certificate, the Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A. 18A:4-33* – adopts the Initial Decision as the final decision for the reasons articulated by the Administrative Law Judge.

Accordingly, respondent's motion for summary disposition is granted and the petition is dismissed.¹

IT IS SO ORDERED.²



DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 1/27/12
 Date of Mailing: 1/30/12

¹ Petitioner filed a letter dated December 28, 2011 bearing the heading "Exceptions." In the letter, petitioner indicated that after she completes the remaining six credits required by the Centenary College program in which she is enrolled, she will reapply for a "Teacher of Students with Disabilities" endorsement. She requests that she not be required to pay another application fee. She further requests that the State "review its policies and process (or in some ways, clarify the gaps), so that future situations similar to my case, may be judged on the facts submitted, as opposed to case law" There is no indication that petitioner served a copy of this letter upon respondent. Consequently, the Commissioner shall forward same to respondent as an attachment to the instant decision.

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)

IN THE MATTER OF THE TENURE :
 HEARING OF JOANNE BRUNO, : COMMISSIONER OF EDUCATION
 SOUTH HUNTERDON REGIONAL : DECISION
 SCHOOL DISTRICT, :
 HUNTERDON COUNTY. :

SYNOPSIS

The petitioning Board certified charges of conduct unbecoming against respondent – a tenured business teacher employed by the district for more than 30 years – for making various misrepresentations concerning medical and psychiatric examinations requested by the Board. Additionally, the Board alleged that respondent exhibited a pattern of tardiness, insufficient class preparation and engagement, lack of communication, and incomplete paperwork related to field trips which constituted insubordination. Respondent denied the charges. The Board sought respondent's removal from her tenured position.

The ALJ found, *inter alia*, that: although respondent may have had a legitimate medical condition, her excuses, changes of rationale and refusal to provide documentation substantiating her condition create a strong inference that she did not wish to cooperate with the Board; respondent postponed her post-observation conference indefinitely by asserting a medical condition that she then could not or would not substantiate; additionally, petitioning Board has met its burden of proving that respondent failed to notify school authorities when she changed hotel arrangements for the Future Business Leaders of America club's field trip to the State convention; failed to properly supervise her students on two separate occasions; and failed to follow the school district's lesson plan policy. The petitioner failed to prove that respondent was chronically late. The ALJ concluded that respondent engaged in multiple acts constituting conduct unbecoming a teacher, but that such conduct did not rise to the level necessary for termination of her employment. The ALJ further concluded that – balancing the respondent's overall successful teaching history with the nature and relatively brief period of her problematic conduct – a one-year suspension and withholding of respondent's annual increment in the following year is the appropriate penalty in this case.

Upon careful review and consideration, the Deputy Commissioner (to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33) concurred with the ALJ's findings and determination, and additionally ordered that respondent – as a condition of her re-employment and return to teaching duties – must produce a then-current medical assessment from a District-selected physician in order to reassure the Board, and respondent, that she is able to resume her responsibilities as a teacher. Accordingly, the respondent: was suspended for a period of one year without pay; will forfeit her salary increments for the year in which she returns to service; and was ordered to produce a medical report certifying her readiness to return to work prior to her reemployment.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

January 30, 2012

OAL DKT. NO. EDU 10928-10
 AGENCY DKT NO. 544-9/10

IN THE MATTER OF THE TENURE	:	
HEARING OF JOANNE BRUNO,	:	COMMISSIONER OF EDUCATION
SOUTH HUNTERDON REGIONAL	:	DECISION
SCHOOL DISTRICT,	:	
HUNTERDON COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent – with the consent of her adversary – was granted an extension of time to file exceptions, pursuant to *N.J.A.C. 1:1-18.4*. The Board of Education's (Board) exceptions and reply, received January 17, 2012, and respondent's response were fully considered by the Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A. 18A:4-33* – in reaching his determination herein.

In petitioner's exceptions and reply, the Board fully endorses the Administrative Law Judge's decision, which finds that the respondent exhibited unbecoming conduct when she neglected to satisfy the post-observation meeting requirements, raised a questionable medical issue, ignored the need to advise the administration on a change of venue for the FBLA trip, failed to supervise students and disregarded the District's policies. The Board's only exception to the ALJ's decision related to the penalty. Given the finding that it had met its burden by a preponderance of the credible evidence, the Board argues that the penalty of termination is required rather than suspension for one year and loss of the increment upon re-employment.

In respondent's exceptions, Ms. Bruno contends that the Administrative Law Judge (ALJ) erroneously sustained the Board's charge of unbecoming conduct and further

asserted that the Board's evidence is insufficient and not adequately credible to warrant even a one-year suspension and the loss of her increment upon her return to employment.

In support of her arguments, respondent also asserts that it was not unbecoming conduct when she failed to attend her post-observation conference without being accompanied by a medical professional, whom she said was necessary. Instead, she believes that once she rescinded the demand, the meeting could have proceeded.

She further maintains that it was not unbecoming conduct when she failed to comply with the Board's resolution to submit to medical exams pursuant to *N.J.A.C.6:32-6.3(e)* because she claims she had a legal right to request a full evidentiary hearing before the Board on the issue of why the exams were necessary. After asserting her right before the Board in closed session, she and her attorney walked out of the session when her request was denied.

Additionally, respondent avers that it was not unbecoming conduct when she neglected to prepare an emergency lesson plan and leave it, along with the class roster, in her desk or in the main office in the event of an unexpected sick day. Moreover, respondent opines that the ALJ mistakenly characterized what actually happened and relied on questionable evidence. In support of her position, she posits that the only record of this incident was all made up and written by the principal or – if not written by him – by someone else whom the Board did not produce at the hearing to affirm its authenticity; therefore, the document was not credible.

Ms. Bruno also maintains that the ALJ erred when he found that she engaged in unbecoming conduct by unilaterally changing the venue of an overnight FBLA field trip without first seeking permission and, once effected, failing to apprise the administration of the change. Again, the respondent believes that it was not wrong to leave some students unsupervised while others attended a different event in the hotel, and asserts that she was going to tell the

administration at some point. That the principal learned of the new arrangements two days before the trip – before Ms. Bruno had an opportunity to inform the administration – was happenstance.

Finally, the respondent argues that it was not unbecoming conduct when she failed to supervise the middle school children who ran the school store, or the students during lunch period, or the members of her FBLA club. Ms. Bruno explained that these lapses – if they occurred – were infrequent, of short duration and common practice, especially during lunch.

Upon full review and consideration and a thorough reading of the hearing transcripts,¹ the Commissioner makes the following observations. Ms. Bruno was the first to mention her medical condition and the need to have medical personnel accompany her to her post-evaluation conference. The principal, after having just observed her lesson and witnessed some planning and execution issues that a 30-year teaching professional should not have confronted, believed that her medical and mental condition could have an impact on her teaching and her students. In ordering medical and psychiatric exams, the principal sought to protect both the respondent and her charges. The record also revealed Ms. Bruno's unwillingness to follow certain directives –whether a Board resolution, an ALJ order or district policies – led to a protracted, time-consuming sequence of events: It took 16 months to schedule the medical exams the principal requested. Moreover, the ALJ comments that respondent's cardiology report had still not been submitted to the ALJ or attached to her post-hearing brief. (Initial Decision at 14, Footnote 10)

As to the other elements of the charge of conduct unbecoming, the Commissioner determines that the Board has proven by a preponderance of the credible evidence that Ms. Bruno's conduct manifested a fundamental disregard for authority; respondent exhibited no

¹ The hearings in this matter were conducted on January 31, 2011 and March 9, 2011.

regret or qualms about engaging in behavior that undermined the public's trust and confidence in her services.

Based on the foregoing, the Commissioner finds and concludes that – in the absence of any basis in the record on which to dispute the fact-finding and credibility determinations of the ALJ pursuant to *N.J.S.A. 52:14B-10(c)*, *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987) – he concurs with the ALJ that the Board has established that respondent engaged in multiple acts of unbecoming conduct. The ALJ had the opportunity to assess the credibility of the witnesses who appeared before him and made findings of fact based upon their testimony; having found the Board's witnesses credible, he was nevertheless silent as to Ms. Bruno's credibility. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [*N.J.S.A. 52:14B-10(c)*].

Moreover, the Commissioner concurs with the ALJ's assessment of respondent's conduct, which – while egregious and disconcerting – does not warrant her termination in light of applicable law and prior decisional precedent. Additionally, he agrees that the conduct proven in this proceeding amply warrants respondent's suspension without pay for one year and the forfeiture of her salary increment. The Commissioner is also mindful that as a result of her suspension, the respondent will not have performed her teaching duties for an extended period of time. Consequently, the Commissioner also orders Ms. Bruno – as a condition of her re-employment and return to her duties – to produce a medical report from a new cardiology exam, performed by District-selected physicians and at the Board's expense. This new medical

assessment will reassure the Board and Ms. Bruno that she is able to resume her responsibilities of serving her students, the Board and the community.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL – as modified above – is adopted as the final decision in this matter. Respondent is hereby suspended for a period of one year without pay from her tenured position with the South Hunterdon Regional Board of Education, and is ordered to produce the medical report, as outlined above, before her employment and salary shall re-commence; upon her return to service, respondent shall forfeit her employment and adjustment increments for the year.

IT IS SO ORDERED.²



DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 1/30/12

Date of Mailing: 1/31/12

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10928-10

AGENCY DKT. NO. 544-9/10

**IN THE MATTER OF THE TENURE
HEARING OF JOANNE BRUNO,
SOUTH HUNTERDON REGIONAL SCHOOL DISTRICT,
HUNTERDON COUNTY.**

Allan P. Dzwilewski, Esq., for petitioner South Hunterdon Regional School District (Schwartz, Simon, Edelstein & Celso, LLC, attorneys)

Arnold M. Mellk, Esq., for respondent JoAnne Bruno (Wills, O'Neill & Mellk, attorneys)

Record Closed: June 15, 2011

Decided: December 14, 2011

BEFORE ISRAEL D. DUBIN, ALJ, t/a:

On August 30, 2010, the South Hunterdon Regional School District Board of Education certified tenure charges against JoAnne Bruno, a tenured teaching staff member, alleging that she had engaged in unbecoming conduct and other just cause warranting termination and loss of tenure. N.J.S.A. 18A:28-5. Specifically, the Board alleged that between March 2009 and July 2010, Bruno made various misrepresentations in connection with the resolution of a dispute concerning medical and psychiatric examinations. The Board also cited a pattern of tardiness, insufficient

class preparation and engagement, a lack of communication, and incomplete paperwork related to field trips, which together also amounted to insubordination.

On September 27, 2010, the Department of Education received Bruno's answer in which she asserted that she had a legal right to refuse to provide documentation of her medical condition, that she did eventually see a cardiologist, and that she has generally performed within standards and should not be disciplined in any way. Upon receipt of Bruno's answer, the Commissioner of Education transmitted the matter to the Office of Administrative Law, where it was filed on October 7, 2010. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The initial hearing dates of January 25, January 27, and February 24, 2011 were adjourned at the request of the parties, and the matter was ultimately heard on January 31, 2011, and March 9, 2011. The record was closed upon receipt of the final responding brief on June 15, 2011.¹

JoAnne Bruno is employed by the South Hunterdon Regional School District as a business teacher at South Hunterdon Regional High School. Prior to the filing of the tenure charges, the parties were engaged in separate but related matters before the OAL (Docket Nos. EDU 6027-09 and EDU 6028-09) that arose over a March 11, 2009 resolution, Exhibit P-1, by which the Board ordered Bruno to undergo medical and psychiatric examinations, and placed her on paid administrative leave pending further action. After most of the procedural issues were resolved,² the parties withdrew their respective petitions, and on November 9, 2010, the matters were returned to the Department of Education. However, the facts that gave rise to, and the procedural history of, these matters, have been reiterated by the Board in the Tenure Charge.

The Board asserts that the reasons for the adoption of the resolution included "Bruno's assertion of a medical condition that impaired Bruno's ability to instruct and/or supervise students and/or to carry out various duties and obligations." Tenure Charge,

¹ The undersigned retired on July 1, 2011, and was appointed as a temporary administrative law judge on September 8, 2011, in order to write this initial decision.

² By Order dated March 15, 2010, I rejected and dismissed Bruno's complaints alleging that the Board had violated the Open Public Meetings Act, N.J.S.A. 10:4-12, as well as N.J.S.A. 18A:16-2 and N.J.A.C. 6A:32-6.2, by failing to comply with her requests for a detailed Statement of Reasons, a discussion during an open public meeting, and a full adversarial hearing before the Board on the merits. Bruno also alleged that the Board's actions were taken in retaliation for her union activities, but did not prosecute this issue.

¶2. According to the Board, Bruno had requested an “employment accommodation regarding having a health professional attend a post observation conference with the Principal based on her health condition(s).” Ibid. But “[w]hen asked for documentation to verify the need for such an accommodation, Bruno refused to provide same and immediately offered to meet with the Principal without a medical professional.”³ Ibid.

By letter dated March 19, 2009, Exhibit P-3, Bruno, through her then attorney Stephen Klausner, responded to the Board’s resolution and requested a hearing pursuant to N.J.S.A. 18A:16-2 and N.J.A.C. 6A:32-6.3. On April 2, 2009, the hearing was convened but not completed due to issues regarding the scope and nature of the hearing and other procedural issues. Consequently, on April 15, 2009, the Board filed a petition with the Department of Education, Exhibit P-4, asking that the Commissioner construe the provisions of N.J.A.C. 6A:32-6.3(e)1 and determine that Bruno was not entitled to a full adversarial hearing. Bruno responded by filing a petition challenging the legitimacy of the resolution and need for the examinations. Tenure Charge, ¶2.⁴ The two petitions were then transmitted by the Commissioner to the Office of Administrative Law, and a hearing on the issue of whether Bruno should be required to submit to the examinations was scheduled to be held on March 17, 2010 and May 3, 2010.

Immediately preceding the commencement of the hearing, Mr. Klausner stated that Bruno was willing to submit to the examinations, and the parties reached an agreement by which they chose a cardiologist to perform the medical examination, and listed the names of three psychiatrists acceptable to the Board, any one of whom Bruno could choose to perform the psychiatric examination. The agreement was subsequently memorialized by the Board’s attorney, Allan P. Dzwilewski, in a letter dated May 25, 2010, Exhibit P-6. The parties also set July 15, 2010, as the date by which the written reports of the examinations were to be submitted to the Board. Ibid.

Bruno subsequently objected to the cardiologist chosen by the Board and, following an exchange of correspondence and a telephone conference, an order was

³ A post-observation conference is a meeting conducted following an observation of a teacher’s classroom teaching skills by a member of the administrative staff.

⁴ Bruno’s petition was not introduced into evidence.

issued on June 22, 2010, Exhibit P-9, directing Bruno to schedule and submit to examinations by the Board's cardiologist, and one of the two psychiatrists I selected from a list submitted by the Board. A short time later, Klausner informed Dzwilewski that Bruno would not undergo the examinations and that she had retained another lawyer, John Rowland, to represent her in the matter.

By letter dated June 30, 2010, Exhibit P-10, Dzwilewski asked Rowland to confirm that he had, in fact, taken over Bruno's representation. Later that same day, Rowland sent Dzwilewski a letter, Exhibit P-11, in which he stated that he did not represent Bruno. The following day, July 1, 2010, Dzwilewski sent Klausner a letter, Exhibit P-12, advising him of Rowland's response and asking that he have Bruno submit, by no later than July 7, 2010, written confirmation that she did not intend to comply with the terms of the June 22, 2010, order. In a telephone conversation on July 8, 2010, Klausner agreed to formally advise the Board of Bruno's intentions by July 13, 2010. Tenure Charge, ¶10.

Dzwilewski did not receive either a letter or phone call by that date. Therefore, by letter dated July 19, 2010, Dzwilewski again asked Klausner to provide the requested confirmation. Tenure Charge, ¶11. He also asked Klausner for the status of Bruno's appointment with the cardiologist and clarification of a communication the Board had received from one of the psychiatrists regarding payment of fees. Ibid.

On July 21, 2010, I received an unsolicited letter dated July 16, 2010, Exhibit P-14, from Dr. Marc S. Rabinowitz,⁵ who was not one of the doctors the parties had agreed upon, attesting to Bruno's good physical and mental health, and lauding her as an excellent teacher. One week later, in separate letters dated July 28, 2010, Exhibits P-15 & P-16, Klausner advised Dzwilewski and this tribunal that Bruno had scheduled an appointment with the designated cardiologist and had also requested that I select three other psychiatrists Bruno could choose from because neither the designated psychiatrist nor the alternate psychiatrist could see her. To the best of the Board's knowledge, the appointment with the cardiologist was kept, but attempts to have Bruno

⁵ There was no indication on the letterhead or in the body of the letter that Dr. Rabinowitz specialized in cardiology, psychiatry, internal medicine or any other particular field of medicine.

examined by a psychiatrist acceptable to the Board were unsuccessful. Tenure Charge, ¶13.

Based on the foregoing facts, the Board has alleged that Bruno's conduct in connection with the scheduling of the post-observation conference, request for medical supervision at the conference, refusal to provide documentation verifying the need for this accommodation, and failure to comply with its resolution requiring medical and psychiatric examinations "is contrary to her duties and responsibilities as a teacher and role model for students, sets an example unbecoming a teaching staff member who is entrusted with the education of students and constitutes unbecoming conduct and/or other just cause for dismissal." Ibid.

In a general all-inclusive concluding paragraph, the Board has also alleged that Bruno's conduct during the 2008-2009 school year, which led to the adoption of the resolution requiring cardiologic and psychiatric examinations, constitutes further evidence of unbecoming conduct or other just cause for dismissal. More particularly, the Board claims that Bruno

fail[ed] to carry out her professional responsibilities regarding student supervision, fail[ed] to follow observation protocols, [sought] unsubstantiated employment accommodations and [] abandon[ed] same when asked for supporting documentation, [and] fail[ed] to follow school rules and administrative directives regarding lesson plans, supervision of students, field trip documentation and reporting of her absences.

[Ibid.]

As to these charges, Principal James Bevere testified that teachers were required to sign in about ten minutes before the students arrived in order to ensure that they were adequately supervised. However, Bruno had frequently been late, arriving at the same time as, or after the students. When her attendance didn't improve after he'd given her several verbal warnings, he expressed his concerns in a memo dated December 23, 2008. Exhibit P-17. Specifically, he explained that reporting to school on

time was crucial to the safety and instruction of her students. And while he acknowledged that she had called ahead when she was going to be late, he also advised her that her classes still needed to be covered and, as a result, her colleagues had to be compensated at additional cost to the district. He therefore requested that she schedule an appointment with him to discuss the matter. Although the requested meeting never took place, "things improved."

On or about January 8, 2009, Bevere had his secretary, Bonnie Kendig, send Bruno an email, Exhibit P-18, advising her that he would be observing her teach one of her classes on Monday, January 12, 2009. Additionally, he had scheduled a pre-observation conference, during which he would look at the attendance books, grades, and lesson plans, for Block 3 on January 9, 2009. When Bruno did not appear for the conference, he had Ms. Kendig send her another email, Exhibit P-19, notifying her of the missed appointment, and requesting that she see him "first thing" on January 12, 2009, before her scheduled observation. Then, on January 12, 2009, Ms. Kendig notified Bruno that Bevere had rescheduled the observation for January 21, 2009, and that the pre-observation conference would instead be held on January 20, 2009. Exhibit P-20.

Although the pre-observation meeting did not take place, on January 21, 2009, Bevere observed Bruno's entrepreneurship class. As he wrote in his observation report, Exhibit P-21, he had "some major concerns about the actual preparation that [Bruno] put in for this lesson." Ibid. He also noted that "[t]here was entirely too much wasted time in this class" with respect to the activities assigned in the class. Ibid. Bevere testified that it was apparent that Bruno had "transitioning problems" and did not have a "back-up plan" or any "tricks in her bag." More particularly, after observing that computer problems had left the students with nothing to do, he cautioned that "[t]echnology should never be used as an excuse to have so many students sitting around with nothing but time on their hands. . . . evidence of prior planning would have been to quickly move onto [sic] another effective activity." Ibid.

Still, the lesson he observed was effective and the students seemed to like the class. As he wrote in the observation report,

Ms. Bruno should be commended on her rapport with her classes. Ms. Bruno is extremely approachable and shows genuine concern for her students' education and well being. Ms. Bruno is readily available and accessible to her students throughout the school day. Students in her class feel comfortable in their skin and are encouraged to take chances while thinking outside the box.

[Ibid.]

According to Bevere, most post-observation conferences are scheduled within five days of the observation, and that, "after a certain amount of time, if the teacher does not meet with you or respond to you with a rebuttal to the lesson, it becomes part of their personnel" file. However, in this instance, Bruno did not respond to his attempts to schedule a meeting. Consequently, on February 24, 2009, Bevere sent Bruno an email, Exhibit P-22, advising her that she'd had seventeen days to prepare for and attend the customary post-observation meeting and, if she'd desired, submit a rebuttal to his evaluation. In response, Bruno wrote that she had been unable to meet with him during the scheduled time because the "medical person" she'd asked to attend the meeting with her could not make it on the scheduled date. According to Bruno, she had been wearing a heart monitor for twenty-one days and felt she would be more comfortable meeting with him if the medical person were with her. Ibid.

By letter dated February 26, 2009, Exhibit P-23, Bevere thanked Bruno for informing him why she had been unable to keep their scheduled appointment on February 25, 2009. However, he also advised her that he had, nevertheless, rescheduled the meeting because he was unaware of her having any medical condition that would require her to have medical personnel present during their meeting. "Although Association representation is acceptable," he added, "you are not entitled to, nor am I obligated to, honor your request to bring medical personnel to your post observation conference." Ibid.

Since he had never before received such a request, he asked her to provide him with specific documentation pertaining to her diagnosis, treatment and prognosis, as well as the credentials of the medical personnel she wanted to accompany her. Moreover, he requested that she undergo a medical and psychological⁶ examination by District-recommended physicians. His request for the examinations was based on his belief that "if the medical concerns were so bad that she couldn't sit in a post observation, there would be concerns" about her ability to carry out daily activities in the building. Bevere forewarned her that if she failed to comply with his requests by March 6, 2009, he would ask the Superintendent to request that the Board mandate these exams. Ibid.

In her email dated February 26, 2009, Exhibit P-24, Bruno advised Bevere that it had been her intention to have Liz Hendricks, the school nurse,⁷ attend the meeting with her, adding, "I would assume that the District already knows of the credentials of this medical professional." Ibid. Nevertheless, she had decided to meet with him, "with or without Liz being present." Ibid. She also advised Bevere that her attorney had advised her that, "[a]ccording to the HIPPA regulations I am under no obligation to provide the District with *any* medical information." Ibid. (emphasis in original). And while "thank[ing] [him] for the invitation to visit the District physicians," she stated that she had decided to "declin[e] that offer at this time as well." Ibid.

Later that same day, Bevere postponed the post-observation meeting scheduled for February 27, 2009, explaining,

I am sorry, but I would like to wait until we feel that your medical condition has been assessed. Based upon your email, you indicated that you could only meet with me with a medical professional present due to a heart monitor. I don't want to jeopardize your health and will therefore continue to heed the March 6 deadline.

[Bevere email dated February 26, 2009, Exhibit P-25].

⁶ The second examination has been referred to as both a "psychological" and "psychiatric" examination. Principal Bevere initially requested that Bruno undergo a "psychological" examination, while the Board's resolution called for a "psychiatric" examination.

⁷ Bevere added that Hendricks was also the union representative.

Bruno responded in an email dated February 27, 2009, Ibid., reiterating that, on the advice of counsel, she would neither provide the requested medical information, nor submit to any medical or psychological examination. She also suggested that Bevere contact her attorney, Stephen Klausner, if he wished to discuss the matter further. Ibid.

In the midst of these discussions, Bruno called out sick on February 18, 2009. In accordance with school policy, teachers were expected to make their lesson plans or, in case of an emergency, a set of generic plans, and a list of the students in the class, available for use whenever they were out. However, Bevere testified, neither Bruno's lesson plans nor a class list could be found on the date in question. What is more, several faculty members, including the vice principal and industrial arts teacher, were unable to open the word processing file Bruno subsequently sent in because it had been sent in *Word Perfect*.⁸ It was only after another faculty member, Toby Jefferis, converted the file that the substitute teacher was provided with a lesson plan. The list of students in the class was subsequently provided by the main office. Memo dated February 18, 2009, Exhibit P-26.

According to Bevere, it was during this same period of time that he had to send Bruno a written warning about her having reported for her contracted cafeteria duty seventeen minutes late on March 3, 2009. In his letter dated March 4, 2009, Exhibit P-27, he also reminded her that when on duty, she was supposed to be walking throughout the commons area (cafeteria) supervising the students, not sitting at a table eating her lunch. This was particularly important because all 100 to 150 ninth through twelfth grade students ate lunch together at the same time. As he emphasized, the safety of the students was an imperative.

Bevere stated that teachers were required to keep their classrooms locked when not in use for the same reason. But, also on March 3, she had reportedly left seventeen students unsupervised in her classroom between 11:40 a.m. and 11:51 a.m. Since she had done this "several" times before, Bevere documented the incident in a letter to

⁸ It may be that the school district had an earlier version of *Word Perfect* than Bruno, or a different word processing program such as *Word*, neither of which could "read" documents created using an updated version of *Word Perfect*.

Bruno dated March 4, 2009, Exhibit P-28, in which he emphasized that “[a]t no time are students permitted to be in a classroom unsupervised.” Ibid. He further stated that he’d noted Bruno’s lack of supervision because “I probably walked by on my way out of the cafeteria or back to the cafeteria” and “constantly circulat[ed] throughout the building.” While he could not recall how many other times he’d noticed unsupervised students in Bruno’s classroom, he explained that “for me to put it in writing it would have to come after several verbal conferences.”

Also during or about this same period of time, Bruno sent the following undated email to Bevere:

I am sending this email to let you know that I suspect someone is capturing emails that I open. I opened one intentionally to find out if this was happening. I can tell when email is being captured and the one I opened just now was from MBruno@jhcohn.com titled “Friends.”

I first became aware of this on Friday during a study hall in my classroom when I was on a web search for information for one of my classes. The same warning came up on my screen. If this is administrative, I hope it is being done to all computers in the school to all staff and faculty. Otherwise it will be considered a continuation of the harassment you have been inflicting on me. A copy of this email will also be sent to Steve Klausner.

[Bruno undated email, Exhibit P-29]

Bevere asserted that he knew nothing about this and that the superintendent of schools was the only person who had the authority to do it, if it was in fact being done. In other words, if it was being done, it had to be at the district level, and he therefore referred the matter to the technology director for review. He had no further discussions about the matter with her.

Bevere also testified that Bruno had planned to take some of her students on an overnight trip to the Future Business Leaders of America (FBLA) conference in Edison, New Jersey, March 11-13, 2009. However, based on her asserted unspecified medical condition, Superintendent of Schools Nancy Gartenberg notified Bruno that she had

decided to send an additional adult chaperone, Matt Walker, on the trip "to offer you and the students the proper assistance necessary" Gartenberg Letter dated March 9, 2009. Exhibit P-30. Bruno was to provide Walker, who would be staying at the same hotel as the club, with a list of the students' names, room arrangements and assignments; FBLA conference sessions; and transportation and meal arrangements.

The following day Bevere sent Superintendent Gartenberg a letter, Exhibit P-31, regarding certain incorrect information Bruno had provided in her Field Trip Request Form. More specifically, Bevere advised her that

[o]ur students going to the NJ State Leadership are staying at the *Sheraton Edison Hotel Raritan Center* and not the *Holiday Inn Edison* as listed in Ms. JoAnne Bruno's Field Trip Request Form. This was discovered by me, when I reserved an additional room for an extra chaperone. This could have been a potential administrative nightmare had we needed to get in touch with our students or staff at the conference. Her lack of attention has been an ongoing problem all year. These field trips have been allowed to go forward because it would not be fair to punish students that are state officers or have made prior commitments because of Ms. Bruno's lack of attention to her paper work.

[Ibid.]

Bevere testified that he also recommended that an additional chaperone accompany Bruno on the March 11, 2009 field trip over concerns with Bruno's health and the general safety of the students. After describing the sending of an additional teacher as a precautionary measure, he added that "it wouldn't hurt." Superintendent Gartenberg agreed and by letter dated March 10, 2009, Exhibit P-32, provided Bruno with the following information and admonition:

Matt Walker has been registered at the Sheraton. We have taken care of all of his needs. In reviewing your paperwork, it indicated that you would be staying at the Holiday Inn. Mr. Bevere, in registering Mr. Walker, was told that you were all staying at the Sheraton and NOT the Holiday Inn. We have provided the principal's secretary with the proper itinerary. Please be sure to update student information with the

secretaries in the main office should any other important details change.

We are glad to support you with Mr. Walker as the gender ratios and events at separate locations, specifically A.B.'s separate dinner for officers and advisors, would leave some student(s) unsupervised. This will provide the remaining students with an adult chaperone, allowing you to attend the dinner with A.B. as his advisor.

[Ibid.]

On June 8, 2009, Bevere gave Bruno a poor assessment on the Co-Curricular Advisor's Evaluation Form, Exhibit P-35. Among other things, he indicated that Bruno's paperwork was often incomplete and untimely which, on several occasions, required administrative personnel to correct "last minute mistakes" to paperwork for FBLA field trips. As an example, he cited the March 2009 FBLA conference when the administration discovered that the students were spending an overnight trip in a completely different hotel than the one she had listed on her paperwork, which he deemed "inexcusable." He also pointed out that Bruno had been warned both verbally and in writing about leaving students unattended in her room during and after the school day. Consequently, he recommended that she not be rehired as an advisor for the FBLA chapter.

On June 16, 2009, Bevere prepared Bruno's Tenured Teacher Summative Assessment Report, Exhibit P-33, in which he assessed Bruno's teaching performance on the basis of "Four Domains of Teaching," and recommended that she not receive an increment for the then-upcoming school year. Among other things, Bevere based his determination on a low level of classroom planning, regularly failing to produce the required substitute lesson plans when she was absent, chronically failing to complete paperwork for field trips and a consistent disregard of the rules as outlined by the administration. More pertinently, "Ms. Bruno's decisions have been challenged throughout the year. She has demonstrated inconsistencies in her demeanor and a questionable ability to make reflective and sound decisions." Ibid.

Testifying on behalf of the Board, Superintendent Gartenberg stated that her decision to send an additional chaperone to the FBLA conference had been based on Bevere's concerns about Bruno's health. More particularly, he'd advised her that Bruno had requested the presence of a medical professional's presence at the post-observation conference. This was the first time in her thirteen years as a teacher and administrator that she'd heard of a teacher requesting the presence of what she understood would be an "outside" medical professional. Had she known "up front" that Bruno had been referring to Liz Hendricks, "there might not have been a problem."

Since she had not previously received any information regarding a medical condition that would have rendered Bruno unable to attend the post-observation conference alone, she believed it would be prudent to send another teacher as a precautionary measure pending receipt of more specific facts. She also advised Bevere to put off the post-observation conference and ask Bruno to provide documentation concerning her medical condition.

Gartenberg stated she was also concerned that the field trip form Bruno had submitted indicated that she and the students would be staying at the Holiday Inn, and it was not until Bevere registered Matt Walker that he learned they would be staying at the Sheraton. This could have made it difficult for the Board to contact a student in case of emergency. Additionally, it was evident from the itinerary that Bruno's attendance at the officers and advisors dinner would have left some of the students unsupervised. This, too, made Walker's assignment as a chaperone necessary. Consequently, she sent Bruno her letter of March 10, 2009, Exhibit P-32, supra, asking Bruno to "update student information with the secretaries in the main office should any other important details change." Ibid.

Concerning Bruno's tardiness, Gartenberg stated that she and Bevere had had frequent conversations—"more than once or twice a week"—regarding his need to provide coverage for Bruno's first period classes. Providing this coverage was problematic because teachers had to be compensated each time they were pulled from prep time to cover a class, thereby causing the Board to incur additional expenses.

Gartenberg added that Bruno was also frequently late for cafeteria duty and, when present, failed to circulate throughout the room and provide proper supervision.

Gartenberg also testified that Bevere had shared with her Bruno's email in which she'd advised him that she'd "sensed something strange," alleging that someone had been "capturing, looking at" the email on the computer in her room. Gartenberg, in turn, asked the network manager, Vince Cifelli, about these allegations and he advised her that it couldn't be done remotely; he'd have to go to the individual computer and check for the presence of a virus. She did not ask him to do so.

Testifying in her own behalf, Joanne Bruno stated that she'd sent Bevere an email on February 25, 2009, Exhibit P-22,⁹ supra, asking that her post-observation conference be moved to a different day because "the person I invited to come with me could not attend." Regarding her request for the presence of this person, she'd advised him that, "[a]s you may or may not know, I had been wearing a heart monitor for 21 days. I am under the care of my doctor at this time. I would be more comfortable meeting with you if the medical person is with me. It is purely precautionary on my part." Ibid. Bruno added that while Bevere had been agreeable to moving the date of the conference, it had not been rescheduled because the Board had directed her to undergo medical and psychological examinations.

Bruno attributed her delay in undergoing the exams to the fact that she had not immediately received this tribunal's order of June 22, 2010. Exhibit P-9, supra. However, she tried to schedule these exams on the day she received it. While the first two psychiatrists she called "refused to meet" with her, she was able to schedule an appointment with the third for September 9, 2010. In the meantime, she saw the cardiologist on August 4, 2010.¹⁰

⁹ Also introduced into evidence as Exhibit R-4.

¹⁰ The psychiatric evaluation by Dr. Charles F. Martinson, dated September 15, 2010, was attached to Mr. Melk's post-hearing brief of May 3, 2011, but not introduced into evidence. No cardiologist report was introduced into evidence or attached to either of the parties' briefs.

Regarding Bevere's concerns over her tardiness and insufficient cafeteria supervision, Bruno acknowledged that she'd been late for cafeteria duty on March 3, 2009. However, she explained that she'd been helping a student with an assignment in her classroom, and if she had been late, it had not been for seventeen minutes; it could not have been for more than "a couple of minutes." As she recalled, another teacher was also assigned to cafeteria duty that day, and she did not know "beforehand" that this other teacher was not going to be there. She also denied having been warned about being late for cafeteria duty the month before.

Bruno also acknowledged that seventeen of her students might have been in her classroom without supervision for a period of time on March 3, 2009. However, she explained that the school store, which was "right around the corner" from her classroom, was open at the time and being operated by middle school students, who had to be supervised as well. She would "periodically check on them, see if they needed anything, and go back to my room." Consequently, it was "possible they were momentarily left unsupervised."

Although her oversight of the school store meant leaving a group of students unsupervised, she explained that she didn't need permission to do such things because it was "common practice" during unit lunch. Teachers did not always stay in their classrooms and the students could eat lunch anywhere they wanted. Consequently, teachers often had students in their classrooms, in the hallways, or in the courtyard, and there wasn't always supervision.

Bruno further testified that she had started the Future Business Leaders of America club at South Hunterdon Regional High School the year she became a faculty member. In fact, she'd received an award for her thirty years of dedication and service to that organization during the 2007-2008 school year.

In preparation for the group's 2009 convention, Bruno said that she'd submitted seven field trip request forms dated on or about September 25, 2008, Exhibit R-7A. She admitted that they had not been fully filled out, but explained that they could not be

completed because there were "unknowns." These forms, and other field trip request forms like them, Exhibit R-8, were submitted sufficiently in advance of the trip to obtain approval. They were frequently amended to reflect changes in the arrangements such as a change of location made by the sponsor.

In this particular instance, the hotel had to be changed because the State Officer Team was staying at the Sheraton and one of her students, who was running for state-wide office, told her on March 9, 2009, two days before the start of the convention, that his room was going to be at the Sheraton. She then moved everyone to the Sheraton because she wanted all of her students to stay at the same hotel. Although she fully intended to inform the administration of the change, she was "not given any opportunity because it happened too quickly." She would have reported it to Kendig if she'd had the time. Then she received Gartenberg's letter of March 10, 2009, and realized that the administration, which had her cell phone number on file and could have called her in case of emergency, was already aware of it. Since Gartenberg "never asked for an explanation, I didn't offer one. I [didn't] think it would've made much difference if I told them why or why it didn't happen."

Tenure is designed to aid in the establishment of "a competent and efficient school system" by affording teachers a measure of security in the ranks they hold after years of service. Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949). It protects teachers from arbitrary dismissal for "unfounded, flimsy or political reasons." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982). Toward that end, N.J.S.A. 18A:6-10 provides that no tenured teacher shall be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause."

The Board of Education bears the burden of establishing the truth of the charges against a teacher by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Preponderance may be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Proof "need not

have the attribute of certainty, but it must be well founded in reason and logic.” Lesniewski v. W.B. Furze Corp., 308 N.J. Super. 270 (App. Div. 1998) (citation omitted). In other words, the evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Precisely what is needed to satisfy this burden must be judged on a case by case basis.

The term unbecoming conduct is “elastic” and has been broadly defined to include any conduct “which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services.” Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). Behavior rising to the level of unbecoming conduct “need not be predicated upon the violation of any particular rule of regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.” Hartman v. Police Dep’t of Ridgewood, 258 N.J. Super. 22, 40 (App. Div. 1992).

Given the position of public trust in which their profession places them, teachers are held to certain prescribed standards of behavior. As the Commission stated in In the Matter of the Tenure Hearing of Jacque L. Sammons, School Dist. of Black Horse Pike Reg., Camden County, 1972 S.L.D. 302:

[T]hey are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. ... Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.

[Id. at 321.]

Having completed a comprehensive review of the record in this matter, I conclude that the South Hunterdon Regional School District Board of Education has met its burden and established that Joanne Bruno engaged in conduct unbecoming a teacher.

Although it is possible that Bruno had a legitimate medical condition of some concern to her at the time of the post-observation conference, the excuses, changes of rationale, and refusal to provide documentation substantiating her condition create a very strong inference that she simply did not want to attend. After initially requesting that an unspecified medical person be permitted to attend the conference, she postponed the scheduled meeting when she learned that the as yet unidentified person was unavailable on that date. Had she actually desired the presence of Liz Hendricks in her capacity as a nurse, she could easily have said so in the first instance. By the same token, since she was entitled to have a union representative present at the conference, she simply could have informed Bevere that Ms. Hendricks, who happened to be the representative, was unavailable. In fact, Superintendent Gartenberg testified that had she "known up front" that the unidentified medical person was in fact the school nurse, and not a private physician, "there might not have been a problem."

Later, when asked to provide medical records or other documentation of her previously undisclosed condition, she declined and advised Bevere that she would attend the conference alone. Pressed to provide the documentation and also undergo the examinations the Board was statutorily entitled to seek, she made one excuse after another, ultimately filing a petition of appeal with the Department of Education. Though she agreed to submit to the examinations, she breached the agreement and forced the Board to seek redress. As a result, the Board requested, and this tribunal issued, an order on June 22, 2010, directing her to make appointments with and be examined by certain named physicians. Still, Bruno objected to the cardiologist and selection of psychiatrists that had been chosen. It was not until July 28, 2010, approximately sixteen months after the Board issued its March 11, 2009 resolution, that the Board received notice that the appointments had been made.

The matter of In re Ingram, EDU 9068-01, Initial Decision (May 17, 2002), adopted, Comm'r (June 27, 2002) <<http://lawlibrary.rutgers.edu/oal/search.html>>, is not dissimilar to the present dispute. In Ingram, a superintendent made several attempts to schedule a post-observation conference with a tenured teacher he had observed. A

week after the January 11, 2001, observation, Ingram notified the superintendent that she would be too busy to meet with him until January 29, 2001. The superintendent, in turn, advised her that the conference had been scheduled for January 22, 2001, and that any further postponement would constitute direct insubordination. When Ingram failed to appear, the principal found and escorted her to his office for a conference with the superintendent. However, Ingram refused to participate in the conference and walked out of the office.

The superintendent recommended that Ingram be suspended until such time as she underwent medical and psychiatric examinations, and on February 12, 2001, the board of education passed a resolution to that effect. Ingram did not formally contest the board's resolution, but did hire a lawyer who requested time for Ingram to decide whether to retire from her teaching position. On April 26, 2001, the board notified Ingram that she had to make her retirement decision within seven days or the examinations would be scheduled and her failure to cooperate would constitute gross insubordination. On May 3, 2001, Ingram agreed to undergo the examinations, but failed to schedule any appointments. The board contacted her again on June 4, 2001, but to no avail, and filed tenure charges against her in August 2001. Following a hearing, Administrative Law Judge Margaret Hayden determined that the board had met its burden of proof that Ingram's behavior in connection with the post-observation conference and the medical and psychiatric examinations constituted insubordination and warranted her removal from her teaching position.

Here, Bruno postponed her post-observation conference, not because she was too busy, but rather by asserting a medical condition that she could not or would not substantiate. This assertion created enough concern on the part of the Board that the conference was put off indefinitely. Moreover, she refused to comply with the Board's March 11, 2009, resolution, not because she was mulling retirement, but rather because she did not believe she was under a legal obligation to comply. After her legal challenge to the legitimacy of the resolution proved unsuccessful, she agreed to resolve the then-pending petition of appeal by undergoing the examinations, only to renege and thereby force the Board to secure an order directing her to cooperate. And even then, she

objected to the doctors that had been selected. The difference between Bruno's conduct and that of Ingram is that Bruno initially asserted a medical condition to delay her conference and then exercised due process in an attempt to prevent disclosure of that condition. And although it may be argued that her refusal to comply with legally issued directives and otherwise honor her legal obligations constituted insubordination, it did not rise to the level of defiantly walking out of a meeting with the principal and superintendent before that meeting could begin. However ill-advisedly, she used the legal tools at her disposal.

The Board has also proven by a preponderance of the evidence that Bruno engaged in conduct unbecoming a teacher by failing to notify school authorities when she changed the hotel arrangements for the FBLA club's field trip to the State convention. Among other things, Bruno stated that she did not have sufficient time to report the change. However, by her own admission, the South Hunterdon High School student who was running for vice president told her that he had been assigned to the Sheraton on March 9, 2009—two days before their scheduled departure. She did not state exactly when she effectuated the change in hotels; however, whether it was on March 9 or March 10, she certainly could, and should, have notified the administration in advance, if not at the time, of making the change. The fact that the Board learned of the change on its own and, as it turned out, did not have to contact a student in case of an emergency, while fortunate, is irrelevant. It did not obviate her responsibility to notify the Board of such an important change in arrangements.

Although not quite as serious as the foregoing, also constituting unbecoming conduct was Bruno's March 3, 2009, failure to properly supervise her students on two separate occasions. According to Bevere, on one of these occasions Bruno was seventeen minutes late for cafeteria duty, during which time she was supposed to be walking around the room and supervising students. He also stated that he'd warned her about such conduct in the past. Bruno, while admitting that she had in fact been late, disputed the number of minutes she'd been tardy and denied having been previously warned about such conduct. She also asserted that she'd been late because she'd been helping a student with an assignment and did not know that another faculty

member assigned to this duty would not be present that day. Although these assertions may explain her conduct, they certainly do not excuse it.

Bevere also claimed that on the second occasion, Bruno left some of her students unsupervised in her classroom for eleven minutes. Bruno admitted that it was possible students were “momentarily left unattended” in her classroom,” but claimed it was necessitated by her responsibility for the middle school students who were contemporaneously managing the school store “right around the corner” during unit lunch. Not leaving well enough alone, she also asserted that it was “common practice” for teachers to leave students unsupervised in classrooms during unit lunch. Even in the latter was true, it was in contravention of established school policy. Moreover, however flawed it may have been, no reasonable interpretation of the unit lunch policy could or should have allowed Bruno to leave the younger middle school students managing the school store alone and unsupervised for any period of time.

Charges of inadequate supervision were also filed against a tenured teacher who on one occasion forced a student to leave and sit alone outside the classroom on one occasion, and left his class unsupervised for twenty-three minutes on another. In re Tenney, 1983 S.L.D. 836. Sustaining the charges, Administrative Law Judge Bruce Campbell concluded that while the teacher’s conduct was unbecoming, “in the hierarchy of wrongdoings in which a teacher may be involved, certainly the conduct of Tenney is relatively minor.” Id. at 841. Consequently, he determined that the teacher’s behavior¹¹ warranted a penalty short of dismissal and ordered that Tenney be reinstated to his tenured position and provided with any emoluments and salary which he otherwise would have received less three months of his salary.” Id. at 842.

The Board has alleged that Bruno also engaged in conduct unbecoming a teacher based of chronic tardiness arriving for school in the morning and reporting for cafeteria duty during unit lunch. To be sure, Bevere testified that after “two or three” verbal warnings, by letter dated December 23, 2008, Exhibit P-17, supra, he warned

¹¹ The teacher was also found to have improperly left a classroom to use the telephone (though there was another teacher in the classroom to supervise the students) and improperly used the school’s envelopes and postage.

Bruno that "arriving to school on time is crucial to the safety and instruction of your students," ibid., and asked her to call his office to schedule a meeting for a discussion of the matter. Similarly, Gartenberg testified that Bruno was late for school more than "once or twice a week," although she did sometimes notify the school that she was going to be late.

However, the testimony of these two administrators, while credible, was rather broad and lacking in specificity. For example, neither one mentioned or discussed any provisions in the district's teachers manual or collective bargaining agreement concerning attendance, reporting times, or tardiness, much less any sign in sheets that would have documented the number of times and total minutes Bruno was late. Also missing was any evidence establishing the amount of compensation the district had to pay the covering teachers. Thus, even though Bruno failed to dispute the allegations, there is no way to determine the gravity of this conduct. Consequently, I cannot find that Bruno was chronically late arriving for school in the morning or unit lunch in the afternoon.

Finally, the Board has met its burden of proving that Bruno engaged in conduct unbecoming a teacher by failing to follow the district's lesson plan policy. As Bevere testified, standard practice requires that a teacher ensure that her lesson plans are available for a substitute teacher should the need arise. More specifically, the lesson plans and class attendance lists should both either be on file in the main office or in the teacher's desk drawer. However, neither Bruno's lesson plans nor class attendance lists could be found in either location. And then, after Bruno was contacted and asked to send them in via email, the documents could not be immediately be opened, which caused additional delay. Still, "in the hierarchy of wrongdoings," this conduct, without more, should not warrant her dismissal. ibid.

After careful review of the record before me, I conclude that the South Hunterdon Regional School District Board of Education has established that from February 2009 through and including June 2010, Joanne Bruno engaged in multiple acts constituting

conduct unbecoming a teacher between. Nevertheless, I also conclude that removal is not the appropriate penalty.

Bruno has been a teacher in the District and advisor of its FBLA club for approximately thirty-one years. And, with the exception of the period of time in question, she has, from all appearances, been a successful teacher who enjoyed a good rapport with her students. As Superintendent Gartenberg noted in one of her classroom observation reports, "Ms. Bruno demonstrates concern and respect for her students. She demonstrates an awareness of the uniqueness of each student. Teacher-student interactions are friendly and demonstrate general warmth, caring and respect." 2007-2008 Tenured Summative Assessment Report, Exhibit R-1. However, the relationship between Mr. Bevere and Ms. Gartenberg on the one hand, and Ms. Bruno on the other, became irreparably strained sometime during the 2008-2009 school year, and given the tone of particularly Ms. Bruno's correspondence early on in the dispute, perhaps well before February 2009.¹² Unfortunately, from that point on, things went downhill fast and resulted in the filing of the present matter.

Upon balancing Ms. Bruno's successful teaching history with the nature and relatively brief period of the problematic conduct, I conclude that a one-year suspension and withholding of her annual increment for the following year is appropriate.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

¹² During the first contested case between the parties, there was anecdotal evidence that Ms. Bruno was very active in the teacher's union, possibly as the president.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 14, 2011
DATE



ISRAEL D. DUBIN, ALJ, t/a

Date Received at Agency:

Date Mailed to Parties:

/bdt

APPENDIX

WITNESSES

For Petitioner:

James Bevere

Nancy Gartenberg

For Respondent:

Joanne Bruno

EXHIBITS

For Petitioner:

- P-1 Board Resolution
- P-2 Dzwilewski Letter to Bruno dated March 13, 2009
- P-3 Klausner Letter to Dzwilewski dated March 19, 2009
- P-4 Petition for Declaratory Ruling with attachments
- P-5 Order Denying Motion to Dismiss dated March 15, 2010
- P-6 Dzwilewski Letter to ALJ dated May 25, 2010
- P-7 Dzwilewski Letter to ALJ dated June 1, 2010
- P-8 Dzwilewski Letter to ALJ dated June 15, 2010
- P-9 Order dated June 22, 2010
- P-10 Dzwilewski Letter to Rowland dated June 30, 2010
- P-11 Rowland Letter to Dzwilewski dated June 30, 2010
- P-12 Dzwilewski Letter to Klausner dated July 1, 2010
- P-13 Dzwilewski Letter to Klausner dated July 19, 2010
- P-14 Rabinowitz Letter to ALJ dated July 16, 2010
- P-15 Klausner Letter to ALJ dated July 28, 2010
- P-16 Klausner Letter to Dzwilewski dated July 28, 2010
- P-17 Bevere Letter to Bruno dated December 23, 2008
- P-18 Kendig email to Bruno dated January 8, 2009
- P-19 Kendig email to Bruno dated January 9, 2009

- P-20 Kendig email to Bruno dated January 12, 2009
- P-21 Tenure Classroom Observation Report dated January 21, 2009
- P-22 Bevere email to Gartenberg dated February 25, 2009
- P-23 Bevere Letter to Bruno dated February 26, 2009
- P-24 Bruno email to Bevere dated February 26, 2009
- P-25 Bruno email to Bevere dated February 27, 2009
- P-26 Bevere Memo to Gartenberg dated February 18, 2009
- P-27 Bevere Letter to Bruno dated March 4, 2009
- P-28 Bevere Letter to Bruno dated March 4, 2009
- P-29 Undated Bruno email to Bevere
- P-30 Gartenberg Letter to Bruno dated March 9, 2009
- P-31 Bevere Letter to Gartenberg dated March 10, 2009
- P-32 Gartenberg Letter to Bruno dated March 10, 2009
- P-33 Tenured Teacher Summative Assessment Report dated June 15, 2009
- P-34 Professional Development Plan dated June 19, 2009
- P-35 Co-Curricular Advisor's Evaluation Form dated June 8, 2009

For Respondent:

- R-1 Tenured Summative Assessment Report 2007-2008
- R-1a Tenure Classroom Observation Report
- R-2 Coverage Chart
- R-3 CST Pre-Observation Report
- R-4 Emails Re: Post-Observation Conference, February 23, 24 & 25, 2009
- R-5 SHREA Ed. Council Building Concerns February 2009
- R-6 Email dated March 9, 2009
- R-7 Field Trip Request Form dated September 25, 2008
- R-7a Field Trip Request Forms
- R-8 Field Trip Request Forms with attachments

#38-12

GREGORY R. CEA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE	:	DECISION
BOARD OF EXAMINERS,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Pro-se petitioner appealed the respondent's denial of his request for the issuance of a Teacher of Career and Technical Education: Carpentry Certificate of Eligibility for failure to attain a passing score on the required Praxis I exam. Petitioner contends that an allowance of five percent would give him a passing score on the Praxis, and that he should be allowed to substitute work experience for a passing score on the Praxis pursuant to *N.J.A.C.* 6A:9-17.13. The respondent filed a motion to dismiss the appeal in lieu of filing an answer to the petition.

The ALJ found, *inter alia*, that: pursuant to *N.J.A.C.* 6A:9-5.16(a), the respondent issues the appropriate certificate upon the candidate's completion of all certification requirements; the requirements for career and technical education certification are set forth in *N.J.A.C.* 6A:9-11.2; for an experience-based endorsement, a candidate must pass a State-adopted test of basic reading, writing and mathematical skills; and, pursuant to *N.J.A.C.* 6A:9-17.16(a), the respondent may not permit an applicant to substitute education and/or experience for a passing score on any State-required test. The ALJ concluded that petitioner does not meet the requirements for issuance of a Teacher of Career and Technical Education: Carpentry Certificate of Eligibility and accordingly ordered the petition dismissed.

Upon review, the Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33 – adopted the Initial Decision of the OAL as the final decision in this matter and dismissed the petition. In so doing, the Deputy Commissioner noted that denial of certification to petitioner is compelled by law as petitioner has not satisfied the basic eligibility requirements for the certificate he seeks.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

January 30, 2012

OAL DKT. NO. EDU 8382-11
AGENCY DKT. NO. 180-7/11

GREGORY R. CEA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE	:	DECISION
BOARD OF EXAMINERS,	:	
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were timely filed however, there is no indication that petitioner sent a copy of his exception letter to either counsel for the State Board of Examiners or the Administrative Law Judge (ALJ) as required by *N.J.A.C. 1:1-18.4(a)*.

Although not contesting that he failed to meet the certification requirements of Teacher of Career and Technical Education: Carpentry Certificate of Eligibility, petitioner's exceptions urge that the current rules governing the obtaining of this certificate be amended. Petitioner contends that Praxis I does not test for the detailed knowledge required to teach carpentry, and that his four-year carpentry certificate from the New Jersey Department of Labor – issued after successful completion of 8000 hours of carpentry and construction technology – along with his 37 years of carpentry and construction experience, should be accepted as sufficient to qualify him as a teacher of Career and Technical Education.

Upon full review and consideration, the Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A. 18A:4-33* – concurs with the ALJ that summary

decision with respect to the denial of certification to petitioner is appropriately granted to the State Board of Examiners as such denial is compelled by law.

In so concluding, the Deputy Commissioner is cognizant of the following regulatory provisions – enacted by the State Board of Education – attendant to this matter: 1) *N.J.A.C.* 6A:9-11.2(c)(1)(i), which sets forth the eligibility requirements for the experience-based certificate petitioner is seeking, clearly states that “[a]ll candidates for an experienced-based endorsement shall pass a state-adopted test of basic reading, writing, and mathematics skills...” (Praxis exam); 2) pursuant to *N.J.A.C.* 6A:9-17.16(b), the Board of Examiners is precluded – under any circumstance – from waiving this certification requirement; and 3) *N.J.A.C.* 6A:9-17.16(a) clearly and unambiguously precludes the State Board of Examiners from allowing an applicant to substitute experience for a failing score on the state Praxis exam. It is uncontested in this matter that petitioner did not achieve a passing score on the Praxis exam. Consequently, as petitioner has not satisfied the basic eligibility requirements for the certificate he seeks, the State Board of Examiners correctly denied his application.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.¹


DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 1/30/12

Date of Mailing: 1/31/12

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36 (*N.J.S.A.* 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 08382-11

AGENCY DKT. NO. 180-7/11

GREGORY R. CEA,

Petitioner,

v.

NEW JERSEY STATE BOARD OF EXAMINERS,

OFFICE OF LICENSURE AND CREDENTIALS,

Respondent.

Gregory R. Cea, pro se

Caroline Jones, Deputy Attorney General, for respondent (Paula T. Dow,
Attorney General of New Jersey, attorney)

Record Closed: December 14, 2011

Decided: December 14, 2011

BEFORE RICHARD McGILL, ALJ:

Gregory R. Cea (petitioner) appeals from a decision by the State Board of Examiners (Board) to deny his request for the issuance of a Teacher of Career and Technical Education: Carpentry Certificate of Eligibility. The Board issued its Decision on May 18, 2011, and petitioner requested a hearing by letter dated June 11, 2011, to the Commissioner of Education.

On July 14, 2011, the Board filed a motion to dismiss in lieu of an answer, and the matter was transmitted to the Office of Administrative Law on July 15, 2011, for determination as a contested case. Petitioner submitted a response to the motion on October 21, 2011, and the Board replied by letter brief received on November 1, 2011.

MOTION TO DISMISS

A. Facts

A motion to dismiss filed in lieu of an answer should be granted where the petition has advanced no cause of action even if petitioner's factual allegations are accepted as true. N.J.A.C. 6A:3-1.10. Based upon petitioner's request for a hearing and his response to the motion to dismiss, petitioner's factual allegations are as follows: Petitioner's credentials include a four-year training program, and upon completion thereof, petitioner received a Certificate of Carpentry issued by the New Jersey Department of Labor. The training program does not require college credits, and therefore, petitioner does not have a grade point average (GPA). Petitioner has thirty-seven years of experience in the carpentry trade.

Petitioner is now seeking issuance of a Teacher of Career and Technical Education: Carpentry Certificate of Eligibility. As part of the application process, petitioner took a State test (Praxis exam) for issuance of a Career and Technical Education Endorsement. Petitioner did not attain a passing score, but he came very close. With an allowance of an additional five percent, petitioner would have a passing score needed for certification. Nevertheless, petitioner was denied certification for lack of a passing score on the Praxis exam.

B. Law and Analysis

The Board issues the appropriate certificate upon the candidate's completion of all certification requirements. N.J.A.C. 6A:9-5.16(a). Requirements may include course

work, degree, tests, fees, GPA and all certificate rules pursuant to N.J.A.C. 6A:9-8, 11, 12, and 13. Ibid.

The requirements for career and technical education certification are set forth in N.J.A.C. 6A:9-11.2. These requirements differ depending on whether the candidate seeks a certificate of eligibility based on experience, N.J.A.C. 6A:9-11.2(c)1i; a baccalaureate degree or higher, N.J.A.C. 6A:9-11.2(c)1ii; or an associate's level degree, N.J.A.C. 6A:9-11.2(c)1iii. For an experience-based endorsement, the candidate must pass a State-adopted test of basic reading, writing, and mathematical skills and an examination in physiology, hygiene, and substance abuse issues. N.J.A.C. 6A:9-11.2(c)1i. If the candidate seeks an endorsement in a regulated occupation for which a State-issued occupational license, certificate or registration is required, the candidate must hold the State-issued occupational license, certificate, or registration. Ibid. Further, the candidate must have employment experience, self-employment, or military experience. Ibid. For degree-based endorsements, the requirements are somewhat different and include provisions related to the candidate's GPA. N.J.A.C. 6A:9-11.2(c)1ii.

If an applicant has areas of deficiency in the requirements for certification, the applicant may provide the Board with evidence of alternative education or experience that the applicant believes is equivalent to the area(s) of deficiency. N.J.A.C. 6A:9-17.13(a). The Board shall not permit an applicant to substitute education and/or experience for a passing score on any State-required test. N.J.A.C. 6A:9-17.16(a).

General requirements for certificates of eligibility are set forth in N.J.A.C. 6A:9-8.1. One subsection, N.J.A.C. 6A:9-8.1(a), provides in part as follows: "Except as indicated in N.J.A.C. 6A:9-11 and (b) below, to be eligible for a [certificate of eligibility] CE in instructional areas, the candidate shall: 1. Hold a bachelor's or an advanced degree from a regionally accredited college or university" This section further provides in N.J.A.C. 6A:9-8.1(f) as follows:

A candidate with a GPA that is 3.50 or higher, when a GPA of 4.00 equals an A grade, but whose score in the

appropriate State test of subject matter knowledge falls below the passing score by no more than five percent will meet the requirements of (a)2 and 4 above. This alternative requirement to (a)2 and 4 above should not be construed as a waiver to N.J.A.C. 6A:9-17.16.

Subsection (a)2 relates to a candidate's cumulative GPA, and subsection (a)4 pertains to knowledge of basic pedagogical skills.

Petitioner's first argument is that the flexibility rule in N.J.A.C. 6A:9-8.1(f) should be applied to his failing score on the Praxis exam. Petitioner contends that an allowance of five percent would give him a passing score on the Praxis exam. The difficulty with petitioner's argument is that N.J.A.C. 6A:9-8.1 pertains to candidates who hold academic degrees and would have a GPA. This regulation is not applicable to candidates who seek a certificate of eligibility based on experience. The provisions which are applicable to candidates who seek a certificate of eligibility based on experience are set forth in N.J.A.C. 6A:9-11.2, but they do not contain a flexibility rule. It follows that petitioner's argument is without merit.

Petitioner next argues that he should be allowed to substitute work experience for a passing score on the Praxis exam pursuant to N.J.A.C. 6A:9-17.13. In accordance with this regulation, an applicant may substitute alternative education and/or experience for an area of deficiency. The difficulty with this argument is that in accordance with N.J.A.C. 6A:9-17.16(a) the Board cannot permit an applicant to substitute education and/or experience for a passing score on any State-required test. Further, the Board may not waive any test requirements for certification. N.J.A.C. 6A:9-17.16(b). It follows that petitioner's argument is without merit.

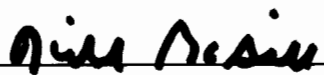
Based upon the above, I **CONCLUDE** that petitioner does not meet the requirements for issuance of a Teacher of Career and Technical Education: Carpentry Certification of Eligibility. Accordingly, it is **ORDERED** that the appeal in this matter is dismissed.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

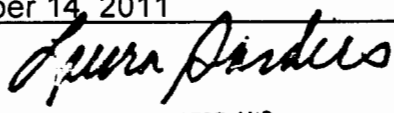
December 14, 2011
DATE


RICHARD MCGILL, ALJ

Date Received at Agency:

December 14, 2011

Date Mailed to Parties: **DEC 15 2011**
lr


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

#39-12

LARRY GRAHAM, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

NEW JERSEY STATE DEPARTMENT : DECISION
OF EDUCATION, CRIMINAL HISTORY
REVIEW UNIT, :

RESPONDENT. :

SYNOPSIS

Petitioner – a school bus driver – appealed the Department’s determination to suspend his school bus endorsement pursuant to *N.J.S.A.* 18A:39-28 after an alleged incident in which a child was left on the school bus in January 2011 because petitioner failed to conduct the mandated visual inspection at the end of his route. Petitioner asserted that his bus aide did not pay attention to the count of children on his bus, and that he was not at fault for this reason. He also stated that he was sorry for the incident, and requested another solution to the situation rather than a suspension of his license. Respondent filed a motion to dismiss in lieu of an answer to the petition.

The ALJ found, *inter alia*, that: on January 10, 2011, petitioner failed to discover that a child remained on his bus, notwithstanding his obligation under *N.J.S.A.* 18A:39-28 to properly inspect the bus at the end of his route; petitioner failed to advance a cause of action or offer any grounds that would entitle him to relief; petitioner also failed to raise any material facts in dispute that would warrant an evidentiary hearing; petitioner did not contest the fact that a child was left on his bus; and, given the mandatory nature of the penalty for a first-time violator of the statute, a six-month suspension is the only possible outcome in this case. Accordingly, the ALJ granted respondent’s motion to dismiss and ordered petitioner’s “S” endorsement suspended for six months.

Upon full review and consideration of the record, the Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33 – concurred with the findings and determinations of the ALJ. Accordingly, the petition was dismissed and the respondent was directed to notify the Motor Vehicle Commission of its obligation to suspend petitioner’s school bus endorsement pursuant to *N.J.S.A.* 18A:39-28 et seq., and to notify petitioner’s employer that he is ineligible for the period of suspension for continued employment as a school bus driver.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

January 30, 2012

OAL DKT. NO. EDU 8439-11
AGENCY DKT. NO. 168-6/11

LARRY GRAHAM, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 NEW JERSEY STATE DEPARTMENT : DECISION
 OF EDUCATION, CRIMINAL HISTORY :
 REVIEW UNIT, :
 :
 RESPONDENT. :

Upon review of the record of this matter and the Initial Decision of the Office of Administrative Law, the Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33 – adopts the Initial Decision granting respondent’s motion to dismiss as the final decision in this case, for the reasons set forth by the Administrative Law Judge.

Accordingly, the petition is dismissed. Respondent is directed to notify the Motor Vehicle Commission of its obligation, pursuant to *N.J.S.A.* 18A:39-28 *et seq.*, to suspend petitioner’s school bus “S” endorsement on his driver’s license for six months and to notify petitioner’s employer that he is ineligible – for the period of suspension – to continue employment as a school bus driver.

IT IS SO ORDERED.¹


DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 1/30/12
Date of Mailing: 1/31/12

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36. (*N.J.S.A.* 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 08439-11

AGENCY DKT. NO. 168-6/11

LARRY GRAHAM,

Petitioner,

v.

**NEW JERSEY STATE DEPARTMENT
OF EDUCATION, OFFICE OF CRIMINAL
HISTORY REVIEW UNIT,**

Respondent.

Larry Graham, petitioner, pro se

Caroline Jones, Deputy Attorney General, for respondent (Paula T. Dow,
Attorney General of New Jersey, attorney)

Record Closed: November 4, 2011

Decided: December 15, 2011

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey Department of Education, Criminal History Review Unit (the CHRU or respondent), intends to suspend petitioner's "S" endorsement on his driver's license, permitting him to operate a school bus. The CHRU intends to take this action

due to an incident in which it is alleged that petitioner left a child on the school bus that he drove. On June 7, 2011, the CHRU notified petitioner by letter of its determination that on January 10, 2011, in Essex County, a child was left on the school bus to which petitioner was assigned, notwithstanding petitioner's obligation pursuant to N.J.S.A. 18A:39-28 et seq. to conduct a visual inspection at the end of his transportation route to assure that no pupil had been left on the bus. The letter further informed petitioner that, as this was petitioner's first offense, the CHRU intended to suspend his "S" endorsement to operate a school bus for six months, and informed petitioner of his ability to request, through the filing of a petition of appeal, an opportunity to be heard as to why the CHRU should not notify the Motor Vehicle Commission of the suspension of petitioner's endorsement. On or about June 20, 2011, petitioner filed a Petition of Appeal. In response, respondent filed a motion to dismiss in lieu of an answer. In support of its motion, respondent filed a brief and relies on the Petition of Appeal submitted by petitioner, which attached various letters. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on July 19, 2011. On October 31, 2011, petitioner submitted a letter in opposition to the motion. Subsequently, respondent submitted a reply brief and the record closed upon receipt of that submission.

FACTUAL DISCUSSION

Petitioner is a school bus driver employed by Madison Coach. See letter dated May 25, 2011, attached to Petition of Appeal. After an investigation, the CHRU determined that on January 10, 2011, a child was left on the school bus to which petitioner was assigned in violation of N.J.S.A. 18A:39-28 et seq. In his Petition of Appeal, petitioner does not dispute that a child had been left behind on his school bus, but, instead, states that he is "sorry for the unfortunate incident that happened" and asks "for another solution to this situation." In the letter that petitioner filed in opposition to the motion, petitioner asserts that he visually inspected the bus, and expresses the view that he was not at fault and that the incident would not have happened had his bus aide paid attention to the count of the children.

LEGAL DISCUSSION AND CONCLUSIONS

This matter arises under the School Bus Safety Act, N.J.S.A. 18A:39-26, et seq., which imposes certain affirmative duties on a school bus driver. More particularly, N.J.S.A. 18A:39-28 unambiguously directs:

A school bus driver shall visually inspect the school bus to which he is assigned at the end of the transportation route to determine that no pupil has been left on the bus.

“In the event that, after notice and opportunity to be heard, a school bus driver is found to have left a pupil on the school bus at the end of his route, his school bus endorsement shall be . . . suspended for six months, for a first offense; or . . . permanently revoked, for a second offense.” N.J.S.A. 18A:39-29 (emphasis added). In situations where the child “is harmed as the result of foreseeable danger and the driver is found . . . to have acted with gross negligence, his school bus endorsement shall be permanently revoked.” N.J.S.A. 18A:39-30.

“Where a school bus driver has been notified by the [CHRU] that a determination has been made that suspension or revocation, as the case may be, of the driver’s school bus endorsement is warranted pursuant to N.J.S.A. 18A:39-28 et seq. because a child was left on the school bus to which the driver was assigned . . . , the driver may contest such determination through the filing of a petition of appeal” N.J.A.C. 6A:3-13.1(a). However, N.J.A.C. 6A:3-13.1(b) limits the aspects of the CHRU’s determination that may be contested by the driver and states:

The following aspects of the Department’s determination may be contested:

1. That a pupil was left on the bus at the end of the driver’s route;
2. That the incident in question was the driver’s second offense;
3. That the pupil was harmed as a result of foreseeable danger; and
4. That the driver acted with gross negligence.

In the within matter, the criteria for contesting the CHRU's determination set forth in 2 through 4 above are not applicable. In short, the CHRU does not assert that the incident amounted to a second offense or that petitioner's endorsement should be permanently revoked because a pupil was harmed as the result of a foreseeable danger and petitioner acted with gross negligence. Accordingly, the pivotal issue presented is whether or not a child had been left on petitioner's bus at the end of his route.

The statute that forms the basis for the proposed suspension reveals that there are limited facts that must be established to substantiate a violation warranting the imposition of a suspension. Specifically, it is necessary to establish that the petitioner was the driver of the bus in question on the date of the incident and that a child was left on the bus after the completion of the route. Firman v. N.J. Dep't of Educ., Office of Criminal History Review Unit, EDU 4415-10, Initial Decision (February 7, 2011), adopted, Comm'r (March 24, 2011) <<http://lawlibrary.rutgers.edu/oal/search.shtml>>; Dacres v. N.J. Dep't of Educ., Office of Criminal History Review Unit, EDU 2278-09, Initial Decision (July 26, 2010), adopted, Comm'r (September 8, 2010) <<http://lawlibrary.rutgers.edu/oal/search.shtml>>. In this regard, "[e]videntially, that a child is left on a bus at the end of the route is itself at the very least prima facie evidence of a failure on the part of the driver to properly inspect the bus at the end of the route." Firman, supra, EDU 4415-10, Initial Decision (February 7, 2011) <<http://lawlibrary.rutgers.edu/oal/search.shtml>>; Dacres, supra, EDU 2278-09, Initial Decision (July 26, 2010) <<http://lawlibrary.rutgers.edu/oal/search.shtml>>.

If a school bus driver is found to have left a child on the school bus at the end of his or her route, the statute provides for the mandatory imposition of a six-month suspension of the driver's school bus endorsement for a first offense. N.J.S.A. 18A:39-29; see Firman, supra, EDU 4415-10, Initial Decision (February 7, 2011) <<http://lawlibrary.rutgers.edu/oal/search.shtml>>; Dacres, supra, EDU 2278-09, Initial Decision (July 26, 2010) <<http://lawlibrary.rutgers.edu/oal/search.shtml>>. Under the terms set by the Legislature, where a violation has been established no consideration may be given as to the circumstances of the event or the driver in determining the penalty to be imposed. Garner v. N.J. Dep't of Educ., Criminal History Review Unit,

EDU 06655-08, Initial Decision (April 3, 2009) <<http://lawlibrary.rutgers.edu/oal/search.shtml>>, adopted, Comm'r (May 1, 2009) <<http://www.nj.gov/education/legal/>>. "The mandatory nature of the sanction may fairly be read as an indication of the Legislature's strong reaction to any such act on the part of someone entrusted with the care and safety of students, who in many instances are of tender years." Garner, supra, EDU 06655-08, Initial Decision (April 3, 2009) <<http://lawlibrary.rutgers.edu/oal/search.shtml>>. Inasmuch as the penalty for such an abrogation of duty is set by statute, it is apparent that the opportunity to be heard refers to an opportunity to contest the determination that a child was left behind, and not an opportunity to argue for waiver or leniency of the penalty. See Garner, supra, Final Decision at n. 1 (May 1, 2009) <<http://www.nj.gov/education/legal/>>. And, matters such as the adequacy of the bus driver's inspection or how it came to be that a child was left behind on the bus after a visual inspection are insufficient to raise a material issue of fact warranting an evidentiary hearing. See Lazo v. N.J. Dep't of Educ., Criminal History Review Unit, EDU 12143-10, Initial Decision (August 10, 2011) <<http://lawlibrary.rutgers.edu/oal/search.shtml>>, adopted, Comm'r (September 26, 2011) <<http://www.nj.gov/education/legal/>>.

Against this backdrop, "upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true" N.J.A.C. 6A:3-1.10. Stated differently, dismissal is appropriate if the petition fails to set forth a basis for relief and discovery would not supply any such basis. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005); Sloan v. Klagholtz, 342 N.J. Super. 385, 394 (App. Div. 2001).

In this regard, petitioner does not dispute that he was the driver of the school bus on January 10, 2011. Additionally, the Petition of Appeal, along with petitioner's response to the motion, fails to set forth any facts contesting the CHRU's determination that a child had been left on the bus at the end of his route. Rather, the crux of petitioner's appeal consists of his regrets for the incident and a plea for leniency due to the consequences that would result should his endorsement be suspended. Petitioner further argues that he visually inspected the bus and other persons should bear the

responsibility for the child being left unattended. Simply put, the statute unambiguously directs that the mandatory penalty is triggered if the school bus driver is found to have left a child on the bus at the end of his or her route. As noted, evidence or facts that do not contest the determination that a child was left unattended on the bus are beyond the scope of matters that a driver may contest. See N.J.A.C. 6A:3-13.1(b); Lazo, supra, EDU 12143-10, Initial Decision (August 10, 2011) <<http://lawlibrary.rutgers.edu/oal/search.shtml>>. Further, the statutes evidence an intendment on the part of the Legislature to assign ultimate responsibility to the school bus driver to assure that children are not left on the bus at the end of the route and, thus, the bus driver will be held liable when such circumstance arises.

Based upon the undisputed evidence offered by the respondent, and giving all reasonable inferences to petitioner, I **FIND** that on January 10, 2011, petitioner was the driver of a school bus. I **FIND** that at the end of his route petitioner failed to discover that a child remained on the bus, notwithstanding his obligation to properly inspect the bus pursuant to N.J.S.A. 18A:39-28. Petitioner has failed to advance a cause of action or offer any grounds that will entitle him to relief, and has failed to raise any material facts in dispute that warrant an evidentiary hearing. Rather, given the limited facts that must be established to support a violation of the duty imposed by the Legislature on a school bus driver to properly inspect the bus at the end of a route to assure that no child is left on the bus, and inasmuch as petitioner does not contest that the child was left on his bus, the arguments offered by respondent amply support dismissal of petitioner's Petition of Appeal. And, given the mandatory nature of the penalty for a first-time violator of the statutory mandate, the six-month suspension is the only outcome where the violation is proven. N.J.S.A. 18A:39-29(a).

ORDER

I **ORDER** that respondent's motion to dismiss be and hereby is **GRANTED**. I further **ORDER** that petitioner's "S" endorsement shall be suspended for six months.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 15, 2011
DATE

Date Received at Agency:

Date Mailed to Parties:

DEC 16 2011

Margaret M. Monaco
MARGARET M. MONACO, ALJ

December 15, 2011
John P. Dardis
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

jb

#41-12

ELBERT SMITH, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
CITY OF ORANGE, ESSEX COUNTY, :

RESPONDENT, :

AND :

CURTIS RICHBURG, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
CITY OF ORANGE, ESSEX COUNTY, :

RESPONDENT, :

AND :

MALVINA KOHN, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
CITY OF ORANGE, ESSEX COUNTY, :

RESPONDENT, :

AND :

SAUNDRA GRAY, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
CITY OF ORANGE, ESSEX COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The four petitioners in this consolidated case were employed under tenure as administrators by respondent Board when their positions were eliminated in a reorganization and reduction in force (RIF) effective July 1, 2009. Petitioners asserted entitlement to administrative positions currently held by non-tenured teaching staff members, including several new positions titled Assistant Director which were created during the 2009 reorganization of the Curriculum and Testing Department. Respondent contended that petitioners neither held the certifications required for the positions they seek, nor were entitled to these positions by virtue of their tenure or seniority rights. Candace Wallace, Director of Curriculum and Testing for the respondent, was granted the right to intervene in this case after petitioners alleged that they were entitled to Wallace's position by virtue of their tenure status.

The ALJ found, *inter alia*, that: the petitioners are entitled to any positions in which they hold tenure that are currently held by non-tenured staff members; all of the petitioners held their positions of employment as supervisors under tenure, and petitioner Gray had additionally earned tenure as an Athletic Director; the petitioners correctly asserted that their tenure protection extends to the Assistant Director positions established by the respondent Board in 2009; the additional certification requirements imposed by the Board for these new positions cannot defeat the clear tenure entitlements of the petitioners, as the additional certifications are not necessary to properly develop curriculum in language arts, science or mathematics; the requirement that the Assistant Directors hold appropriate subject-matter certification is reasonable and petitioners do not assert rights to positions for which they are not properly certified as to subject matter; and none of the petitioners are entitled by virtue of tenure to the position of Director of Curriculum and Testing currently held by Candace Wallace. The ALJ concluded that: petitioner Gray is entitled to the position of Athletic Director, retroactive to June 30, 2009; two of the remaining petitioners are entitled to compensation for lost wages and benefits during the 2009-2010 school year due to the respondent's failure to appoint them to one of the Assistant director positions created in 2009; and, as to the position of Assistant Director for Mathematics and Science K-12, the respondent is directed to select between petitioners Richburg and Kohn, and immediately appoint the petitioner deemed better qualified for the position; the petitioner selected shall be compensated for lost salary and benefits retroactive to July 1, 2010.

Upon independent review of the record, the Commissioner, *inter alia*, concurred in part with the ALJ – albeit for different reasons – that Candace Wallace is entitled to serve as Director of Curriculum and Testing. The Commissioner also concurred that Sandra Gray is entitled to the Director of Athletics position, and that additional endorsements – beyond the appropriate subject matter endorsements – are not required for the new positions. The Commissioner went on to modify the ALJ's conclusions with respect to the Assistant Director positions, and directed that these positions be re-titled as Supervisors as there is no need for the district to utilize an unrecognized director title since the job descriptions for the positions in question do not specify that the holders will supervise other supervisors. Accordingly, the Commissioner ordered the Board: to appoint Gray as Athletic Director; to leave Candace Wallace in her role as Director of Curriculum and Testing; to compensate two of the remaining petitioners for lost wages due to its failure to appoint them to one of the new positions in the 2009-2010 school year; and to appoint either petitioner Richburg or petitioner Kohn – recognizing their seniority rights – to the position of Supervisor for Mathematics and Science K-12, and compensate that petitioner for lost salary and benefits retroactive to July 1, 2010.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
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February 1, 2012

OAL DKT. NO. EDU 11566-09, 11567-09, 11568-09 AND 11598-09 (CONSOLIDATED)
AGENCY DKT. NO. 194-8/09, 207-8/09, 192-8/09 AND 203-8/09

ELBERT SMITH, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
CITY OF ORANGE, ESSEX COUNTY, :

RESPONDENT, :

AND :

CURTIS RICHBURG, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
CITY OF ORANGE, ESSEX COUNTY, :

RESPONDENT, :

AND :

MALVINA KOHN, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
CITY OF ORANGE, ESSEX COUNTY, :

RESPONDENT, :

AND :

SAUNDRA GRAY, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
CITY OF ORANGE, ESSEX COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION
DECISION

The record of these consolidated matters and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the petitioners, the Board and intervenor, Candace Wallace.¹ This consolidated matter involves claims by four tenured supervisors whose positions were abolished during reorganization. These petitioners claim an entitlement to the newly created Assistant Director positions, to the Director of Curriculum and Testing position, held by the intervenor, and also to the position of Athletic Director. They do not contend that the Board improperly abolished their supervisory positions, nor are any of the relevant facts concerning the certifications and/or endorsements that are held by each of the petitioners in dispute.

In their exceptions, the petitioners agree with the conclusions of the Administrative Law Judge (ALJ) that Sandra Gray, pursuant to her tenure and seniority rights, is appropriately the Athletic Director under the new reorganization. They agree, as the ALJ found, that each petitioner has the necessary certification and endorsements and each is thus qualified to undertake one of the new titles of Assistant Director. The petitioners only challenge the ALJ's conclusion in which, they assert, she erroneously determined that the petitioners were not entitled to the position of Director of Curriculum and Instruction, which is currently held by Ms. Wallace, who does not have tenure. The petitioners contend that the ALJ incorrectly found that the appropriate certification for the job was the school administrator endorsement despite the fact that all that was required by the Board in the job description² was an administrative certificate with a principal endorsement, which each of them currently holds. Additionally the petitioners argue that the ALJ improperly sought to distinguish the Director of Curriculum and Testing position from the Assistant Director titles by concluding that the position was a "qualitatively

¹ Both the Board and the Intervenor filed motions to file exceptions out of time. The Commissioner's decisions granting those motions required the Commissioner to obtain extensions for issuing the final decision.

² On May 9, 2009, the Executive County Superintendent of Schools, Essex County, issued approval of the new titles of Assistant Director with a principal endorsement. It is unclear what exactly was provided for the Superintendent to review and whether or not he had the opportunity to review the addition of the dual content-specific certification requirement.

higher level of administrative responsibility than that entrusted to a supervisor.” The petitioners claim it is irrelevant that Ms. Wallace had a supervisory role over the Assistant Director positions, but instead argue that the controlling factor is that both titles are unrecognized under *N.J.S.A.* 18A:28-5, and both titles fall under the administrative certificate. Further, Ms. Wallace does not have tenure as compared to the petitioners, each of whom is a tenured supervisor. Therefore, the petitioners maintain that under *Duva v. State Operated School District of the City of Jersey City*, EDU 9801-98, State Bd. of Educ. (March 6, 2002), the petitioners are entitled to the Director of Curriculum and Instruction position.

In its exceptions, the Board argues that the ALJ improperly determined that the petitioners were entitled to the Assistant Director positions.³ The Board takes exception to the ALJ’s finding that the additional certification requirements imposed by the Board cannot serve to defeat the tenure entitlements of the petitioners. The job descriptions for the Assistant Director positions require that, in addition to an endorsement for Principal, each must also hold an Educational Services certificate or a Special Education or ESL endorsement. The Board contends that its requirement that the Assistant Directors hold dual certification was to focus on the needs of certain student population groups and to raise the bar. The Board further argues that the decision to require a dual certification was sound and its educational expertise in approving the creation of the new positions should not be second guessed. *Denmery v. Board of Education*, 131 *N.J.* 626, 638 (1993). As a result, the Board contends that since none of the petitioners holds a dual certification, none is qualified for the position of Assistant Director.

In reply exceptions, intervenor Candace Wallace agreed with the ALJ that none of the petitioners is entitled to the Director of Curriculum and Testing position that Ms. Wallace currently holds. Ms. Wallace argues that before the reorganization, she supervised the very individuals who now seek to replace her and many of their duties have been assigned to building principals. In their former titles, all petitioners were responsible for the supervision of their limited content areas and some were further limited by grade level. In contrast, the intervenor maintains that her duties are significantly and qualitatively different from any of petitioners’ prior supervisory functions. Allowing a subordinate to “bump up” into a position of greater scope and level of responsibility without support of law would create

³ The Board agrees with the ALJ’s determination that petitioner Sandra Gray has tenure and seniority rights to the position of Athletic Director retroactive to July 1, 2009.

an anomalous result. Moreover, she asserts, the ALJ correctly held that Ms. Wallace was fully qualified and met the requirements for this position.

Upon a comprehensive review of the record and exceptions filed in this matter, the Commissioner concurs in part with the Administrative Law Judge that intervenor Candace Wallace is entitled to serve as Director of Curriculum and Testing (but not for the reasons articulated by the ALJ) and that petitioner Sandra Gray, by virtue of her tenure and seniority rights, is entitled to the Director of Athletics position. The Commissioner agrees with the ALJ that – other than subject matter endorsements – the additional certifications are not required, and modifies the ALJ’s remaining conclusions as follows.

Initially, the Commissioner agrees with petitioners that pursuant to *Duva v. State-Operated School District of Jersey City, supra*, both the “Director of Curriculum and Testing” and the “Assistant Director” titles are unrecognized position titles and are, therefore, subject to the requirements of *N.J.A.C. 6A:9-5.5*. That regulation provides that the district must submit to the county superintendent a written request for permission to use the proposed title, together with a detailed job description. The county superintendent is then required to approve or disapprove use of the title and, if approved, to specify the appropriate certification and identify the actual title under which the teaching staff member will accrue tenure and seniority rights. There is no evidence in the record that the district complied with this requirement regarding the “Director of Curriculum and Testing” position, but – as in *Duva, supra*, and *Jack A. Perna v. State-Operated School District of the City of Paterson, Passaic County*, Commissioner’s Decision No. 2-12, decided January 4, 2012 – there is no need to remand this matter to the Executive County Superintendent to consider the merits. The Commissioner of Education is the ultimate arbiter of school law disputes and thus has the ultimate authority and responsibility to determine certification. The Commissioner agrees with the ALJ’s general description of Ms. Wallace’s job duties as district-wide and would agree with the judge’s conclusion concerning the appropriate certification, but for the fact that the administrative code carves out an exception to the rule that district-wide job duties require an administrator’s endorsement. Specifically, *N.J.A.C. 6A:9-12.3(b)* and (c) provide that an Assistant Superintendent for Curriculum and Instruction may perform those job duties for the district

with either a principal endorsement or a supervisor endorsement. The Commissioner, upon review of the job description for Director of Curriculum and Testing, determines that the duties are actually those of an Assistant Superintendent for Curriculum and Instruction and that the necessary certification is either a principal or supervisor endorsement. The district may utilize the title "Director of Curriculum and Testing," but Ms. Wallace will accrue tenure and seniority rights as an Assistant Superintendent in charge of curriculum and instruction. Since this is a lesser included title under the assistant superintendent rubric, there is not a problem with her continuing to report to another Assistant Superintendent, and – pursuant to *N.J.A.C. 6A:32-5.1(1)2i* – each assistant superintendency shall be a separate category for seniority purposes.

With respect to the Assistant Director positions, the Commissioner determines to disapprove the use of that unrecognized title and instead directs that the respective positions be re-titled as Supervisors. Tenure and seniority will accrue under the recognized position title of Supervisor. There is no need for the district to utilize an unrecognized director title for these positions because the job descriptions do not specify that the holders will supervise other supervisors.

For the foregoing reasons, the Commissioner hereby orders the Board to immediately appoint Sandra Gray to the position of Athletic Director together with back pay from June 30, 2009, subject to mitigation, as well as restoration of all benefits and emoluments consistent with that position; further, the Board shall leave Candace Wallace undisturbed in her role as Director of Curriculum and Testing. With respect to the remaining petitioners, all of them hold appropriate endorsements for the supervisor positions in issue during the 2009-2010 school year, including subject matter certification in mathematics, science or physical education. Effective with the 2010-2011 school year, only petitioners Richburg and Kohn continue to have an entitlement to the positions in question by virtue of their tenure rights. They both hold the subject matter certification required for the Supervisor for Mathematics and Science K-12 position. Accordingly, the Board is directed to compensate two of the remaining petitioners for any lost wages, benefits or emoluments, less mitigation, due to its failure to appoint them to these positions for the 2009-2010 school year in accordance with their tenure and seniority rights. As to the position of Supervisor for Mathematics and Science K-12, the Board is directed to appoint either

Curtis Richburg or Malvina Kohn – recognizing their respective seniority rights – and compensate that petitioner for all lost salary, benefits and emoluments, less mitigation, retroactive to July 1, 2010. If a dispute arises concerning seniority rights, a new petition shall be filed.

IT IS SO ORDERED.⁴


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/01/12

Date of Mailing: 2/02/12

⁴ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

(CONSOLIDATED)

DR. ELBERT SMITH,

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY
OF ORANGE, ESSEX COUNTY,**

Respondent.

OAL DKT. NO. EDU 11566-09

AGENCY DKT. NO. 194-8/09

CURTIS RICHBURG,

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY
OF ORANGE, ESSEX COUNTY,**

Respondent.

OAL DKT. NO. EDU 11567-09

AGENCY DKT. NO. 207-8/09

MALVINA KOHN,

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY
OF ORANGE, ESSEX COUNTY,**

Respondent.

OAL DKT. NO. EDU 11568-09

AGENCY DKT. NO. 192-8/09

SAUNDRA R. GRAY,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY

OF ORANGE, ESSEX COUNTY,

Respondent.

OAL DKT. NO. EDU 11598-09

AGENCY DKT. NO. 203-8/09

Robert M. Schwartz, Esq., for petitioners

Melvin C. Randall, Esq., for respondent (Love and Randall, attorneys)

David Nash, Esq., for intervenor Candace Wallace

Record Closed: June 22, 2011

Decided: August 4, 2011

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, Elbert Smith, Curtis Richburg, Malvina Kohn and Sandra Gray, were employed under tenure as administrators by respondent, Board of Education of the City of Orange (the Board), when their positions were abolished, effective July 1, 2009. They assert an entitlement to administrative positions currently held by non-tenured teaching staff members. The Board replies that petitioners neither hold the certifications required for the positions they seek, nor are they entitled to these positions by virtue of their tenure or seniority rights.

Four separate petitions of appeal were filed with the Commissioner of Education in August 2009, and were transmitted to the Office of Administrative Law (OAL) for hearing as contested cases on September 22, 2009. By order dated December 7,

2009, the petitions were consolidated for hearing, in accordance with the standards set forth at N.J.A.C. 1:1-17.3. The order of consolidation directed that counsel for petitioners, on or before December 15, 2009, notify any Board employees whose employment status might be adversely affected by the outcome of this proceeding of their right to intervene, pursuant to N.J.A.C. 1:1-16.4.

The parties appeared for hearing on May 18, 2010, at which time I first learned that notice had not been sent to potential intervenors. Accordingly, the hearing did not proceed, and instead the day was devoted to settlement discussions, which proved unsuccessful. Letters were sent by petitioners' counsel on May 19, 2010, informing two potential intervenors that they must communicate with me in writing, before June 1, 2010, if they wished to participate. I did not receive a request for intervention.

The parties again appeared on June 1, 2010, at which time counsel were able to agree to a comprehensive stipulation of facts. In the course of reviewing those facts it was determined that additional intervenors should have been notified of this proceeding. Accordingly, on the record, I again directed counsel for petitioners to send letters to these additional potential intervenors, this time affording them until June 30, 2010, to contact me. Counsel did so via letters dated June 8, 2010, to Anita Vogel and Jason Green. Those letters clearly directed that I be advised prior to June 30, 2010, in writing, if the recipient wished to intervene. I did not receive a request to intervene from either Ms. Vogel or Mr. Green.

August hearing dates were adjourned at the request of the parties due to scheduling conflicts, and the matter proceeded to hearing on November 9, 2010. On the day of hearing, Mr. Green appeared, unrepresented by counsel, and asked to intervene. Green did not contend that he had not timely received counsel's June 8, 2010, letter. I denied his request on the record, as I felt he had been afforded more than ample time to communicate with me and that it would be inappropriate to delay the hearing further. At the conclusion of the hearing, I directed counsel to supply me with several additional documents, including Board resolutions and job descriptions, that I felt were necessary to complete the record. Counsel for the Board did so via letters

dated November 29, 2010, and December 3, 2010. Post-hearing submissions were filed on December 20, 2010, and January 11, 2011.

In his post-hearing brief, counsel for petitioners alleged, for the first time, that petitioners were entitled, by virtue of their tenure status, to the Director of Curriculum and Testing position currently held by Candace Wallace. I contacted counsel via telephone, and expressed concern that there was an insufficient factual record developed to address this claimed entitlement, and that, additionally, Wallace had never been afforded notice of her right to intervene. Via letter dated January 25, 2011, counsel for the Board provided me with additional information regarding Wallace's certifications and employment background. I determined to reopen the record, and I directed that counsel for petitioners advise Wallace of her right to intervene. He did so via letter dated February 12, 2011.

Wallace filed a motion seeking leave to intervene, and an order was entered permitting her to do so on March 17, 2011. Additional testimony was taken on May 12, 2011, to address the limited issue of petitioners' entitlement to Wallace's position. That day, counsel for petitioners learned for the first time through Wallace's testimony that Richburg allegedly had been offered and had declined reemployment by the Board in an administrative capacity. I allowed Richburg to testify on this issue as well. Counsel for the Board appeared without witnesses, so I afforded him an opportunity to rebut Richburg's testimony, agreeing to hold the record open for the remainder of the day. Counsel advised that no Board representatives wished to appear, and instead he offered to file a certification of the Board Secretary. To date, none has been filed. Supplemental post-hearing submissions were filed on June 22, 2011, at which time the record closed.

FINDINGS OF FACT

Stipulation of Facts

The parties agreed to many of the underlying facts, and I **FIND** as follows:

Smith's Employment History

1. Elbert Smith was employed as a Supervisor of Vocational Career Education by the Board commencing in or about November 2000.

2. On or about May 15, 2009, Smith was advised that his title of Supervisor of Vocational Career Education was to be abolished effective at the end of the day on June 30, 2009.

3. Smith's compensation as Supervisor of Vocational Career Education ended on June 30, 2009.

4. Smith holds a Teacher of Physical Education and Teacher of Industrial Arts certificate issued in September 1976, and a Principal/Supervisor certificate issued in June 1984.

Richburg's Employment History

5. Curtis Richburg was employed by the Board as a Supervisor of Science beginning on or about January 8, 2001.

6. Prior to his service as Supervisor of Science, Richburg also served in the title of "Acting" Assistant Principal. When Richburg served as the Acting Assistant Principal, from September 19, 1994, to June 30, 1995, the Assistant Principal title was "vacant." Richburg was not replacing someone who was on leave. During this period of time, however, Richburg did not hold a Principal's certificate.

7. On or about May 15, 2009, Richburg was notified by the Board that his position of Supervisor of Science would be abolished at the end of the day on June 30, 2009.

8. Richburg's compensation as a Supervisor of Science ended on June 30, 2009.

9. Richburg holds a standard Supervisor certificate issued in January 1993, a certificate of eligibility for a Principal endorsement/certificate issued in May 2007, and a certificate of eligibility for a School Administrator certificate issued in August 2007.

10. Richburg is presently employed as a teacher of science for the Board, and it is uncontroverted that he is appropriately certificated to do so.

Gray's Employment History

11. Sandra Gray was employed by the Board as a Supervisor of Health and Physical Education K–12 from in or about September 1999 until June 2009.

12. Prior to her service as a Supervisor of Health and Physical Education K–12, Gray served as a Supervisor of Health and Physical Education 7–12 and Athletics 7–12 from 1995 to 1999.

13. From July 1, 1988, to June 30, 1993, Gray served as a "Department Chairperson" of Health and Physical Education and Assistant Athletic Director. Gray received a stipend for this position while assigned to a teaching position.

14. From on or about September 1, 1971, through June 30, 1995, Gray served as a health/physical education and driver education teacher.

15. On or about May 15, 2009, Gray was notified that her position of Supervisor of Health and Physical Education K–12 was to be terminated at the end of the day on June 30, 2009.

16. Gray's compensation as the Supervisor of Health and Physical Education K–12 terminated on June 30, 2009. Gray is currently employed by the school district as a teacher of physical education, and has held that position since June 2009.

17. Gray holds a certificate as Teacher of Health and Physical Education issued in July 1972, a Teacher of Driver Education certificate issued in November 1976, a Principal/Supervisor certificate issued in March 1984, and a School Administrator certificate issued in June 1992.

Kohn's Employment History

18. Malvina Kohn was employed by the Board as a Supervisor of Mathematics 7–12 beginning in or about August 8, 1997.

19. On or about May 15, 2009, Kohn was advised that her position of Supervisor of Mathematics 7–12 was to be abolished effective at the end of the day on June 30, 2009.

20. Kohn's compensation as Supervisor of Mathematics 7–12 terminated effective June 30, 2009.

21. Kohn holds a Teacher of Mathematics certificate issued in June 1984 and a Principal/Supervisor certificate issued in February 1990.

The District Reorganization in 2009

22. On or about May 26, 2009, the Board reorganized the Curriculum and Testing Department and created the title of Assistant Director. Titles newly created by formal Board resolution included:

- a. Assistant Director of Special Projects K–12 for Visual and Performing Arts, Technology Instructional Education and Media Specialists;
- b. Assistant Director for Language Arts K–6, Testing K–8, and Elementary Professional Development K–6;

- c. Assistant Director for Language Arts 7–12, Testing 9–12, and Secondary Professional Development 7–12;
- d. Assistant Director for Mathematics K–6, Science K–6, and Physical Education/Health K–6;
- e. Assistant Director for Mathematics 7–12, Science 7–12, and Physical Education/Health 7–12.

23. The following positions were abolished by formal Board resolution on May 26, 2009:

- a. Supervisor of Visual and Performing Arts K–12;
- b. Supervisor of Language Arts K–8;
- c. Supervisor of Language Arts 7–12;
- d. Supervisor of Professional Development;
- e. Supervisor of Mathematics 7–12;
- f. Supervisor of Science 7–12;
- g. Supervisor of Physical Education/Health K–12; and
- h. Supervisor of Vocational Education/Careers in the Department of Special Programs.

24. Via letter dated May 18, 2009, the Executive County Superintendent of Schools, Dr. Lawrence Feinsod, wrote to the Interim Superintendent for the Orange

School District, Dr. Judith Kronin, and granted approval for the newly created titles of Assistant Director. Dr. Feinsod's letter stated that the "legal title" for each position would be "principal," and that the "authorized endorsement" on the Administrative certificate would be "principal."

25. Each of the petitioners holds a School Administrator certificate with a Principal or Supervisor endorsement.

26. The Assistant Director job titles required the following job qualifications, per the job descriptions:

- a. A minimum of a master's degree from an accredited institution;
- b. A New Jersey Principal certificate or School Administrator certificate;
- c. Content-specific certifications depending upon assignment, i.e., math, science, health and physical education, music, art, media specialist, English, reading, reading specialist, and elementary education;
- d. One or more of the following certificates—Reading Specialist or Reading or Educational Support Services (LDTC, Guidance Counselor or Pupil Personnel Services, School Psychologist, Social Worker), or Teacher of Students with Disabilities, or Teacher of the Handicapped, or ESL or Bilingual/Bicultural;
- e. At least 5 years' experience as an administrator or supervisor in one or more position content areas as deemed by the superintendent;
- f. Demonstrative experience as described in the duties and responsibilities set forth in the job description;
- g. Such alternatives to the qualifications as the superintendent deemed

appropriate.

27. Each of the petitioners has the requisite Administrative certificate/Principal endorsement set forth in the Executive County Superintendent's approval; each has the requisite standard certificate in one or more of the content areas. Petitioners do not hold an additional instructional certificate as a Reading Teacher or Reading Specialist or Teacher of Students with Disabilities, Teacher of the Handicapped, or ESL or Bilingual/Bicultural or the Educational Support Services certificate in the areas of: LDTC, Guidance Counselor or Pupil Personnel Services, School Psychologist, Social Worker, as required under the job descriptions.

28. The Board appointed a non-tenured staff member, Jason Green, to serve as full-time Athletic Director K-12, effective September 21, 2009, to June 30, 2010.

The Testimony

Gray's Service as Athletic Director

In uncontroverted testimony, Gray described her duties as Athletic Director during the years 1995-1999.¹ I **FIND** that she served in this role while holding a title that also encompassed responsibility for supervision of health and physical education for grades 7-12. Gray did not receive a separate stipend for her duties as Athletic Director. She reported to the building principals and the superintendent of schools.

I **FIND** that Gray was responsible for the entire athletic program for the Orange School District while serving as Athletic Director. These duties included hiring, supervising and evaluating athletics coaches; coordinating the scheduling of athletic events; coordinating transportation for these events; coordinating the hiring of game officials; coordinating transportation for the marching band and color guard; coordinating physicals and the efforts of team doctors; overseeing the concession

¹ The testimony reflected confusion regarding the exact years that Gray served as Athletic Director, and counsel ultimately agreed, on the record, to rely upon the dates contained in their joint stipulation (J-1).

stand; ordering equipment; and arranging end-of-season banquets. Gray is familiar with the New Jersey State Interscholastic Athletic Association (NJSIAA) and its rules and regulations; she stated that verifying athlete eligibility for participation in interscholastic sports was likewise her responsibility.

I **FIND** that Gray performed these duties on a full-time basis, in addition to the other duties required of her in supervising physical education and health for the secondary grades. She indicated that her duties as physical education supervisor entailed the supervision of only ten teachers, as well the responsibility for ordering equipment for and generally managing the activities of the Physical Education Department. Gray ceased performing the duties of Athletic Director in 1999, when these responsibilities were reassigned as part of an administrative reorganization, and assigned instead to an Assistant Principal. It is uncontroverted, and I **FIND**, that Jason Green continues to hold the position of Athletic Director, to date.

After the hearing, counsel supplemented the record with the job descriptions for the current Athletic Director and for the position held by Gray when she performed the duties she described at hearing.² This latter job description readily confirms that Gray testified with accuracy regarding the scope of her responsibilities as Athletic Director. The job description likewise echoes that of the current job description for the position, and I **FIND** that it is incontrovertibly the same job. Under both job descriptions the Athletic Director organizes and administers interscholastic athletics for district students, including determining athlete eligibility, and managing first aid, transportation, field locations, and coaching staff, among other responsibilities. The only genuine difference between Gray's prior job and that held by Green is that Gray was required to additionally supervise ten teachers in the Physical Education Department. While the earlier job description stated that the Athletic Director duties encompassed grades 7–12, and the current position encompasses interscholastic athletics for all grades, interscholastic sports are primarily conducted for secondary-school students.

² It should be noted that the latter job description states that it is for grades K–12, but the stipulation and the testimony reflect that Gray's duties were for grades 7–12. Counsel clearly indicated in correspondence, dated December 3, 2010, however, that this is the correct job description.

The Reorganizations for 2009–2010

School district administrators Candace Goldstein and Belinda Smiley testified regarding the rationale for the reorganization and for the Assistant Director certification requirements. Their testimony was uncontroverted, and I **FIND**:

Goldstein is employed by the Board as Director of Special Programs. She testified that in 2008 she was supervising eight departments. She did not supervise the petitioners, with the exception of Smith. Economic exigencies forced the district to analyze whether administrative services were being delivered in the most efficient way possible. She noted that Smith supervised only eleven employees. Accordingly, his position was abolished and his duties were subsumed in other district positions.

Smiley urged that while the reorganization was prompted by financial exigencies, it was also motivated by a desire to completely change focus; she described the reorganization as a “paradigm shift.” Whereas the supervisors were responsible for supervision of instruction, including the formal evaluation of instructional staff, these duties were now reassigned to building principals, as were many of the departmental managerial duties previously completed by the supervisors, such as ordering departmental supplies. The Assistant Director positions were now intended to focus on curriculum development. Smiley stated that a recent Collaborative Assessment and Planning for Achievement (CAPA) review of the district reflected that student test scores were low.³ A Quality Single Accountability Continuum (QSAC) evaluation of the district likewise found that while the district passed as to most indicators, it did not pass in the area of instructional progress. The district has been a “district in need of improvement” under No Child Left Behind (NCLB) for several years, necessitating a changed administrative focus; as Smiley expressed it, “from the top down.”

It was with these concerns in mind that the Board adopted job descriptions requiring Educational Services certifications or Reading or Special Education

³ CAPA is a four-day process that targets Title I schools in improvement status as defined under No Child Left Behind. During a CAPA visit, a team of six to seven experienced educators, district and school staff, representatives from higher education and department of Education staff conduct a review of the school.

certifications for the holders of the new Assistant Director positions. Smiley testified that the subgroups at greatest risk in the district included special education students and English-language learners. Requiring either Educational Services certificates or Special Education or Reading certification would “raise the bar” and attract candidates for these Assistant Directorships who could focus on the needs of these discreet student populations. Raising the test scores of these subgroups would raise district test scores overall. Smiley urged that requiring these additional certifications would attract candidates to the Assistant Director position who understood the unique needs of the Orange student population.

During the 2009–2010 school year, the position of “Assistant Director of Special Projects K–12 for Visual and Performing Arts, Technology Instructional Education and Media Specialists,” was filled by Peter Crosta, who held both the Fine Arts certifications and Educational Services certifications required by the job description. Crosta is a tenured staff member. The position of “Assistant Director for Mathematics K–6, Science K–6, and Physical Education/Health K–6” was held by Anita Vogel, a non-tenured employee who likewise held the requisite Mathematics certification and the Educational Services certifications required by the job description. Vogel is no longer employed by the school district. The position of “Assistant Director for Language Arts K–6, Testing K–8, and Elementary Professional Development K–6” was held by Katherine Carter, a non-tenured employee who holds the requisite certifications under the newly created job description.

The district was unable to find suitably qualified candidates to fill the positions of “Assistant Director for Language Arts 7–12, Testing 9–12, and Secondary Professional Development 7–12,” and “Assistant Director for Mathematics 7–12, Science 7–12, and Physical Education/Health 7–12.” When asked how the duties of these positions were addressed in the interim, Smiley indicated that Wallace, who supervised the Assistant Directors, completed these duties as best she could. Wallace’s job description reflects that the only certification required for her position is a “valid New Jersey Supervisory/Administrator’s Certificate.” She is not required, like her subordinates, to hold an Educational Services certificate, even though she performed the very curriculum-

development duties that Smiley urged could only be adequately completed by an individual with Educational Services, Special Education or Reading certification.

The job descriptions for the newly created positions confirm the emphasis on curriculum development and the use of curriculum to guide instruction. Job responsibilities include supervision of curriculum writing, monitoring of instructional programs, and assisting in the supervision of district-wide curriculum initiatives. The Assistant Directors report to the Director of Curriculum and Testing.

The Reorganizations for 2010–2011

The district budget became increasingly constrained during the 2009–2010 school year, necessitating a further reorganization effective with the 2010–2011 school year. It is uncontroverted, and I **FIND**, that the math and language supervisory positions were consolidated, leaving only three Assistant Directorships: “Assistant Director of Special Projects K–12 for Visual and Performing Arts, Technology Instructional Education, Media Specialists,” “Assistant Director for Language Arts, Testing and Professional Development K–12,” and “Assistant Director for Mathematics and Science K–12.” The district continued to require Assistant Directors to hold a Principal or School Administrator certificate, subject-matter certification and an Educational Services certification or specialized certification in Special Education or Reading.

Peter Crosta continued to serve as Assistant Director K–12, and Katherine Carter was reassigned to the K–12 Language Arts position. The math position remains unfilled.⁴ These unrecognized titles were approved by Dr. Feinsod via letter dated June 28, 2010. Dr. Feinsod's letter indicated that the endorsement to the Administrative certificate required for these positions is “Principal/Supervisor.” His letter of approval noted no further certification requirements.

Despite urging that the Educational Services certification requirement was thoughtfully added to the Assistant Director job descriptions to enhance the position

and to improve student performance, Smiley readily conceded that a recent advertisement for the Math K–12 Assistant Director position indicated that if a candidate held a doctorate, this requirement would be waived. The job descriptions for the newly consolidated positions likewise so provide. Both Smiley and Goldstein conceded that the additional Educational Services certificate is likewise not required for other administrative positions in the district, including principal, deputy superintendent or superintendent of schools.

Candace Wallace's Testimony

Candace Wallace has held employment with the Board since January 26, 2009, at all times serving as Director of Curriculum and Testing. She holds an Administrator's certificate with a Supervisor endorsement, an Instructional certificate with an Elementary endorsement, grades pre-school–8, a provisional certificate and certificate of eligibility as a Principal, and a certificate of eligibility as a School Administrator.

Wallace offered uncontroverted testimony regarding her job duties, and I **FIND** that she coordinates district-wide academic testing, including State-mandated testing, and local benchmark testing. She writes curriculum, administers in-service training for district staff, and attempts to bring “best practices” strategies and methodologies to the district to guide instruction. She trains district personnel in test administration. Wallace analyzes test data so that it may guide instruction. When retained by the Orange schools, she understood her charge to be to bring instructional technology to the district, and promote professional development.

Wallace testified that she participates in weekly cabinet meetings, attended by the superintendent of schools, the deputy superintendent, the administrative assistant to the superintendent (who is responsible for Human Resources), the business administrator and other district directors. She supervises other, lower level, district administrators. It is uncontroverted, and I **FIND**, that Wallace directly supervised three of the petitioners: Kohn, Richburg and Gray. Currently, the Assistant Directors for

⁴ It should be noted that the math position previously included a physical education component—during the 2010–

Language Arts/Professional Development and Testing, Mathematics/Science, and the Assistant Director for Special Programs report to Wallace.

Wallace urged, and I **FIND**, that her duties are district-wide and global, whereas the supervisor positions previously held by the petitioners were content-area based. The supervisors directly supervised instructional staff, and their work effort was focused on the needs of their assigned instructional area, including ensuring that staff and students had proper supplies and equipment. Conversely, Wallace's role is to assist in formulating the educational philosophy that will guide the work of content specialists and instructional staff. Wallace's job description echoed her testimony, and revealed that she correctly described the scope and breadth of her responsibilities.

The Offer of Reemployment to Richburg

Sometime during the 2010–2011 school year, Superintendent Ronald Lee raised the issue of Richburg's employment status at a weekly cabinet meeting. Wallace could not recall many details regarding the exchange, including what month it took place. She could not recall who else was present. Lee had advised that he had offered an "administrative position" to Richburg at an alternative school, and that Richburg was uninterested in the position. Wallace indicated that the conversation came up in the course of "tossing around ideas" about reorganizing administration, but she could not describe the proposed offer to Richburg with any specificity. As Wallace's testimony was a hearsay recount of a conversation between Richburg and Lee, her testimony provided no assistance in clarifying what type of position was offered to Richburg.

Richburg testified at hearing and the district offered no testimony, documents or other evidence to rebut his version of the events. Thus, I **FIND** that Richburg was approached in or about November 2010 by the Director of Special Services regarding an opportunity at a specialized program conducted in a local church. He was advised that the district was looking for a teacher of science who could also perform some administrative duties, but the proposed position was not described to him with any

2011 year these duties were absorbed by the building principals.

greater specificity. The Director advised that she thought he would be a good fit for the position, and Richburg replied that he would need more information before he could react. The Director supplied neither the title for the position nor any detail about the scope of his duties or the salary proposed.

Richburg heard nothing further until, while home on a sick day, he received a phone call from Smiley, who advised that he had been appointed to a position at the Bridges Program. Richburg knew little about the program, except that it was for troubled children, and he expressed surprise, as he had never applied for the position. Richburg returned to school the next day, and was summoned to the superintendent's office. There he was again told that he had been appointed to this position, which would entail teaching and administrative duties. Richburg credibly testified that he was given no job description, no detail about the nature and scope of his administrative duties, no information regarding the certification requirements for the position, nor any clarification about how many students were enrolled in the program. He was presented with a copy of a Board resolution appointing him to the position and providing a stipend of \$500 a month above his teacher's salary. I **FIND** that Richburg declined the position, and continues to be employed to date as a teacher of science for the district.

CONCLUSIONS OF LAW

Petitioners claim an entitlement to the newly created Assistant Director positions, the position of Director of Curriculum and Testing, and the position of Athletic Director. Any right to these positions of employment upon the abolishment of their positions as supervisors arises from their tenure rights.⁵ N.J.S.A. 18A:28-1 to -18 defines the conditions under which teaching staff members are entitled to the security of tenure. Tenure is a "statutory right imposed upon a teacher's contractual employment status." Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), cert. den., 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed. 2d 502 (1963). These statutory provisions supersede contractual terms. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 72 (1982). They are "designed

⁵ Petitioners do not claim that the Board exceeded its authority or otherwise acted improperly in determining to abolish their supervisory positions. See N.J.S.A. 18A:28-9; Maywood Bd. of Educ. v. Maywood Educ. Ass'n, 168 N.J. Super. 45, 55 (App. Div.), certif. denied, 81 N.J. 292 (1979).

to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service.” Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949). It is uncontroverted, and I **CONCLUDE**, that the petitioners held their positions of employment as supervisors under tenure. Gray had also earned tenure as an Athletic Director.

The Newly Established Assistant Director Positions

Dismissals resulting from a reduction in force (RIF) must be made on the basis of seniority according to standards established by the Commissioner and approved by the State Board. N.J.S.A. 18A:28-10; see N.J.A.C. 6A:32-5.1; Howley v. Ewing Bd. of Educ., 1982 S.L.D. 1328, 1339, aff’d, 1983 S.L.D. 1554. Our courts have held that “seniority provides a mechanism for ranking all *tenured* teaching staff members so that reductions among the tenured force can be effected in an equitable fashion and in accord with sound educational policies.” Capodilupo v. West Orange Bd. of Educ., 218 N.J. Super. 510, 514 (App. Div.), certif. den., 109 N.J. 514 (1987). Accordingly, the regulations specify precise categories of prior employment to which a tenured employee such as these petitioners may assert an entitlement in the event of a RIF.

But our case law recognizes that the rights of these petitioners are more expansive than their mere seniority rights would reflect. A tenured staff member continues to be entitled to retention as against a non-tenured teacher, regardless of his or her seniority rights. Our courts have held that “[t]o hold otherwise would be to defeat the purpose of tenure[,] which was to give a measure of security to teachers after the prescribed number of years of service.” Id. at 515. Thus, these petitioners are entitled to any positions in which they hold tenure, and that are currently held by non-tenured staff members.

The sometimes complex issue of which positions fall within the scope of an employee’s tenure protection is the subject of a wealth of post-Capodilupo case law. The “position” in which a teaching staff member achieves tenure is either one of the

specifically designated positions in N.J.S.A. 18A:28-5 or other employment for which an appropriate certificate is required. Ellicott v. Frankford Twp. Bd. of Educ., 251 N.J. Super. 342, 347 (App. Div. 1991); see Howley, supra, 1982 S.L.D. at 1337. The system of educational certificates established by the New Jersey Department of Education provides for three distinct types of certificates: the Instructional certificate, the Educational Services certificate and the Administrative certificate. N.J.A.C. 6A:9-5.2 et seq. Endorsements on these certificates specify categories within which an individual is authorized to provide service in a public school.

This petition requires an analysis of the tenure rights of the holder of an Administrative certificate, which according to regulation may carry endorsements as School Administrator, Principal, Supervisor and School Business Administrator. N.J.A.C. 6A:9-12.3. Insofar as various administrative positions are enumerated specifically in the tenure statute, our courts have held that these positions are “separately tenurable.” Nelson v. Old Bridge Bd. of Educ., 148 N.J. 358, 363 (1997). Thus, for example, a tenured staff member could seek to bump a less senior or non-tenured principal only by having actually served in the position of principal. Importantly, N.J.S.A. 18A:28-5 provides that “[f]or purposes of this chapter, tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. . . .” The statute states in pertinent part that “all teaching staff members employed in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses . . . , and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners,” may earn tenure if employed for the time periods specified in the statute.

Although tenured supervisors, Smith, Richburg, Gray and Kohn do not contend that they are entitled to any of the separately enumerated positions contained in N.J.S.A. 18A:28-5. Nor would they be so entitled. But they rightly assert, and I **CONCLUDE**, that their tenure protection extends to the Assistant Director positions established by the Board in 2009. Petitioners’ rights are as governed by Duva v. State-Operated School

District of Jersey City, EDU 9801-98, State Bd. of Educ. (March 6, 2002) <<http://lawlibrary.rutgers.edu/oal/search.html>>, which held that since neither “director” nor “supervisor” is among those positions enumerated in N.J.S.A. 18:28-5, the petitioner there was entitled to be employed in assignments requiring a Supervisor endorsement in preference to any non-tenured individuals. See also Sahagian v. N. Bergen Bd. of Educ., 1989 S.L.D. 2878, 2883–84, which held that because the petitioner there was tenured as a supervisor, having served under that endorsement with his Administrator’s certificate, he was entitled, by virtue of his tenured status as a supervisor, to any other supervisory position in the district over a non-tenured individual.

Each of the petitioners here holds a School Principal or Supervisor endorsement on his or her Administrative certificate, a requirement for the Assistant Director positions.⁶ However, the Assistant Director job descriptions also require either an Educational Services certificate, or Special Education or ESL certification. I **CONCLUDE** that these additional certification requirements imposed by the Board cannot serve to defeat the clear tenure entitlements of these petitioners. N.J.A.C. 6A:9-5.5(a) provides that “[e]ach district board of education shall assign position titles to teaching staff members that are recognized in these rules.” Should a district board of education determine that the use of an unrecognized position title is desirable, prior to appointing a candidate the district board must submit to the county superintendent a written request for permission to use the proposed title, which shall include a detailed job description. N.J.A.C. 6A:9-5.5(b)(1). The county superintendent will then exercise his discretion regarding approval of the request and determine the appropriate certification and title for the position. N.J.A.C. 6A:9-5.5(b)(2).

It is well established that local boards may establish additional certification requirements for a particular supervisory position, but those requirements must have a clear nexus to effective performance of the job. Kendrick v. Bd. of Educ. of S. River, EDU 10331-96, Initial Decision (December 18, 1997), aff’d, Comm’r (February 2, 1998)

⁶ The Assistant Director positions require certification as a Principal; all the petitioners hold this endorsement on their Administrative certificates, with the exception of Richburg. But it should be noted that he is qualified to serve in a position requiring a Principal’s certificate by virtue of his certificate of eligibility, N.J.A.C. 6A:9-6.4, and by virtue of his Supervisor’s endorsement. N.J.A.C. 6A:9-12.3 provides that a Supervisor’s endorsement authorizes its holder to supervise instruction, or even serve as an assistant superintendent in charge of curriculum and/or instruction.

<<http://lawlibrary.rutgers.edu/oal/search.html>>. A Supervisor endorsement is generic and authorizes the holder to supervise any subject matter and any grade level. Thus, "absent a showing that [additional] certification is necessary to perform the duties of the position at issue, such requirements cannot sidestep the educator's tenure rights on a preferred eligibility list." Lisa v. Bd. of Educ. of Washington, 97 N.J.A.R.2d (EDU) 478 (citing Galbraith v. Lenape Reg'l High Sch. Dist., 96 N.J.A.R.2d (EDU) 396). A case-specific assessment of the duties and responsibilities of any given position must guide the ultimate determination whether imposition of these additional requirements can serve to defeat a tenure claim. Kendrick, supra, EDU 10331-96, Initial Decision (December 18, 1997), aff'd, Comm'r (February 2, 1998) <<http://lawlibrary.rutgers.edu/oal/search.html>>.

A review of the letters of approval issued by Executive County Superintendent Feinsod readily reflects that he did not make dual certifications a requirement of the position. But more importantly, I heard no convincing evidence that these requirements had any real relationship to the job responsibilities of the positions at issue. Indeed, this was such an unusual combination of skills that it proved impossible to fill many of the newly created positions. Candace Wallace, who did not possess these additional certificates, performed the duties of the positions in the interim; ultimately it was determined that the district would receive applications from individuals who lacked these certifications, but whose credentials were enhanced by having earned a doctorate. These facts support petitioners' challenge to the legitimacy of these additional certification requirements.

A review of the job descriptions for these new positions buttresses the conclusion that the unusual combination of certifications required by this Board is simply unnecessary. The clear focus of the new positions is curricular in nature. The responsibilities of the Assistant Directors center on curriculum writing and the monitoring of instructional programs in assigned content areas. Although Orange is a district with many "at risk" students, there is no reason why any properly certificated individual cannot write curriculum and monitor instructional programs. I am unpersuaded that added certification as a learning consultant, psychologist, school counselor or special educator is needed to properly develop curriculum in language arts, science or mathematics.

Conversely, the requirement that Assistant Directors hold subject-matter certification is quite logically related to the requirements of the position, and I **CONCLUDE** that this requirement may properly limit the entitlements of these petitioners in the aftermath of their RIF. While the County superintendent did not expressly make subject-matter certification a requirement when approving the job descriptions, the relevant case law directs that I look beyond his approval or lack thereof to the actual job responsibilities. Kendrick, supra, EDU 10331-96, Initial Decision (December 18, 1997), aff'd, Comm'r (February 2, 1998) <<http://lawlibrary.rutgers.edu/oal/search.html>>. The goal of proper certification is the proper delivery of educational services. Clearly, an Assistant Director responsible for curriculum activities as they relate to assigned content and/or assessment areas will best serve district students with knowledge and background in that content area.

While earlier case law has rejected board claims that dual certification is essential, and upholds tenure entitlements to supervisory positions even where a staff member has no content certification, these holdings predate No Child Left Behind and its emphasis on "highly qualified" staff. 20 U.S.C. § 6319(a)(2); see Galbraith v. Bd. of Educ. of the Lenape Reg'l High Sch. Dist., supra, 96 N.J.A.R.2d (EDU) 396. Moreover, our Supreme Court has recognized that dual certification may be appropriate under certain circumstances, is not prohibited by any regulation, and is neither "anomalous, arbitrary [n]or irrational." Dennery v. Passaic County Reg'l High Sch. Dist. #1, 131 N.J. 626, 638 (1993).

Petitioners' post-hearing brief makes it plain that they do not argue otherwise, and they make no claims to positions outside their content expertise. Accordingly, I **CONCLUDE** that the petitioners were entitled by virtue of their tenure to employment in the Assistant Director positions as follows:

2009–2010

All four petitioners were entitled by virtue of their tenure to the positions of Assistant Director for Mathematics K–6, Science K–6, and Physical Education/Health K–6. All four hold the required certifications, including subject-matter certification, in mathematics, science or physical education. Likewise, all four petitioners were entitled by virtue of their tenure to the position of Assistant Director for Mathematics 7–12, Science 7–12, and Physical Education/Health 7–12.

2010–2011

Effective with the 2010–2011 school year, only Richburg and Kohn continued to have an entitlement to an assistant directorship by virtue of their tenure rights; they both held the subject-matter certification required for the Assistant Director for Mathematics and Science K–12 position.

Athletic Director

I **CONCLUDE** that all four petitioners were also entitled by virtue of their tenure to the position of Athletic Director, currently held by a non-tenured employee. Indeed, N.J.A.C. 6A:9-12.3(c) provides that the Supervisor endorsement authorizes service as an Athletic Director, an endorsement held by all these petitioners. But Gray's rights supersede those of her co-petitioners because she was also entitled to the position by virtue of having previously served as Athletic Director, and thus has earned seniority in the position. N.J.A.C. 6A:32-5.1. The fact that she previously performed additional duties, or that her prior title differed from the current title, is of no moment. It is well established that "[w]hen the duties of the position in which a teaching-staff member has acquired tenure are substantially identical to those of the position that the person seeks, a local school board may not sidestep an educator's tenure rights by simply renaming the position" Dennerly, supra, 131 N.J. at 639.

Director of Curriculum and Instruction

According to Wallace, petitioners request that I take the “unprecedented step” of awarding them their supervisor’s job. I concur that doing so would extend the holding in Duva in a manner inconsistent with legal precedent and sound educational policy. Accordingly, I **CONCLUDE** that petitioners are not entitled by virtue of their tenure status to the Director of Curriculum and Instruction position held by Wallace.

An analysis of petitioners’ tenure entitlement must start, as always, with the certifications and endorsements they hold, and the certification requirements of the position they seek. The job description for Director of Curriculum and Development is somewhat vague in its certification requirements, stating only that a “[v]alid New Jersey School Supervisor/Administrator’s Certificate” is needed. The regulations governing certification in New Jersey offer clarity on this issue. N.J.A.C. 6A:9-12.3(a) provides that

[t]he school administrator endorsement is required for any position that involves services as a district-level administrative officer. Such positions shall include superintendent, assistant superintendent, and director. Holders of this endorsement are authorized to provide educational leadership by directing the formulation of district-wide goals, plans, policies and budgets, by recommending their approval by the district board of education and by directing their district-wide implementation. . . . Holders of this endorsement are authorized to direct district operations and programs, and to supervise and evaluate . . . central office staff

Clearly, the School Administrator endorsement is required for Wallace’s job. The Director of Curriculum and Testing is responsible for curriculum development district-wide, and supervises the efforts of subordinate administrative staff in curriculum implementation. She coordinates testing, including State-mandated testing, district-wide. The Director is a member of the administrative cabinet, and participates in weekly meetings with the superintendent of schools and other top central-office administrators. She provides “educational leadership by directing the formulation of

district-wide goals” in two critical areas—what the children of Orange should be taught, and assessing if they have learned it. Her job responsibilities have a “qualitatively higher level of administrative responsibility than that entrusted to a supervisor.” Duva, *supra*, EDU 9801-98, State Bd. of Educ. (March 6, 2002) (citing Schaefer v. Bd. of Educ. of Lakewood, 93 N.J.A.R.2d (EDU) 741, State Board of Education, slip op. August 2, 1995) <<http://lawlibrary.rutgers.edu/oal/search.html>>.

Neither Smith nor Kohn holds certification as a School Administrator, and, accordingly, I **CONCLUDE** that they are not qualified to perform the duties of the Director of Curriculum and Testing. Richburg holds a certificate of eligibility as a School Administrator, and Gray holds a standard School Administrator endorsement. Nonetheless, I disagree with their contention that they are entitled by virtue of tenure to the Director of Curriculum and Testing position.

Indeed, although the State Board in Duva held that the petitioner’s tenure protection there extended to any non-“separately tenurable” assignments under his Administrative certificate, he had been employed as a Director, and sought to bump a subordinate, a non-tenured supervisor. Furthermore, although the case law cited by the intervenor predates Duva, the decision in Sandri v. Bergen County Vo-Tech, 1986 S.L.D. 1501, surely reflects the Commissioner’s recognition that some consideration must be given to the nature and scope of the position sought by a RIF’d administrator. There, the Commissioner rejected a claim to a position that encompassed “a much broader range of responsibilities.” Sandri, *supra*, 1986 S.L.D. at 1514.

Likewise, the Supreme Court in Nelson recognized that a determination regarding the scope of tenure protection must always be made through the lens of educational policy. The Court there rejected the notion that an administrator could bump into a separately tenurable position in which he had never served precisely because this sort of transfer of tenure rights is “unsound public policy.” Nelson, *supra*, 148 N.J. at 367. Likewise here, it is inappropriate to require a district to promote an administrator in the aftermath of a RIF. The Commissioner and courts have historically viewed tenure and seniority rights expansively. But neither counsel nor I could unearth

any case law extending tenure rights after a RIF to anything other than a lateral position. Just as the Nelson Court concluded that it is unsound to require a district to place an administrator who has never served as principal in charge of a school, it is equally unsound to compel a district to promote an administrator who implements district procedures to the position that formulates those procedures. The fact that these petitioners seek to displace their own supervisor emphasizes this point.

Accordingly, I **CONCLUDE** that none of the petitioners are entitled by virtue of tenure to the position of Director of Curriculum and Testing currently held by Candace Wallace.

Richburg's Offer of Employment

At hearing, the Board appeared to argue that Richburg has waived his right to further employment as a supervisor because he declined the position at the district alternative school. But somewhat surprisingly, the Board offered no testimony to rebut Richburg's contention that the details of this position were never adequately discussed with him, leaving him unable to assess if the job was truly administrative in nature. Likewise, despite being offered an opportunity to do so, the Board provided me with no documentary evidence of a bona-fide offer of employment as an administrator.

None of the supplemental briefs submitted after the May 2010 hearing addressed this issue, and, accordingly, it would appear that the contention that Richburg has waived his rights to reemployment has been abandoned by the Board. In any event, based on the facts presented at hearing, I **CONCLUDE** that Richburg did not waive his rights to reemployment as a supervisor, insofar as the Board did not provide him with sufficient information to intelligently determine whether the job offered was truly administrative.

Relief

The foregoing analysis confirms that the Board improperly failed to consider petitioners' entitlement to administrative positions when it reduced force in 2009. It is clear that Gray should be appointed, retroactive to the date of her reduction in force, to the position of Athletic Director. Unlike her co-petitioners, she is entitled to this position by virtue of both her tenure and seniority, having previously served the district in this capacity.

Fashioning relief for the remaining three petitioners is complicated by the fact that their entitlements arise exclusively from their tenure, and there are fewer Assistant Director positions than there are petitioners. Even if the Board had properly placed these petitioners in Assistant Director positions, each year, one petitioner would have been left without a supervisory job. There is some appeal to granting relief based upon their seniority as supervisors in the district, and, indeed, doing so feels consistent with the general regulatory scheme that makes seniority determinative of rights upon a RIF. But the rights of these remaining petitioners arise exclusively from tenure; none have served as Assistant Directors. Where more than one tenured staff member has an equal claim to a particular position, the Commissioner has made it clear that the "Board [is] free to select the candidate it believe[s] most qualified." Weinstein v. Old Bridge Bd. of Educ., 91 N.J.A.R.2d (EDU) 102, aff'd, 92 N.J.A.R.2d (EDU) 328.

In accordance with petitioners' tenure rights as set forth herein, and recognizing that only two of the remaining petitioners will be entitled to back pay and other retroactive compensation for the 2009–2010 school year, it is incumbent upon this Board to exercise its discretion and select the candidates it would have deemed most qualified to fill the Assistant Directorships from among Smith, Kohn and Richburg. Additionally, either Richburg or Kohn will be entitled to back pay and retroactive compensation for the 2010–2011 school year, as well as continued appointment to the Assistant Director position for Math and Science K–12 during the 2011–2012 school year. The Board must again exercise its discretion in choosing between them.

ORDER

Based on the foregoing, I **ORDER** as follows:

1. The Board is directed to immediately appoint Sandra Gray to the position of Athletic Director, with all salary, benefits and emoluments of this position, less mitigation, retroactive to June 30, 2009.

2. As to the positions of "Assistant Director for Mathematics K-6, Science K-6 and Physical Education/Health K-6," and "Assistant Director for Mathematics 7-12, Science 7-12 and Physical Education/Health 7-12," the Board is directed to compensate two of the remaining petitioners for any lost wages, benefits or emoluments, less mitigation, due to its failure to appoint them to these positions for the 2009-2010 school year.

3. As to the position of "Assistant Director for Mathematics and Science K-12," the Board is directed to select between Curtis Richburg and Malvina Kohn, and immediately appoint the petitioner it deems better qualified to this position, and compensate that petitioner for all lost salary, benefits and emoluments, less mitigation, retroactive to July 1, 2010.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 4, 2011

DATE

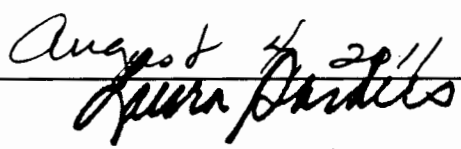


ELLEN S. BASS, ALJ

Date Received at Agency:

Date Mailed to Parties:

AUG - 5 2011



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioners

Saundra Gray
Curtis Richburg

For Respondent

Belinda Smiley
Candace Goldstein

For Intervenor

Candace Wallace

Evidence

Joint Exhibits

- J-1 Joint Stipulation of Fact with attached documents:
 - J-1a Job Descriptions
 - J-1b Board resolution dated May 26, 2009
 - J-1c Board resolution dated May 26, 2009
 - J-1d Letter dated May 18, 2009
 - J-1e Teaching certificates
 - J-1f Teaching certificates
- J-2 Job Description
- J-3 Job description
- J-4 Letter dated June 28, 2010
- J-5 Job Description (also marked as I-1 at hearing)
- J-6 Job Descriptions
- J-7 Board resolution dated June 8, 2010

IN THE MATTER OF THE TENURE : COMMISSIONER OF EDUCATION
HEARING OF KIM BANKS, SCHOOL :
DISTRICT OF THE TOWNSHIP OF : DECISION
ORANGE, ESSEX COUNTY. :
_____:

SYNOPSIS

The petitioning Board certified seven charges of conduct unbecoming and excessive absenteeism against respondent – a tenured secretary employed by the district since 1993 – for, *inter alia*, allegedly: conducting personal business during school hours; retrieving personal information about another District employee without permission; smoking on school grounds; unsatisfactory work performance; and attendance problems. Respondent denied the charges. The Board sought respondent's removal from her tenured position.

The ALJ found, *inter alia*, that: witnesses for the petitioning Board presented credible and believable testimony, while respondent's testimony was not credible; respondent conducted private business on the petitioning Board's computer, which was a violation of the school district's computer policy; respondent accessed and printed out a confidential transcript of another district employee without her authorization or permission; respondent smoked on school grounds in violation of district policy; respondent's work performance during the 2001-02, 2005-06, and 2010-11 school years was unsatisfactory; and throughout her employment, respondent abused her sick leave by taking days off before and after holidays, vacations, and pay days. The ALJ concluded that the Board had sustained its burden of proving six of the seven tenure charges against respondent, and the proven charges are sufficient to terminate her employment.

Upon independent review and consideration, the Commissioner concurred with the ALJ that petitioner met its burden to prove unbecoming conduct for the majority of the tenure charges, and that the proven charges are sufficient to warrant respondent's termination from tenured employment. Accordingly, the respondent was dismissed from her tenured position.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

February 3, 2012

OAL DKT. NO. EDU 8582-11
 AGENCY DKT. NO. 190-7/11

IN THE MATTER OF THE TENURE : COMMISSIONER OF EDUCATION
 HEARING OF KIM BANKS, SCHOOL
 DISTRICT OF THE TOWNSHIP OF : DECISION
 ORANGE, ESSEX COUNTY.

_____:

This controversy arose when petitioner certified charges of unbecoming conduct against respondent, a tenured secretary. Upon review of the record, Initial Decision of the Office of Administrative Law (OAL), respondent's exceptions and petitioner's reply thereto, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner has met its burden to prove unbecoming conduct for the majority of the charges,¹ and that the proven charges are sufficient to warrant the discipline petitioner seeks.

The six charges found sustainable by the ALJ are:

Charge One – Conducting Personal Business during School/Work Hours

Charge Two – Retrieving Personal Information About an Employee Without Authorization

Charge Four – Smoking on School Grounds in Violation of N.J.S.A. 26:3D-58 and School District Policy

Charge Five – Unsatisfactory Performance in the 2001–02, 2005–06 and 2010–11 School Years

Charge Six – Excessive Transfers Due to Poor Performance During the Period from September 29, 1997, to September 1, 2006

Charge Seven – Failure or Refusal to Adhere to Recognized Procedures Regarding Staff Attendance Despite Counseling on Multiple Occasions.

Since the sustainability of the charges depends heavily upon factual findings, it is important to recognize at the outset that the Commissioner must accept the ALJ's credibility

¹ Of seven charges, the ALJ found six to be sustainable and found Charge Three to lack sufficient support in the record.

determinations unless the record blatantly contradicts same, *see, e.g., N.J.S.A. 52:14B-10(c); D.L. and Z.Y. on behalf of minor children, T.L. and K.L. v. Board of Education of the Princeton Regional School District*, 366 N.J. Super. 269, 273 (App. Div. 2004).

Thus, in evaluating Charge One, the Commissioner must consider the credibility determinations made by the ALJ. More specifically, the ALJ regarded as credible the testimony of Jocelyn Easley – former Supervisor of Guidance in petitioner’s school district – that she observed respondent conducting on-line shopping during school hours. (1T49-50²) This testimony related to a comment on the third page of respondent’s March 8, 2011 “Secretary Observation Report,” which comment disclosed that during times when respondent did not have regular tasks to complete, she would conduct personal business instead of requesting additional assignments. (Exhibit A-1(b)) Respondent denied that she shopped on-line at work, but there is nothing in the record as a whole that would compel the Commissioner to reject the ALJ’s determination that Easley was a more credible witness than respondent. The Commissioner accordingly sustains Charge One.

Charge Two does not require extensive discussion. Respondent admitted that she retrieved the transcript of another district employee – without authorization. (3T166-67) The charge is accordingly sustained.

Charge Four is based upon the observation of Maxine Johnson, a former principal and Board of Education member in petitioner’s district, who observed respondent leaving the Orange High School building with a cigarette in her mouth and entering an Orange Board of

² 1T designates the transcript of the first day of the hearing at the OAL.

2T designates the transcript of the second day of the hearing at the OAL.

3T designates the transcript of the third day of the hearing at the OAL.

4T designates the transcript of the fourth day of the hearing at the OAL.

Education van. (3T12; 3T16-17) She testified that she did not see smoke, but that respondent “turned her head as you would to light a cigarette.” (3T18) Johnson reported the incident to High School Principal Erica Stewart, who issued respondent a written reprimand. (Exhibit D-11) Respondent ultimately, on cross examination, admitted that she had smoked in the Board of Education van on the way to the Board offices. (4T133-35) Accordingly, Charge Four is sustained.

The Commissioner agrees with respondent that it is appropriate to consider Charges Five and Six together, as the transfers referenced in Charge Six are not so much infractions as they are the consequence of deficiencies such as those alleged in Charge Five, *i.e.*, unsatisfactory performance. Indeed, Belinda Scott Smiley – petitioner’s District Human Resources Administrator – testified that each transfer of respondent was made because a building administrator was dissatisfied with respondent’s performance. *See, e.g.* 2T111, 2T112-13, 2T114-15.

Examination of evaluations and memoranda in respondent’s personnel file over the thirteen or so years of her employment in petitioner’s district reveals the documentation of several performance issues that remained unresolved. Conspicuous among those issues were timeliness/accuracy, organization, and compliance with procedures and directives.

As early as August 1998 the principal of Heywood Avenue School, Matthew Bocchino, wrote to petitioner that her work was inaccurate and untimely, and would lead to a “negative job recommendation” if it did not improve. (Exhibit F19) In 2000, Bocchino’s successor, Amanda Wright-Stafford, documented an incident in which copies of test booklets were not completed in time for a first grade test because respondent left her post without informing Wright-Stafford of her whereabouts. (Exhibit E18) Respondent was advised

2005-06 and 2010-11 school years) indicate problems with attendance and punctuality. *See, e.g.* Exhibits A1a, A1b, E13, E15b, and E16.

Absenteeism has a negative impact on an employee's workplace. The foregoing evidence about respondent's unsatisfactory attendance, tardiness, and disregard of notification procedures is more than enough support for the petitioner's charge that respondent persistently failed to adhere to petitioner's policies regarding attendance and punctuality. Accordingly, Charge Seven is sustained.

In the Commissioner's view, respondent's performance history would be sufficient grounds for her termination from employment in petitioner's district. However, petitioner has also proven charges that suggest a lack of professionalism by respondent. Accordingly, Tenure Charges One, Two, Four, Five/Six and Seven are sustained and respondent is terminated from her position.

IT IS SO ORDERED.⁷



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/03/12

Date of Mailing: 2/06/12

⁷ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 08582-11

AGENCY DKT. NO. 190/7-11

**IN THE MATTER OF THE TENURE HEARING
OF KIM BANKS, SCHOOL DISTRICT OF THE
TOWNSHIP OF ORANGE, ESSEX COUNTY.**

Melvin C. Randall, Esq., for petitioner Township of Orange Board of Education
(Love & Randall, attorneys)

Nancy I. Oxfeld, Esq., for respondent Kim Banks (Oxfeld Cohen, attorneys)

Record Closed: December 5, 2011

Decided: December 22, 2011

BEFORE **CAROL I. COHEN, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 18, 2011, the Board of Education of Orange, New Jersey, filed Tenure Charges against respondent Kim Banks. The respondent was charged with seven counts of unbecoming conduct and excessive absenteeism. The charges included that Ms. Banks conducted personal business during school hours; that she retrieved, without permission, personal information regarding another District employee; that she induced a student to allow her to claim the student and her infant son as dependents on her 2009 income tax return; that she was observed smoking on school grounds; that she

exhibited unsatisfactory performance and failed or refused to improve her performance as a secretary; and that she failed to adhere to the recognized procedure regarding staff attendance and had to be counseled regarding same.

On July 19, 2011, the respondent filed an Answer to the Tenure Charges. On July 21, 2011, the matter was forwarded from the Department of Education to the Office of Administrative Law, where it was filed. A pre-hearing conference was held on August 10, 2011, at which time a discovery schedule and hearing dates were determined and an Order was issued. The matter was to commence on September 21. However, it had to be adjourned due to the illness of the District's attorney. It was heard on October 3 and 4 and continued on November 2 and 4, 2011. Simultaneous summation briefs were due on December 2, 2011. The District asked for an extension, which was consented to by the petitioner. Briefs were received on December 5, 2011.

ISSUES

1. Did the actions of the respondent rise to the level of conduct unbecoming such that Ms. Banks should lose her tenured position?
2. Did Ms. Banks' history of absenteeism warrant removal from her tenured position?
3. Was the respondent incorrectly charged with conduct unbecoming when she should have been charged with inefficiency?¹
4. What penalty, if any, should be imposed on the respondent?

¹ While this issue was raised at the pre-hearing conference, it was not addressed at the hearing or in the summation brief. Therefore, I assume that the issue has been abandoned and I will not deal with it in the decision.

ARGUMENTS OF THE PARTIES AND FINDINGS OF FACT

Charge 1 --- Conducting Personal Business during School/Work Hours

The District provided a copy of the Board policy on "Acceptable use of Computer Network(s)/Computer and Resources by Support Staff Members." In the document it stated that "The Board provides access to computer network(s)/computers for administrative and educational purposes only." Further, the document states: "it is prohibited to engage in other activities that do not advance the educational purposes for which computer network(s)/computers are provided." (Ex. G-32.) There was testimony from Ms. Easley, Ms. Banks' supervisor, that she saw Ms. Banks on the computer conducting private business involving the purchase of a T.V. and a car for Banks' son. She also said that Ms. Banks showed her on the school computer how to get coupons for the purchase of shoes from a website called Zappos. Ms. Easley stated that on a number of occasions she saw Ms. Banks away from her desk either fraternizing with the security people or taking rides in the District van. In addition, Ms. Banks would return back late from lunch and would take many cigarette breaks. At these times the Guidance office was left unattended.

Ms. Banks denied all these charges and added that she would not have looked to purchase a car, since she does not have a driver's license. She also asserted that if these charges were true, Ms. Easley would have mentioned them in prior performance deficiencies that she sent to Ms. Banks.

This comes down to a "she said, she said" situation. I can see no reason why Ms. Easley would have concocted these allegations. It was clear from Ms. Banks' tone and facial expressions during her testimony that there was no love lost between Ms. Easley and Ms. Banks. However, it did not appear from Ms. Easley's testimony that her charges against Ms. Banks arose from a personal dislike of Ms. Banks rather than her frustration at Ms. Banks' unwillingness to perform the tasks she assigned her. As will be outlined in other portions of this decision, I found Ms. Banks to be less than forthright in her testimony. Therefore, based on the credibility of the witnesses, I **FIND** that Ms.

Banks was conducting private business on the Board's computer, which was a violation of the Orange District's computer policy.

Charge 2 --- Retrieving Personal Information About an Employee Without Authorization

Both sides agree that Ms. Banks retrieved the transcript of Terry Everett, a security guard at Orange High School. Ms. Banks' version of the incident, which took place on February 15, 2011, was that, while spinning the microfiche to come up with a student's transcript, she came upon the transcript of Ms. Everett, who was a friend and co-worker. Ms. Banks thought it was a great coincidence that this occurred, and she decided to print out the transcript. She presented it to Ms. Everett, who became upset, because she felt that it was an invasion of her privacy. Ms. Banks offered to shred the transcript, but Ms. Everett took it. Banks acknowledged that if the situation ever presented itself again, she would not print out the transcript. According to Adekunle James, the District's business administrator and board secretary, he was asked by the superintendent to conduct an investigation into charges brought by Ms. Everett that her personal information was accessed by Ms. Banks without her permission. Mr. James produced a report and statements from witnesses. According to the report and testimony, Ms. Banks came to Ms. Everett, while other employees were present, and indicated that she had Everett's government information. She dropped a piece of paper on the desk in front of Ms. Everett. Ms. Everett became very upset about the fact that Ms. Banks had access to her personal information. Ms. Smiley testified that there was personal information, including Social Security numbers, on the transcripts. This information was confidential and a release of this information was required under FERPA (Family Educational Privacy Act).

It is clear that Ms. Banks printed out personal and confidential information. She had no authorization to do so and she admitted in her testimony that she would never do so again. It is not necessary to decide whether Ms. Everett was upset because this information was presented to her or why she took a period of time to report the

incident.² It is also not necessary to decide whether Ms. Banks said that she had Ms. Everett's government/confidential information. In addition, I do not need to determine whether the District's proofs consisted of hearsay only. Ms. Banks has admitted that she accessed and printed a confidential transcript and presented it to Ms. Everett. Therefore, I **FIND** that Ms. Banks printed out the transcript of Ms. Everett without her permission and authorization.

Charge 3 --- Inducing a Student, with the Offer of Money, to Claim the Student and Her Infant Son as Dependents on Her 2009 Income Tax Return

The District introduced Ex. C-8(b), which was a note from N.N., a student at Orange High School. In the letter N.N. claimed that she was approached by Kim Banks and asked to claim her son on Ms. Banks' tax return as a dependent. N.N. stated that Ms. Banks had agreed to give her \$600 if she could claim her son on her return. N.N. also asserted that Ms. Banks said that she was going to claim N.N. as a dependent also. Ms. Banks told N.N. to bring her son's Social Security card in, but she said that the respondent claimed that she did not need N.N.'s Social Security information because she had already taken the information out of her school files. N.N. stated that Ms. Banks was going to give her \$500 for taking N.N. as a deduction. N.N. claimed that she later found out that Ms. Banks received a refund based on the dependent deduction, but she did not give N.N. any money. N.N. felt that she was taken advantage of. She also claimed that she never gave Ms. Banks permission to access her files to obtain her personal information. The District also introduced Ex. C-9, which was a letter from Mr. Randall, attorney for the Board, to Nancy I. Oxfeld, attorney for Ms. Banks. In the letter the District claimed that on March 16, 2011, in the presence of her representative and several school administrators, Ms. Banks admitted that she claimed a student and the student's child as dependents on her income tax return. Also introduced into evidence was Ex. C-10(b), a notarized letter from N.N. dated March 21, 2011. In the letter she stated that Ms. Terry (Everett) paid her \$50 to write the letter (C-8 (b)), which contained a false statement that Banks went into N.N.'s personal file and took down the information about her Social Security number. N.N. said that she did

² On cross-examination Ms. Banks did acknowledge that when she presented the transcript to Ms. Everett she was shocked and surprised, and that is why the respondent offered to shred the transcript.

what Everett asked because she needed the money. On the same day N.N. wrote a notarized statement in which she said that Ms. Banks did not steal her son Z.F.'s Social Security card. She said that she gave it to Ms. Banks so that she could claim her son on the tax return because she and her son stayed with Ms. Banks at her home for about six months. In addition, a letter from P.N., grandmother of N.N., was introduced into evidence as Ex. C-10(d). In this letter P.N. said that she was saddened by her granddaughter's behavior in making false claims against Ms. Banks when the respondent had given food and shelter to N.N. and her son. P.N. also claimed in the letter that she gave permission for Ms. Banks to claim Z.F. as a tax deduction in 2009, in order to repay Ms. Banks for her generosity and kindness.

In an interview conducted by Mr. Randall at the District's offices and in her testimony at court, P.N. claimed that she threw her granddaughter, N.N., out of her home in December 2008. P.N. said that her granddaughter told her that she lived with Ms. Banks from then until July 2009, when she returned to her grandmother's home. P.N.'s knowledge of where her granddaughter was staying came entirely from N.N. She never spoke to Ms. Banks, nor dropped by her home to see if N.N. was staying there. P.N. said that N.N. told her that she had given Ms. Banks Z.F.'s Social Security number to take him as a deduction on the respondent's income tax return. Later N.N. told her that Banks did not give her any money for claiming Z.F. because Z.F.'s father had already taken him as a dependent on his tax return. P.N. said that she knew that Ms. Banks did not take N.N.'s Social Security information from the school records because N.N. told her that she gave the Social Security information for herself and Z.F. to Ms. Banks to take them as dependents. P.N. said that she found out about what went on with the tax returns one day when N.N. got mad and told her that Ms. Banks had not given her any money from the tax return. P.N. said that Ms. Banks called her and told her that N.N. was telling people that she stole her identity. P.N. said that that was wrong, because N.N. had told her that she gave Ms. Banks her Social Security number and Z.F.'s Social Security number. P.N. offered to write a letter regarding the Social Security incident, and asked Ms. Banks how she felt about that. Ms. Banks said that that would be okay, but P.N. said that it was her idea to write the letter based on what N.N. had told her. During the hearing, P.N. said that when she asked Ms. Banks to whom she should send the letter, Ms. Banks told her to send it to Mr. Lee. During the

interview at the Board, P.N. stated that she had not typed up Ex. C-10(d), the March 28, 2011, letter to Mr. Lee. She said that her friend (possibly a former foster child)³ typed up the letter. P.N. gave her thoughts to her friend and she put it in written form. She said that the statement "We gave permission to her [Ms. Banks] to claim him [Z.F.] as a tax deduction in 2009" was not correct. She stated that it should have said that N.N. gave Ms. Banks permission. P.N. said that she did not have the authority to give Ms. Banks permission to take Z.F. as a dependent.⁴

At the same meeting at District offices, N.N. was also interviewed regarding her relationship with Ms. Banks and her taking N.N. and her son as dependents. N.N. said that Ms. Banks had asked her in January 2009⁵ if she could take her and her son as dependents on her tax return. N.N. said that she gave her permission to do so. She got her son's Social Security card and gave Banks a copy of it. She claimed that she did not give Ms. Banks her Social Security card, which was kept at her grandmother's house. Rather, Ms. Banks got the information from her file at Orange High School.⁶ N.N. claimed that Ms. Banks promised to give her \$600 for allowing her to take Z.F. as a dependent, and \$500 for allowing her to claim N.N. as a dependent. N.N. voiced her resentment at not being given any money by Ms. Banks. She claimed that even though Banks did not get a rebate for Z.F., because his father claimed him as a deduction, Banks should have given her some money. N.N. thought that Banks had used the money she received for taking her as a dependent to pay for her daughter's wedding. When N.N. was told by Ms. Smiley that her grandmother claimed that N.N. had told her that she gave Ms. Banks her Social Security information, N.N. insisted that she did not give the respondent her Social Security information.

During questioning at the District offices and at the hearing, N.N. said that Terry Everett paid her \$50 to write Ex. C-8(b). N.N. claimed that what she wrote in the letter

³ P.N. explained at the hearing that she had raised a number of foster children who she considered to be her children. The friend of one of her foster children typed up the letter for her.

⁴ During the hearing P.N. claimed that N.N. told her that Ms. Banks took her Social Security card number to claim her as a deduction. P.N. asked N.N. how she could take the card if P.N. had N.N.'s card, and her response was, "From the school."

⁵ While N.N. claimed that Banks approached her in January 2009, it appears that this happened in January 2010, because N.N. was back living with her grandmother and she was not living with her in January 2009.

⁶ Ms. Smiley, an assistant superintendent in the Orange School system testified that N.N.'s Social Security number was in her working papers' file in the guidance office at the time of the alleged incident. Ms. Banks had access to the file.

was mostly true, except that Everett told her to write, "I feel as a student I was taken advances [advantage] of." N.N. said that she did not use big words like that. When asked why she wrote Ex. C-8(b), N.N. said that she needed the money to get her hair done for her birthday. N.N. claimed that Ms. Everett approached her and said that Ms. Banks had gone into her personal files, the same way she had gone into N.N.'s files.

N.N. also stated that she wrote Ex. C-10(b) & (c), dated March 21, 2011, at Ms. Banks' instance. She said that Ms. Banks called her and asked her to write the first letter because she was going to lose her job. N.N. stated that Ms. Banks and her boyfriend picked her up in his cab, and Ms. Banks told her what to say in the letter while they were sitting in the cab. Then she told N.N. that they had to get the letter notarized and went with her to the notary. Ms. Banks' boyfriend paid the notary fee. N.N. said that Ms. Banks told her to say in the first letter that she did not enter N.N.'s files, and that N.N. handed Banks Z.F.'s Social Security card. Banks also told her to say that she did not claim N.N. on her tax return. N.N. said she protested, but wrote it anyway. In a second letter (Ex. C-10(c)), Ms. Banks told her to say that Ms. Terry (Everett) paid her to write false information.

During the interview and during the hearing N.N. also stated that while Ms. Banks told her to write in Ex. C-10(c) that she lived with Banks for six months, she did not in fact live with her. N.N. acknowledged that it was a lie when she stated in the letter that she lived with Banks. She stated that she lived with her baby's father for a short time, and then she moved in with her mother in East Orange. She again claimed that Ms. Banks got her Social Security information from her school file.

Ms. Banks' rendition of the incident with N.N. and her son differs greatly from that of N.N. She claimed that N.N. came to her and said that her grandmother had thrown her out of her home and she had nowhere to go. She took care of N.N. and her son Z.F. for six months and never was given any money. When asked by the Board's attorney whether anyone could substantiate the fact that N.N. and her child had lived with her for that period of time, Ms. Banks could not provide any names. She claimed that she had not told anyone, including her two adult children, fiancé or friends, and no one saw N.N. and her son living at her home.

Ms. Banks testified that N.N. agreed to Ms. Banks' taking Z.F. as an income tax deduction and gave Banks her son's Social Security card.⁷ Banks said that she never agreed to give N.N. any money in exchange for taking Z.F. as a deduction. Banks denied ever taking N.N. as a deduction or telling anyone that she took that deduction. She also denied telling N.N. that she had her Social Security information from the school files. Ms. Banks produced a Tax Return Transcript which showed one deduction, which she said was for Z.F.⁸ However, she said that the IRS denied this deduction because someone else had taken Z.F. as a deduction (purportedly his father). Ms. Banks also denied that she had anything to do with composing the letters to the Board written by N.N. (Ex. C-10(b)&(c)).

The District's case in regard to this charge is problematic. P.N.'s testimony about N.N.'s living with Ms. Banks came entirely from secondhand knowledge supplied to her by N.N.⁹ P.N. never visited N.N. at the Banks residence and her information about the Social Security card and dependency deductions was from conversations with N.N. Therefore, the only testimony that can be considered is that of N.N. and Ms. Banks. As the respondent pointed out, N.N.'s testimony was far from credible. She testified that she was told by a classmate that Ms. Everett wanted to talk with her. Everett asked her if she wanted to make a few dollars (\$50). N.N. agreed to write a letter (Ex. C-8(b)) in which she wrote that Ms. Banks approached her to claim her son as a deduction. She promised to give her \$600 for that deduction. She also stated in the letter that Banks said that she was going to take N.N. as a deduction, but she did not need her Social Security information because she had taken it from the school files. She said that Banks agreed to pay her \$500 for that deduction. Subsequently, N.N. wrote another letter disclaiming her first letter, supposedly because she felt bad about Ms. Banks losing her job. In this letter N.N. stated that Ms. Everett paid her \$50 to put false information in the letter stating that Ms. Banks went in her file and took out her Social

⁷ In her answers to interrogatories Ms. Banks stated that P.N. would testify that she and her family gave Banks permission to take Z.F. as a tax deduction. However, at trial, P.N. testified that she did not give respondent permission to claim her grandson as a tax deduction in 2009.

⁸ Ms. Banks did not produce her actual tax return(s) for 2009.

⁹ There was conflicting testimony. P.N. testified that N.N. told her that she lived with Ms. Banks for six months. N.N. testified that she never told her grandmother that she lived with Ms. Banks and if her grandmother said that she told her that she lived with Ms. Banks, then she was lying.

Security information. At the hearing N.N. claimed that some of the information in that letter was true, i.e., that she was paid \$50 to write Ex. C-8(b), and other information was false, i.e., that Ms. Banks went into her file and took out her Social Security information. In Ex. C-10(c) N.N. said that she allowed Ms. Banks to claim her son as a deduction because they lived at her home for six months. P.N. also testified that N.N. told her that she lived with Banks from December to June. Yet, at the hearing N.N. testified that she never stayed at Ms. Banks' home, but rather lived with her son's father and her mother during this period of time.

It is clear that N.N. was "all over the board" when it came to her testimony about where she lived, whether she allowed Ms. Banks to take her as a deduction, and where the respondent got her Social Security information. N.N. appeared to be willing to change her story depending on who was the highest bidder. On the other hand, I do not find that Ms. Banks' testimony was entirely credible either. I find it unbelievable that Ms. Banks could not name anyone who could testify, let alone bring anyone to testify, to the fact that N.N. and Z.F. lived with her for six months in her home in the same town where she worked.¹⁰ Nor is it believable that she did not tell anyone in the school that one of the students was homeless and was living with her. She also could produce no bills to show that she was supporting Z.F. or his mother. I also find it less than believable that she had nothing to do with the composition of the two letters signed by N.N. and notarized (Ex. C-10(b) & (c)). Based on N.N.'s level of sophistication, I do not believe that she would have had the letters notarized, except at the instance of Ms. Banks. N.N.'s explanation, that the letters were composed in Ms. Banks' fiancé's cab on the way to the notary, seems more believable.

I **FIND** that the testimony of both N.N. and Ms. Banks is in many ways incredible, but I must base my decision on the preponderance-of-the-evidence standard. Because the testimony of N.N. is not credible, I must **FIND** for the respondent on this point.

Charge 4 --- Smoking on School Grounds in Violation of N.J.S.A. 26:3D-58 and School District Policy

¹⁰ Ms. Banks said that she told her immediate family, but no one came to visit her during the six-month period of time to observe N.N. and her son in the house.

Ms. Johnson, who was a former teacher and assistant principal and who served for six years as a member of the Orange Board of Education, testified that on August 25, 2009, she observed a school employee, who was later identified as Ms. Banks, smoking on school grounds. She said that as she pulled into the parking lot at Orange High School she saw a woman coming out of the school, lighting a cigarette, and entering a Board of Education van. At the time she did not know Ms. Banks, but she saw an ID around her neck. She reported the incident to the principal of the school. On cross-examination Ms. Johnson said that she saw Ms. Banks turn, as one would if lighting a cigarette, but she did not see smoke coming from the cigarette. Ms. Banks admitted that she was a smoker. However, she claimed that while she had a cigarette in her hand on the way to the van, it was not lit. She was going in the van to the Board of Education offices to drop off a log sheet to Accounting. She did not remember if she smoked in the van, but she said that many employees did smoke in the van.¹¹

N.J.S.A. 26:3D-58(b) states:

Smoking is prohibited in any area of any building of, or on the grounds of, any public or nonpublic elementary or secondary school, regardless of whether the area is an indoor public place or is outdoors.

Ms. Banks is attempting to rebut the charge of smoking on public school property by saying that Ms. Johnson did not see smoke emanating from the cigarette, and therefore she was not smoking. Ms. Banks could not remember whether she had smoked in the Board van, but she claimed that employees regularly smoked in the van. Ms. Banks' explanation is not persuasive. A Board member not only took the time to report to the principal, but also came to testify that she saw Ms. Banks with a cigarette in her mouth, and Ms. Banks had turned as one does to light a cigarette. Ms. Banks did not deny that she might have been smoking in the van, which is also school property. Her explanation that Ms. Johnson did not see smoke emanating from the cigarette and that "everyone" smoked in the van does not negate the eyewitness testimony. Ms.

¹¹ In respondent's answers to interrogatories she stated, "once I had entered my car and driven off school grounds, I smoked a cigarette while I was in the car."

Banks did not explain why Ms. Johnson should make up a story that the cigarette was in Ms. Banks' mouth, rather than her hand, which the respondent alleged. As the District pointed out, Ms. Johnson was close enough to Ms. Banks to read her ID tag—why would she not be close enough to see if the respondent had the cigarette in her mouth and not her hand? Ms. Johnson's rendition of the incident is more credible. I therefore **FIND** that Ms. Banks was smoking on school property.

Charge 5 --- Unsatisfactory Performance in the 2001–02, 2005–06 and 2010–11 School Years

The District produced a number of documents from prior supervisors stating that Ms. Banks had failed to perform her administrative duties in an accurate and punctual fashion. In her evaluation report for June 9, 2006 (Ex. E-13), Ms. Neain, the principal of Oakwood Avenue School, gave Ms. Banks an "unsatisfactory" in clerical and organizational skills and punctuality and attendance and "needs improvement" in ability to work independently, human relations skills, knowledge of job, telephone etiquette and overall evaluation summary. She recommended the withholding of her increment. The Board voted to withhold her increment for 2006–07. The District introduced another document, labeled "Performance," which was written by Principal Neain and dated November 7, 2005 (E-14), in which she stated that she was not satisfied with Ms. Banks' performance in entering the daily attendance for both students and staff. In her memo she stated that while she had told Ms. Banks that attendance had to be entered each day for staff by 9:00 a.m. and for students by noon, she discovered that Ms. Banks had failed to enter the information for September 13, 14, 19 and 27 and October 24 and 28, 2005. Ms. Neain also commented on Ms. Banks' lack of organization, which affected her efficiency. In another memo from Ms. Neain, dated January 26, 2006 (Ex. E-14), she noted Ms. Banks' lack of competence in her job. She pointed out that Ms. Banks took a personal day without notifying her.¹² In her absence, Ms. Neain noticed that Ms. Banks had not checked her messages from the day before and had not relayed the messages to the teachers. One of the messages was from a parent. Ms. Neain

¹² Ms. Neain noted that while Ms. Banks followed procedure in notifying the substitute service, she had also asked Ms. Banks to notify her of absences so that she could make arrangements for front-office coverage. This same issue came up with Ms. Easley years later. Ms. Banks testified that she had followed procedure by calling the substitute service and therefore was not obligated to call her supervisor.

stated that she had talked to Ms. Banks before about the importance of checking messages and making sure that they were transmitted.¹³ On February 10, 2006, Ms. Neain sent another memo (Ex. E-14) about Ms. Banks' performance. Entering daily attendance continued to be a problem. In addition, Ms. Neain noted that on picture day Ms. Banks brought her own grandchildren for pictures when pictures were to be taken for students only. In addition, Ms. Banks had left her post to get her grandchildren's picture taken. Ms. Neain also pointed out that Ms. Banks had failed to send over the payroll information in a timely fashion. As a result of the performance issues, Ms. Neain was recommending disciplinary action. The District also introduced a memo from the assistant principal of Lincoln Avenue School, Helen M. Tinsley, to Ms. Banks (Ex. E-15(a)) in which she noted that the respondent failed to comply with tasks assigned to her, specifically, completion of the master eligibility list and five-day breakfast roster, and that timeliness of completion was essential. The evaluation from Ms. Whitworth dated March 8, 2002, (Ex. E-16) rated Ms. Banks as unsatisfactory in "ability to work independently and clerical and organizational skills." It also noted that she needed improvement in "ability to work with staff, knowledge of job and overall evaluation summary." There was a notation of "frequent absences." In the comments, Ms. Whitworth stated, "Ms. Banks refuses to use the task checklist in order to avoid forgetting routine items," and recommended that "Banks should seek employment where she can do as she pleases. We don't have time to beg her to complete routine tasks." On this evaluation Ms. Banks stated that a rebuttal would follow. The District also introduced a memo from Athenia Whitworth to Belinda Smiley dated April 11, 2002. In this memo Ms. Whitworth provided additional information regarding Kim Banks' evaluation in which she listed that the respondent "refused to use checklists that were prepared for her, was absent every time there was a scheduled task update conference, wasted time and refused to devote two days weekly to processing purchase orders as requested by Ms. Whitworth and 'yelled in a rude, insubordinate voice that orders should only be done in May-June of the previous year.'" An evaluation dated June 2, 2002, (Ex. E-15(b)) from administrator A. Whitworth at Central School rated Ms. Banks' performance unsatisfactory in "ability to work independently," "clerical and organizational skills," "knowledge of job," "punctuality and attendance" and "overall

¹³ During testimony Ms. Easley similarly complained about taking messages and transmitting the information to her.

evaluation summary," and "needs improvement" in "ability to work with staff," "human relations skills" and "telephone etiquette." In comments, Ms. Tinsley stated, "Ms. Banks tends to base her decisions on her own convenience rather than on procedures appropriate for a child centered school." She did not recommend Ms. Banks for continued employment at Central School. Ms. Banks refused to sign the evaluation, and it was noted that "[s]he said that only one evaluation per year was needed."

In a memo to Ms. Banks from Ms. Whitworth dated November 4, 2001, (Ex. E-18) Ms. Whitworth claimed that other staff including herself were doing Ms. Banks' job to help her transition into a new position. However, the delayed payroll report, which was Ms. Banks' responsibility, caused hardship for many people and was unacceptable and preventable. To help Ms. Banks in her organizational skills, Ms. Whitworth prepared a Task Completion checklist. (This was the list referred to in other evaluations, which Ms. Banks refused to follow.) Also included in the exhibits was a memo labeled "Incident on May 2, 2000" from Amanda Wright-Stafford, principal of Heywood Avenue School, in which she stated that Ms. Banks needed to notify her or another staff person prior to leaving the building in all cases, including emergencies. According to the memo, Ms. Banks' failure to notify anyone that she was leaving the building caused a serious problem in the office.

Ms. Jocelyn Easley, former supervisor of Guidance for the Orange District from February 22, 2010, until September 2011, and presently assistant principal of Guidance in the Middletown Public Schools, testified regarding her evaluation of Ms. Banks. Ms. Easley outlined Ms. Banks' responsibilities as a secretary, which included organizing the front office, answering phones, taking messages, scheduling appointments for counselors, fulfilling transcript requests, reregistering students, ordering supplies and maintaining the integrity of confidential documents. Ms. Banks agreed that these were her duties as the Guidance secretary. Ms. Easley said that she was instructed to evaluate Ms. Banks only a week before the June 24, 2010, Evaluation. Since she found out so late that she was to evaluate Ms. Banks, she really did not think it would be fair to give her a negative evaluation, because she would not have enough time to give Banks a PIP. Therefore, she gave her a satisfactory evaluation in all areas. However, at the time, she had already gotten a number of telephone calls complaining that transcript

requests had not been fulfilled. This was Ms. Banks' responsibility. She also noted that Ms. Banks seemed to have problems with organization, including clutter in her work area, late arrivals to work, and long lunches and breaks.

Ms. Easley testified about her March 15, 2011, Evaluation (Ex. A-1(b)) of Ms. Banks, which the respondent refused to sign. In that evaluation she gave Ms. Banks an "unsatisfactory" in maintains properly identified, organized and up-to-date files and records; prepares reports that are accurate, understandable and complete; handles work load efficiently; meets work deadlines set by supervisor; effectively adapts to changes or interruptions in work routine; and effectively handles several assignments at the same time. Ms. Easley said that even if she told Ms. Banks that something was high priority, the respondent would not complete the assignment. She also marked Ms. Banks unsatisfactory in ability to prioritize; ability to exercise discretion and maintain confidentiality; follows through on an assignment to its completion; seeks out additional work when own job demands are low; keeps office efficiently organized; accurately records and relays telephone messages; and maintains a schedule of appointments, arranges conferences, meetings and interviews. In a number of other areas Ms. Easley felt that Banks needed improvement. Ms. Easley noted that despite requests to the respondent to organize the front office, it remained disorganized. There were piles of paper in disarray on the desks, in the drawers and in the hutch, and Ms. Banks did not clean the area up despite numerous requests by Ms. Easley to do so. Ms. Banks did not move confidential files to locked cabinets as requested and refused to organize the microfilm drawer. She also found that Ms. Banks did not process transcript requests in a timely fashion, and the money submitted for the transcript requests did not tally with the number of transcript requests. Banks was instructed to keep a log of payments, but it was sent back on a number of occasions because of inaccuracies. This caused a problem for the Business office. Ms. Easley noted that Ms. Banks appeared to have difficulty handling the fast pace and workload of the Guidance department, was unable to multitask, had difficulty prioritizing, and refused to complete tasks in the order in which she was asked to complete them. Despite the fact that she was given help in completing her duties, and Ms. Easley tried to help her by setting up schedules and logs, Ms. Banks resisted following her directions. Ms. Banks continued to miss

deadlines, and when she was not busy she did not request additional assignments, but instead conducted personal business.

Although Banks was asked to schedule appointments for students to see their counselors, she did not arrange appointments, and the students continued to congregate outside the Guidance door waiting to see their advisors. In addition, Ms. Easley testified that she discovered that college representatives would come to the Guidance department expecting to meet students who were interested in speaking to them about their colleges. On numerous occasions the representatives would arrive and there would be no students ready to meet with them. One college representative told her that she had come three times, and neither the counselors nor the students knew that the representative was available for interviews. According to Ms. Easley, it was Ms. Banks' job to arrange these meetings. Ms. Easley said that she did not know if there was a procedure for dealing with college representatives, but she said that she explained to Ms. Banks how to handle appointments with college representatives and wrote a letter to Ms. Banks outlining the proper procedure. However, Ms. Banks refused to follow the procedure and Ms. Easley continued to receive complaints from college representatives.

Ms. Easley also noted that Ms. Banks was frequently tardy and/or absent. Ms. Smiley also testified that Ms. Banks' sick days often preceded or followed weekends, holidays or vacations. Ms. Easley testified that Ms. Banks was absent from work on a number of occasions during the summer of 2009–10. She related that Ms. Banks was on vacation for three weeks. She was supposed to be back from work, but she did not return and no one had heard from her.¹⁴ Ms. Easley became alarmed and went to Ms. Banks' home with a coworker. They knocked on the door, but Ms. Banks was not there. When she spoke to Ms. Banks she told her that she had to produce a doctor's note and that she was required to call in to report her absences so that a substitute could be found. Ms. Banks ultimately produced a doctor's note, but she did not call in to report her absence.

¹⁴ There was also a memo from Ms. Neain in which she complained that Ms. Banks had not notified her that she would be taking a sick day. She told her that although Ms. Banks had followed procedure and had notified the substitute service, it was important for her to call the principal, so that she could get coverage for the office.

Ms. Easley claimed that she had instructed Ms. Banks to organize the office so that she could work more efficiently and have quick access to documents. Ms. Banks refused to do so because she claimed that it would just get messy again. Ms. Easley said that during the 2010–11 school year she got telephone calls and e-mails from students and their parents saying that they had not gotten the transcripts that they had requested. It was very important that the transcripts were sent out because this affected a student's ability to obtain a job or get into a college of their choice. Ms. Easley claimed that Ms. Banks had the responsibility to deregister students transferred to other districts. This was supposed to be done in five days so that students could be registered in the new district. Ms. Easley stated that, despite the fact that she gave the respondent instructions on the registration process (Ex. 31(e)), Ms. Banks failed to perform this job in a timely fashion, which then affected the student's ability to register in Orange and see their guidance counselors or register in a new district. Ms. Easley was also responsible to make sure that every junior took the HSPA examination. However, because Ms. Banks did not perform her job in a timely fashion, there were many students remaining on the computer who had in fact left the school. This made the process of finding out who should take the HSPA test more difficult. Ms. Easley recounted that during a meeting with Ms. Banks, the assistant superintendent and a union representative, Ms. Banks claimed that she had difficulty getting work done because of the volume and fast pace of the office. A substitute assistant was assigned to help her, but transcript requests were still not being fulfilled and the office was still disorganized and records were left out in the open. Ms. Banks would stay late at lunch and not complete her work. Easley observed several times that there was no coverage of the front office. She would go to Security or the Attendance office and find Banks there talking with the staff.

Ms. Easley also referred to Ex. A-2(a), dated August 2, 2010, in which she wrote to Ms. Banks that she wanted to see improvement in certain areas, including transcript requests being fulfilled within three working days of the initial request; maintaining the office in a neat and orderly fashion; and insuring confidentiality of documents and making sure there was coverage of the front desk at all times. Ms. Easley testified that Ms. Banks did not show improvement in these areas. A November 3, 2010, letter to Ms.

Banks from Ms. Easley (Ex. A-2(b)) talked about the fact that Ms. Banks was asked to maintain a daily log of transcript requests, but Ms. Banks had failed to provide logs since June 9, 2010, despite persistent requests for them. Again, on November 9, 2010, Ms. Easley wrote to Ms. Banks telling her that she should not schedule appointments with college representatives when they called the Guidance office. Instead, she was to take a message or transfer the call to Ms. Easley so that she could schedule a visit. Ms. Easley testified that she had asked Ms. Banks not to transfer calls to voice mail, but rather to take messages. She gave Ms. Banks a message pad, but the respondent refused to take messages.¹⁵

Ms. Easley testified that on December 7, 2010, she sent a letter to Ms. Banks in which she documented that she asked Ms. Banks four times during a single day to complete a task which required her to file confidential student developmental records, and Ms. Banks failed to complete the assignment. In her testimony, Ms. Easley also documented an incident regarding a child's removal from an HSPA standardized assessment test required for graduation. According to Ms. Easley, Ms. Banks contacted the library and requested that the counselor, who was acting as the proctor, send the student to the counseling office to be dismissed. Ms. Easley claimed that Ms. Banks did not notify her that the parent was requesting to have her son removed from the testing. In a memo to Ms. Banks, Ms. Easley stated that removal from the testing site had serious consequences to the student and the validity of the test results. Ms. Easley stated in her memo (Ex. A-2(e)) that in the future Ms. Banks was to contact the principal or herself before disturbing a test site.¹⁶

As to a number of the charges leveled against her by Ms. Easley, Ms. Banks claimed that she had sent in memos rebutting the charges. As to the six students who had withdrawn from the school, but were still listed on the rolls of the school, Ms. Banks claimed that she had sent in a memo through interoffice mail rebutting that charge. However, she did not keep copies of her rebuttals. Ms. Banks also claimed that she had sent in a rebuttal to the charge that she was responsible for keeping a daily record

¹⁵ Ms. Neain had had a similar problem with Ms. Banks refusing to take or retrieve messages.

¹⁶ Ms. Easley did not claim that Ms. Banks knew the procedure for removal of a child from the test site at the time of the incident. Her complaint was that Ms. Banks did not notify her about the situation, so that she could handle the problem, before instructing the librarian to send the child to the office.

of transcript requests, but failed to do so. She said that she sent the rebuttal to Ms. Smiley with a copy to the union president, but she did not keep a copy for herself and never confirmed that anyone in the District had received a copy of the rebuttal. Ms. Banks also claimed that she sent in a rebuttal to Ex. A-1(b), the March 8, 2011, evaluation, to the Personnel department. However, she did not keep a copy of the rebuttal and there was no record of the rebuttal in the District's files. Ms. Banks claimed that there were only a couple of complaints about transcripts not going out, and these were really tied to problems that predated her arrival at the school. Ms. Banks said that at one point Mr. James came to her and gave her a big envelope filled with money orders and checks from 2007–08. This money was for transcripts that had never been sent out. Ms. Banks testified that she called all of the people who had sent in money and asked them if they were still interested in obtaining their transcripts. (Some of these requests were two to three years old.) Any of the current transcript requests that she received, she got to right away, and if there was a problem finding a transcript she called the parent or student right away. Ms. Banks said that once Ms. Easley came to the school, Ms. Easley wanted everything regarding transcripts to be changed. She wanted a log of daily transcript requests. Ms. Banks claimed that she complied with this request on a daily basis.

Ms. Banks testified that she was given a directive by Ms. Easley to clean up the papers around her office in preparation for getting a new desk. That is when she found checks and money orders for transcript requests for 2007–08. Ms. Banks acknowledged that she had not previously gone through the desk or the hutch in her office during the first eight months she was working at the high school and the eight months prior to the arrival of Ms. Easley. Ms. Banks said that Ms. Easley became upset because she wanted Banks to clean out the drawers of the filing cabinet. Banks testified that because she did not do it in a timely manner, Ms. Easley emptied out the contents of the file cabinet onto the floor. Banks said that she looked at Easley and told her that she should clean it up. The respondent then contacted her union representative, who took a picture of the mess on the floor and sent it to the vice president of the union, who called Easley's boss. The vice president of the union spoke to Banks and told her that Easley would be back to pick it up. Ms. Easley came back later and picked the stuff up from the floor. Ms. Banks said that she was not directed to

put anything into the file cabinet. It was about one month between the time that Easley asked her to clean out the files and the time that this incident occurred. From the testimony it appeared that Ms. Easley became entirely frustrated by Ms. Banks' unwillingness to follow directives and clean up the office and "lost her cool." While Ms. Easley's behavior was inappropriate, it seems telling that, rather than realizing that she had a part in the incident and pitching in to clean up the mess, Ms. Banks took the position that she was wronged and reported it to the union.

As for the claim by Ms. Easley that Ms. Banks did not keep the microfiche drawer in good order, Ms. Banks testified that when she started her job, the drawer was not in any kind of order. She felt that it was of no help to her to organize the drawer, because it kept getting messed up. However, she did not recall telling Ms. Easley that she refused to organize the drawer.

Ms. Banks disputed Ms. Easley's allegation that she refused to take telephone messages for her even after she provided her with a message pad. Ms. Banks said that Ms. Easley had voice mail on her telephone and her supervisor did not tell her not to allow voice mail and to take messages. She did not remember the incident that precipitated Ms. Easley writing a memo to her about taking messages. Ms. Banks denied leaving the office uncovered.

As to the allegation of her not setting up appointments for the college representatives, Ms. Banks acknowledged that one of the college representatives came three times, but there were no appointments scheduled for her. Ms. Banks testified that it was not her responsibility to set up the appointments, but rather the job of the secretary in the main office. She said that another staff member, Ms. Thomas, had the calendar for the conference room where college interviews were held. Ms. Banks testified that the students were aware of the dates that the college representatives were going to be there because fliers were handed out. She had worked on handing out the leaflets once or twice.

Ms. Banks' rendition of what happened regarding the HSPA incident differed markedly from that of Ms. Easley. According to Ms. Banks a parent came to the office

and said that she was there to pick up her son. The parent said that she had called Ms. Easley that morning and told her that she would be there at 10:30 a.m. to pick up her son to take him to upstate New York for a visit with his father at a prison there. Ms. Easley had told her that it was okay. When the parent arrived, Ms. Easley was nowhere to be found. Ms. Banks therefore contacted the principal, who tried to get the parent to allow her child to finish the HSPA test. However, the parent was persistent. Ms. Banks claimed that the principal and Ms. Easley conferred and agreed to let the child leave the test site. Ms. Banks argued that at the time of the incident she did not know the proper procedure when a parent wanted a student removed from testing. Ms. Easley admitted in testimony that she wrote a memo after the incident explaining the proper procedure to be followed. Banks argued that she could not be found to have performed unsatisfactorily by directing that a student be released from testing when it was acknowledged that "the identity of the individual to whom she spoke when she called the testing site is not known and that Banks could not have known the proper procedure!"

Ms. Banks testified that while she was absent for health reasons on a number of occasions, she had not exceeded the time allotted to her. She claimed that when she was sick, she called into the subservice to inform them that she would be out. She was not under an obligation to inform her superior that she was going to be out. Instead, the supervisor could check the list produced at the main office by the subservice, which showed the people who were going to be out for the day. Ms. Banks had a different rendition of what occurred in August 2010. She stated that she was scheduled to come back from vacation on August 24. She was not able to return to work because she had three herniated discs and could not get out of bed. She called into the subservice at 6:00 a.m. to report her absence. She was scheduled to be out Monday through Friday, but came to work on Thursday. On Wednesday someone called her and said that her supervisor and the assistant principal were on their way to her house. She asked the main office secretary if her name was on the substitute sheet that day and the secretary said that it was. She said that Ms. Easley and the vice principal never came to her house that day. On cross-examination, Ms. Banks testified that she considered Ms. Easley's coming to her home to be a form of harassment. However, she never reported this to the District.

Ms. Banks argued that the allegations of poor performance through the 2005–06 school year and the negative statements in some job performance observations and evaluations were meaningless because the District did not produce any negative evaluations during the period from 2006 until Ms. Easley became the respondent's supervisor in 2010. As for Ms. Easley's testimony, Ms. Banks argued that she did not point to one specific incident in which confidential files were left exposed to the public. Ms. Banks acknowledged that her office was cluttered, but she maintained that a claim of clutter did not prove that anyone entering the office could see confidential student material. It was Ms. Banks' position that the District had to specifically identify the date the confidential material was observed and the nature of the material. Further, the District had to specifically identify the individuals who complained that they did not receive their transcripts and the specific dates that the transcripts were requested.

What it comes down to is a matter of credibility. Do I believe Ms. Banks' testimony or that of Ms. Easley? I find it very difficult to believe Ms. Banks' rendition of her work history. If there was just one supervisor who disapproved of her work habits, then I could attribute the negative comments to a clash of personality, but in this case we have four supervisors who have expressed similar dissatisfaction with her work, including poor work habits, lack of organization, failure to get and keep the worksite in good order, failure to take and deliver telephone messages, refusal to follow procedures outlined by her supervisors, unnecessary absences, and inability or unwillingness to complete tasks assigned to her. I also find Ms. Banks' assertions that she wrote rebuttals to a number of negative evaluations and memos sent to her and yet she failed to keep copies of any of these rebuttals, and they are not present in her Personnel file in the District, to be unbelievable. In addition, while Ms. Banks acknowledged that she was aware that Ms. Easley's negative letters were sent to Personnel, she did not send any written responses to these negative reports. Ms. Banks certainly was familiar with the procedures to dispute negative evaluations and had called her union representative on a number of occasions, yet she did not respond at all to the letters sent to Personnel by Ms. Easley. Ms. Banks claimed that the problem with the transcripts was the fault of her predecessor. She discovered checks and money orders for old transcript requests when she cleaned out a hutch in the office eight months after she assumed her duties.

Ms. Banks claimed that she was hired to work at the high school in order to clean up the mess that was left by the prior secretary. Yet after eight months, she still had not opened the hutch in her office to see what was in the cabinet and to clean it up. Her idea of cleaning up was fixing up her desk and getting pencils and pens in order. Ms. Banks claimed that the person who was assigned to assist her was of little or no help and that the pace of the office was overwhelming. There is no doubt that the Guidance office housed confidential records. Ms. Banks acknowledged that confidential files were left in unsecured locations and often out in the open. She also acknowledged that parents, students and former students came to the office on a regular basis. It does not take a large leap of imagination to find that due to Ms. Banks' failure to secure the files and keep the office in an organized fashion, confidential files were exposed to the public. After a decade of working as a secretary in the school system it seems incredible that she could not find the time in eight months to get the office in order and secure confidential information.

As to the argument that, because of the lapse of time between the 2006 poor evaluations and increment withholding in 2007 and the negative evaluations of 2010–11, the prior assessments cannot be used to show conduct unbecoming, I do not find the argument persuasive. The problems with her performance from 1998 through 2006 were the same problems that Ms. Easley found in 2010–11, namely, a lack of organization, and an unwillingness to follow directions, to listen to suggestions from her supervisors, to report to her superiors, and to improve her overall work habits and attendance.

As for the incident involving the invalidation of the testing, while Ms. Banks might not have known the procedure to be followed to release a student from the test site, it is clear that she took it upon herself to allow the student to leave the site. I do not find believable her testimony that she conferred with Ms. Easley in the morning and Ms. Easley approved of the student leaving the test site. Given Ms. Easley's testimony of the importance of following test protocol, I cannot believe that she would have approved of allowing the student to leave prior to completing the test. I also find it difficult to believe the rest of Ms. Banks' story, that is, that she could not find Ms. Easley when the parent arrived, that she spoke to the principal, and that he hunted down Ms. Easley and

they agreed to letting the student leave. Rather, it appears that Ms. Banks followed her usual pattern of failing to consult her supervisors on important matters and making decisions on her own. In this case the result of her decision was that the student's test scores on a standardized test were invalidated.

From the testimony and exhibits presented, it is clear that Ms. Banks was unwilling to change her work habits, to follow the suggestions of her supervisors or to go the extra mile to perform her job in an acceptable manner. Therefore, I **FIND** that the respondent's performance during the 2001-02, 2005-06 and 2010-11 school years was unsatisfactory.

Charge 6 --- Excessive Transfers Due to Poor Performance During the Period from September 29, 1997, to September 1, 2006

Ms. Banks was transferred a total of six times during the period from September 1997 to September 2006. She was transferred from Heywood to Central School effective September 1, 2001. (Ex. 20.) On September 10, 2002, Ms. Banks was notified that she was being transferred from Central School to Lincoln School effective immediately. (Ex. 21.) On August 25, 2004, Ms. Banks was informed that she was being transferred from Lincoln to Orange High School (Ex. 22), and on September 20, 2004, she was notified that she was being moved to Orange Alternative School. On February 11, 2005, Ms. Banks was moved from Orange Alternative School to Oakwood Elementary School. She was then transferred to Orange High School. According to Ms. Smiley, most of the transfers were as a result of recommendations to the administration that Ms. Banks was not doing well in her current school and perhaps she would fare better in another environment.

Ms. Banks explained these transfers by stating that in many cases she moved because a principal requested that she come in and straighten out the mess in the office. She testified that she went to Central High School at the request of Principal Athenia Whitworth. The respondent alleged that Ms. Whitworth called her and asked to go to Central High School to clean it up. The school had lost its Title 1 funds because

of the mess in the office. Ms. Banks claimed that she was never told that she was being transferred from one school to another for disciplinary reasons. The respondent testified that at one point she worked for two schools at the same time because she was asked by the principal of the Park Avenue School to help her out. As for the transfer to Central School, Ms. Banks said that she did not want to go, but she agreed to go there for one year. After that time, she asked for a transfer to Lincoln School. Ms. Banks claimed that the principal at Central told her that there were performance issues, and she sent in a rebuttal to that evaluation. Ms. Banks could not produce a copy of the rebuttal and the District did not have a rebuttal on file. Ms. Banks said that she applied for a position at the Forest Street School, after the secretary to the principal died, and she was given that position. Ms. Banks said that she worked at Orange Alternative School for two years. She then received a request from the principal of Oakwood Avenue School to work for her. She worked at the Alternative School from 8 a.m. to noon, and at the Oakwood School from 1 p.m. to 8 p.m. She did this for about one year. Oakwood liked her work and wanted her full time, and she went there in 2005. She was there two years. She asked for a transfer from Oakwood because she was not happy there. Ms. Banks claimed that she was never told that the transfers were for disciplinary reasons or performance problems.

Ms. Smiley, the director of Human Services, had a different version of why Ms. Banks was constantly being transferred. She testified that Ms. Banks was transferred to practically every school within the school district due to her lack of performance. Ms. Smiley stated that most of the transfers were done to accommodate the building administrator's request that the respondent not continue in his or her school.

Ms. Banks argued that since the last transfer occurred five years prior to the charges being brought and there was no record that Ms. Banks was ever advised that she was being transferred because of performance, the District cannot utilize the transfers as a notice to Banks to improve her conduct. Therefore Charge 6 is meaningless and must be dismissed.

While it appears that Ms. Banks never received a notice that she was being transferred for disciplinary reasons, it seems impossible to believe Ms. Banks' rendition

of the facts regarding her transfers. The respondent claimed that many of her transfers were the result of principals asking her to come to their schools to straighten out the mess in the office. However, in many cases these were the same supervisors who complained about her work ethic, her organizational skills and her willingness to follow the instructions of her superiors. A letter dated September 21, 1998, and written by Matthew Bocchino, the principal of Heywood Elementary School, (Ex. 19) stated that Ms. Banks' administrative work was not accurate. Mr. Bocchino stated that unless there was improvement he would give a negative job recommendation. Despite the fact that Ms. Banks promised to improve, he did not see signs of improvement in the three years that she worked for him. Ms. Banks claimed that the people at Oakwood School liked her work, and yet it was Principal Neain who recommended the withholding of her increment. Similarly, Principal Whitworth at Central School wrote Ms. Banks up regarding her refusal to follow directions, her wasting of time and her disorganization. She went so far as to recommend that "Ms. Banks should seek employment where she can do as she pleases. We don't have time to beg her to complete routine tasks." This does not appear to be a ringing endorsement of her work. Unfortunately, it appears that rather than deal with Ms. Banks' poor performance, the District just transferred her from school to school. However, this does not negate the fact that while Ms. Banks did not get formal notice that she was being transferred for performance reasons, I **FIND** it impossible to believe that Ms. Banks was not aware, based on the poor evaluations and constant transfers that she received, that her transfers were not linked to her substandard performance.

Charge 7 --- Failure or Refusal to Adhere to Recognized Procedures Regarding Staff Attendance Despite Counseling on March 8, 2011, April 14, 2010, May 11, 2009, February 16 and 27, 2007, January 29, 2007, and December 14, 2006

There was testimony from Belinda Scott Smiley, administrative assistant to the superintendent for Operations/Human Relations, that she had sent notices to Ms. Banks on a number of occasions regarding her overuse of sick time. Exhibit G-25 stated that Ms. Banks had overused her sick days by 1.50 days, and therefore they would be changing the sick time to personal time in order to avoid a payroll deduction. This occurred on December 14, 2006. Again on January 29, 2007, Ms. Banks received a

notice (Ex. G-26(a)) stating that she had overused her sick time by one day and there would be a payroll deduction. There was also an exhibit marked (G-26(b)) in which the assistant principal at Orange High School wrote to Ms. Banks to tell her that her "pattern of occasional absences would make the school exceed the absentee rate of 3.5% established as a statewide standard." Ms. Hall also had a meeting with Ms. Banks on February 16, 2007, in which she advised Ms. Banks that she should not be absent from work for the remainder of the year. Ms. Hall asked if there was anything that the school could do to help support her work effort and better attendance, and Ms. Banks denied the need for any assistance. Ms. Smiley also testified about a pattern of absences, specifically on Mondays and Fridays, days before and after holidays, and pay days.

During the period from July 20, 2008, through June 2009, Ms. Banks was out on Tuesday after the Columbus Day holiday; Friday, October 17; November 13 and 14, Thursday and Friday; and November 21 and 24, Friday and Monday. Proceeding these two days were two personal business days on November 19 and 20. Ms. Banks also took off on Monday, December 1; Monday, December 8, and Tuesday, December 9; January 15, and January 30, both pay days; April 1, also a pay day; and June 5, a Friday. Ms. Banks received notifications regarding this pattern on May 11, 2009, April 14, 2010, and March 8, 2011. There was an opportunity to respond to the allegations on the second page of the notification form on May 11, 2009, but Ms. Banks did not respond. Later she noted on the comments section on April 14, 2010, that she had sarcoidosis and it affected her work, but she was feeling better. She also said that she would provide physicians' notes to the principal and Human Resources. For the 2010–11 school year Ms. Banks continued her pattern of absences on October 12, the day after Columbus Day, and Thursday and Friday, October 14 and 15. She was out on October 28 and 29, Thursday and Friday. She was out on January 18, the day after the Martin Luther King Day observance. She was out on Monday, January 31, and Friday, February 11. From March 16 through until May 1, 2011, Ms. Banks took medical leave. Because of the pattern of twelve or more occasional absences, Ms. Smiley was required, as per the Board's attendance policy, to schedule a meeting for Ms. Banks with the superintendent in 2010. In addition, Mr. Gibney, the principal of Orange High School, had a meeting with Ms. Banks on March 8, 2011, regarding her pattern of absences. As a result of the meeting Ms. Banks was to document all absences with

doctors' notes and set up an appointment with Human Resources. Ms. Smiley had a meeting with Ms. Banks because she had eight or more occasional absences in 2011. Ms. Smiley also identified an e-mail (Ex. 31(a)) in which Ms. Easley told Ms. Smiley that Ms. Banks took a half personal day and did not inform her or the principal that she was not coming back after lunch. Ms. Smiley pointed out that while 48-hour notice of personal time was not required under the secretaries' contract, it was unprofessional to leave without notifying her supervisor that she would not be returning.

While Ms. Banks claimed that she did not exceed her allowable sick days, she did not dispute the fact that her Personnel record correctly reflected her days absent and/or tardy. From the testimony and the documentation, it is clear that she did exceed the days by 3.5 days. In addition, some days were changed in order to avoid having her pay being docked. While Ms. Banks may have had health issues, this does not explain the pattern of absences before and after weekends, holidays and vacation days. It is clear that Ms. Banks had been counseled on attendance early in her career in the Orange School District, yet her attendance pattern continued throughout her employment. The Board policy specifically discusses chronic absenteeism as a reason for disciplinary action. When a staff member is out, this causes problems for the District. Absenteeism affects the efficiency of the office and has a budgetary impact, since another person must be hired to cover the secretarial duties. In addition, the substitute is usually not as familiar with the workings of the office and as a result more time and money is expended in getting a job done. This can also have an impact on the students, since they need to make appointments with the guidance counselors, require transcripts to be sent to colleges and jobs,, and may need assistance in planning their school schedules. All of these things are handled through the Guidance office secretary. It is not the number of days, but the pattern of days that the respondent took off, that is telling. It is obvious that Ms. Banks took her sick days as additional vacation days, before and after holidays and vacations and before and after pay days. Sick days are meant to be used for valid sicknesses, not for additional days off. Being out sick is disruptive to the smooth workings of an office. Especially in the Guidance office of a high school, which both sides describe as busy and where present and former students, parents and college representatives interact, it is important to have staff that is available and responsive to the public. I **FIND** that throughout her employment Ms. Banks

abused her sick leave by taking days off before and after holidays, vacations and pay days.

Based on the testimony presented and the exhibits submitted I make the following **FINDINGS OF FACT:**

1. Ms. Banks was originally hired by the Orange School District in 1993. She worked as a temporary secretary and then as a paraprofessional. She was laid off and rehired in 1997 as an administrative assistant.

2. Ms. Banks worked as an administrative assistant at the Forest Street School for the 1997–98 school year. She was then transferred to the Heywood School, where she stayed for three years. She was transferred again to Central Avenue School in the 2001–02 school year and to the Lincoln School in 2003. She worked at the Orange Alternative School in 2004–05 and part time at the Oakwood School in 2006–07. Ms. Banks was transferred to Orange High School in 2006. Originally she worked in the Attendance office at the high school, but after two years she was transferred to the Guidance office. In 2010, after her return from a leave of absence she was sent to Orange Preparatory Academy to work.

3. The respondent conducted private business on District computers including ordering personal property, researching the purchase of a car and printing coupons online.

4. During the time that the respondent was supposed to be at her desk she left her post and fraternized with members of the security staff and took rides in the District's van for non-school reasons.

5. Ms. Banks printed out a copy of a coworker's confidential school transcript without authorization and gave the transcript to the coworker in the presence of other staff.

6. On August 25, 2009, Ms. Banks smoked on the school grounds in violation of N.J.S.A. 26:3D-58 and school district policy.

7. The respondent received unsatisfactory performance evaluations in the 2001–02, 2005–06 and 2010–11 school years and had her increment withheld for the 2006–07 school year.

8. Ms. Banks was transferred six times during a nine-year period. These transfers can be attributed to her poor performance at the schools in which she was working.

9. Despite repeated counseling, Ms. Banks failed or refused to adhere to recognized procedures regarding taking and reporting sick absences. Ms. Banks exhibited a pattern of taking sick days following vacations, holidays and weekends.

ANALYSIS OF THE LAW

The tenure of education personnel is authorized by the Education Tenure Act, N.J.S.A. 18A:28-1 to -18. According to N.J.S.A. 18A:6-10, no person under tenure of office, position, or employment shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause. Tenure is a status in a particular position created by statute, not the agreement of the parties, therefore, it is a “statutory right imposed upon a teacher’s contractual employment’ [that] may not be forfeited or waived.” Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 77 (1982) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), cert. denied, 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed. 2d 502 (1963), and citing Red Bank Educ. Ass’n v. Red Bank Bd. of Educ., 78 N.J. 122, 141 (1978)). Tenure was designed to protect employees “from dismissal ‘for unfounded, flimsy or political reasons.’” Wright v. Bd. of Educ. of E. Orange, 99 N.J. 112, 118 (1985) (quoting Zimmerman, supra, 38 N.J. at 71). Lack of fitness is usually demonstrated by a series of incidents, but it also may be found when there is a single incident that is sufficiently flagrant. Redcay v. State Bd. of Educ., 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff’d, 131 N.J.L. 326, 327 (E. & A. 1944). While tenure was designed to protect employees, teachers (and other tenured employees) are responsible to act in a professional manner and to serve the welfare of the students in their care. Tenure charges can be sustained based on a history of unprofessional

conduct, In re Riddick, 93 N.J.A.R.2d (EDU) 345, or based on a single incident, "if sufficiently flagrant." In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967).

Among the charges lodged against Ms. Banks was "conduct unbecoming." This conduct was defined by the administrative law judge in In the Matter of the Tenure Hearing of Motley, State-Operated School District of Newark, Essex County, EDU 7421-97, Initial Decision (May 5, 1999), aff'd as modified, Comm'r (August 4, 1999), aff'd, State Bd. of Educ. (December 1, 1999) <<http://lawlibrary.rutgers.edu/oal/search.html>>:

"Unbecoming conduct" is an elastic term broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and [confidence] in the operation of [public] services." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). Behavior rising to the level of unbecoming conduct "need not be predicated upon a violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 22, 40 (App. Div. 1992). Despite the apparent vagueness of this standard, "it fairly and adequately conveys its meaning to all concerned." Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1957). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), certif. denied, 65 N.J. 292 (1974).

Conduct unbecoming can also be found when a tenured employee demonstrates a "willful and continued disobedience to Administration directives." See Scarpignato v. Edgewater Bd. of Educ., 83 S.L.D. 311, aff'd, Comm'r, 83 S.L.D. 335, aff'd, State Bd., 83 S.L.D. 338, aff'd, App. Div., 84 S.L.D. 2013.

It is the obligation of the District to prove the tenure charges by a preponderance of the credible evidence. The Commissioner, in In the Matter of the Tenure Hearing of Grundfest, School District of Madison, Morris County, EDU 5326-98, Comm'r (June 20, 2000), rev'g Initial Decision (March 29, 2000), aff'd, St. Bd. (November 1, 2000)

<<http://lawlibrary.rutgers.edu/oal/search.html>>, outlined what a board of education had to prove in order to meet its burden in a tenure charge:

Sustaining tenure charges for unbecoming conduct, however, is a very serious matter. . . . Since the penalty for respondent would be severe, it is the Board's responsibility and its burden to prove by a preponderance of credible evidence [the tenure charges against respondent].

Determinations often turn on credibility. Credibility is the value that a finder of the facts gives to the testimony of a witness. The process of evaluating the credibility of witnesses entails: (a) observing demeanor; (b) evaluating the ability to recall specific details; (c) considering the consistency of the testimony under direct and cross-examination; (d) determining the significance of any inconsistent statements or evidence; and (e) otherwise developing a sense of the witness's candor. This requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. See Carbo v. U.S., 314 F.2d 718, 749 (9th Cir. 1963), cert. denied sub. nom., Palermo v. U.S., 377 U.S. 953 (1964).

In evaluating the weight, trustworthiness and reliability of the evidence, factors such as motive, bias, confirming witnesses or statements, corroborative evidence, and common sense must be considered. Frequently, the trier of fact relies on the innate sense of whether the testimony has the ring of truth.

CONCLUSIONS

Based on the **FINDING OF FACTS** and reasoning outlined in the **ARGUMENTS** and **ANALYSIS OF THE LAW** above, I **CONCLUDE** that the District has sustained its burden of proving Tenure Charges 1, 2, 4, 5, 6 and 7 against the respondent. The District has failed to sustain its burden to prove Tenure Charge 3. While the District has not sustained Charge 3, there is sufficient evidence regarding the other charges to sustain the Tenure Charges against the respondent.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

12/22/11
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency:

December 22, 2011 (db)

Date Mailed to Parties:

db

December 28, 2011

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Orange:

Jocelyn Easley
Adekunle James
Maxine Johnson
N.N.
Belinda Scott Smiley

For Kim Banks:

Kim Banks
P.N.

EXHIBITS

Joint

J-1 Transcript of Interview of P.N. and N.N.

For Petitioner:

Exhibit A: Tenure Charge One

Sub-Exhibit 1 Observation/Evaluation Report dated March 8, 2011

Sub-Exhibit 2 August 2, 2010, November 3, 2010, November 9, 2010, December 7, 2010 and March 11, 2011

Exhibit B: Tenure Charge Two

Sub-Exhibit 3 Correspondence to Ronald Lee, Superintendent of Schools from Adekunle James, School Business Administrator/Board Secretary dated March 11, 2011

Sub-Exhibit 4 Correspondence to Edwin Vasquez, Security Supervisor from Terry Everett, Security Officer dated March 1, 2011 regarding incident of February 15, 2011

Sub-Exhibit 5 Statement of Security Officer, Patricia Joseph regarding incident of February 15, 2011

Sub-Exhibit 6 Statement of Security Officer, Akbar James regarding incident of February 15, 2011

Sub-Exhibit 7 Statement of Security Officer, Radalia Dixon-Amar regarding incident of February 15, 2011

Exhibit C: Tenure Charge Three

Sub-Exhibit 8 Correspondence to Ronald Lee, Superintendent of Schools from Adekunle James, School Business Administrator/ Board Secretary dated March 11, 2011

Sub-Exhibit 9 Correspondence to Nancy I. Oxfeld, Esq., attorney for Respondent from Melvin C. Randall, Esq., attorney for Petitioner dated March 28, 2011

Sub-Exhibit 10 Correspondence from Respondent, Kim Banks to Ronald Lee, Superintendent of Schools regarding an explanation of events with attachments that were the subject of the School District meeting with Respondent on March 16, 2011

Exhibit D: Tenure Charge Four

Sub-Exhibit 11 Notice of Reprimand dated August 27, 2009 from E. Stewart, Principal regarding Respondent, Kim Banks smoking on school grounds

Exhibit E: Tenure Charge Five

Sub-Exhibit 12 Correspondence to Respondent, Kim Banks from Dr. Nathan Parker, Superintendent of Schools dated July 10, 2006

Sub-Exhibit 13 Observation/Evaluation Report dated June 9, 2006

Sub-Exhibit 14 November 7, 2005, January 26, 2006 and February 10, 2006

Sub-Exhibit 15 Correspondence to Respondent, Kim Banks from E. Stewart, Principal of Lincoln Avenue School dated September 8, 2003

Sub-Exhibit 16 Observation/Evaluation Report dated March 8, 2002 together with additional information regarding Respondent's performance

Sub-Exhibit 17 Correspondence to Respondent, Kim Banks from Athenia Whitworth dated November 4, 2001

Sub-Exhibit 18 Correspondence to Respondent, Kim Banks from Amanda Wright-Stafford dated May 2, 2000

Exhibit E: Tenure Charge Six

Sub-Exhibit 19 Correspondence to Respondent, Kim Banks from Matthew Bocchino dated September 21, 1998

Sub-Exhibit 20 Correspondence to Respondent, Kim Banks from Belinda Scott Smiley, Administrative Assistant to the Superintendent of Operations/Human Resource Services regarding Respondent's Administrative transfer

Sub-Exhibit 21 Correspondence to Respondent, Kim Banks from Constance L. Frazie, Interim Superintendent of Schools regarding Respondent's Administrative transfer

Sub-Exhibit 22 Correspondence to Respondent, Kim Banks from Dr. Nathan Parker, Superintendent of Schools dated August 25, 2004 and September 20, 2004

Sub-Exhibit 23 Correspondence to Respondent, Kim Banks from Belinda Scott Smiley, Administrative Assistant to the Superintendent of Operations/Human Resource Services regarding Respondent's payroll change notice and reassignment

Sub-Exhibit 24 Correspondence to Respondent, Kim Banks from Dr. Nathan Parker, Superintendent of Schools dated February 11, 2005 regarding Respondent's Administrative transfer

Exhibit G: Tenure Charge Seven

Sub-Exhibit 25 Correspondence to Respondent, Kim Banks from Belinda Scott Smiley, Administrative Assistant to the Superintendent of Operations/Human Resource Services regarding Respondent attendance record for the 2006-2007 school year

Sub-Exhibit 26 Correspondence to Respondent, Kim Banks from Belinda Scott Smiley, Administrative Assistant to the Superintendent of Operations/Human Resource Services regarding Respondent's attendance record for the 2007-2008 school year

Sub-Exhibit 27 Correspondence to Respondent, Kim Banks from Belinda Scott Smiley, Administrative Assistant to the Superintendent of Operations/ Human Resource Services regarding Respondent's attendance record for the 2009-2010 school year

Sub-Exhibit 28 Correspondence to Respondent, Kim Banks from Belinda Scott Smiley, Administrative Assistant to the Superintendent of Operations/Human Resource Services regarding Respondent's attendance record for the 2010-2011 school year

Sub-Exhibit 29 Correspondence to Respondent, Kim Banks from Belinda Scott Smiley, Administrative Assistant to the Superintendent of Operations/Human Resource Services regarding Respondent's attendance record for the 2011-2012 school year

Sub-Exhibit 30 Documents containing information regarding N.N., student

Sub-Exhibit 31 Emails from Jocelyn Easley, former Supervisor to Respondent, Kim Banks

Sub-Exhibit 32 Board's Policies

Sub-Exhibit 33 Interrogatories, 15 pgs.

For Respondent:

R-1 Tax Return Transcript

BOARD OF EDUCATION OF THE :
 FREEHOLD REGIONAL HIGH SCHOOL :
 DISTRICT, MONMOUTH COUNTY, :

PETITIONER, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE :
 BOROUGH OF BERGENFIELD, :
 BERGEN COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner claims that respondent Board is obligated to share its cost of educating A.M. and M.M. – disabled twin brothers who have been in a residential placement since 2001 at Bancroft Neuro-Health – because their parents are separated and the twins’ father has continuously resided in Bergenfield since 2004, while the mother remains at the family home in Howell. Cross motions for summary decision were filed by the parties.

The ALJ found, *inter alia*, that: *N.J.S.A.* 18A:38-1 provides children between the ages of five and twenty with an entitlement to a free public education; domicile is the primary criteria for determining which school district will pay the costs of this education; the existing regulatory scheme attributes a child’s rightful domicile to the home of one or the other parent; where parents live apart, the regulations favor single-district responsibility for education costs; costs are generally borne by the district of domicile of the children, but in this case the twins do not reside with either of their parents; *N.J.A.C.* 6A:22-3.1(a) provides that separated or divorced parents living in different communities can – by written agreement – designate a district for school attendance; although no such written agreement exists in this case, the intent of the twins’ parents is clear – through their conduct and depositions – that they want the house in Howell to serve as the twins’ home since it is where they grew up and continue to spend the majority of their time when not at Bancroft; and it appears that the twins’ mother is the parent most actively engaged in the boys’ care. Accordingly, the ALJ denied petitioner’s cross-motion for summary decision and granted respondent’s cross motion, thus determining that the petitioning Board must bear the full cost of education for A.M. and M.M.

Upon full and careful consideration, the Commissioner adopted the Initial Decision as the final decision in this matter as he concurred that – given the undisputed facts – summary disposition was appropriate, respondent’s motion for summary disposition was properly granted and petitioner’s motion for summary disposition was properly denied – for the reasons stated in the ALJ’s decision, as amplified in the within final decision.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 4590-07
AGENCY DKT. NO 143-6/07

BOARD OF EDUCATION OF THE :
FREEHOLD REGIONAL HIGH SCHOOL
DISTRICT, MONMOUTH COUNTY, :

PETITIONER, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE :
BOROUGH OF BERGENFIELD,
BERGEN COUNTY, :

RESPONDENT. :

This controversy concerning financial responsibility for the education of two disabled students, twin brothers A.M. and M.M.,¹ comes to the Commissioner by way of cross motions for summary disposition. Upon review of the record, Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions and respondent's replies thereto, the Commissioner concurs with the Administrative Law Judge (ALJ) that, given the undisputed facts of this case, summary disposition was appropriate, respondent's motion for summary disposition was properly granted and petitioner's motion for summary disposition was properly denied.

The parties agree that it is the domicile of students that determines which district will be obliged to provide their free public education, *N.J.S.A.* 18A:38-1; *N.J.A.C.* 6A:22-3.1(a),

¹ The Commissioner notes that the two students whose educations are addressed herein "aged out" of the right to a free public education in 2009, when they reached the age of 21. Thus, the educational costs at issue are retrospective.

and that the domicile of minor – or unemancipated – children is the domicile of their parents, legal custodians or legal guardians. *See, e.g. N.J.A.C. 6A:22-3.1(a)(1.)*. The disagreement in this case flows from the fact that in 2004, when the twins were 16 years old, their parents separated. (At this point in time the twins had been living at Bancroft NeuroHealth – a residential facility – for four years.) Their mother remained domiciled in the family home in Howell, a municipality covered by petitioner’s regional high school district, and their father moved to Bergenfield, respondent’s district.

Petitioner maintains that the father’s move to Bergenfield made him a domiciliary of Bergenfield which, in turn, mandated respondent’s participation in the payment of the twins’ educational expenses – as of 2004. According to petitioner, “the plain language of [*N.J.A.C. 6A:22-3.1(a)(1.)*] compels the conclusion that A.M. and M.M. are domiciled in both [parents’] districts.” (Petitioner’s Exceptions at 4) The Commissioner disagrees.

The domicile of the twins’ father is not determinative of whether there will be shared responsibility for the education of the twins. As the ALJ found, and as the record reveals, notwithstanding that the twins live at Bancroft NeuroHealth, the Howell home in which they were raised, and in which their mother resides, still serves as the hub of their family life.² For most of their family outings, both with their mother and their father, they are brought to the Howell home. Both parents intend that the twins enjoy the continuity derived from keeping the Howell residence as their home. The twins have never lived in Bergenfield, and they rarely visit their father there. Further, while the twins’ parents are legally co-guardians of their sons, the

² Although the twins’ father lives in Bergenfield, he is still married to the twins’ mother, pays the Howell home mortgage, uses the Howell address for his voting registration, drivers license and tax returns – which he files jointly with the twins’ mother, and maintains his bank accounts in Howell – which are joint accounts with the twins’ mother.

record shows that it is the mother who attends meetings at Bancroft, hosts holidays for the entire family, and is the *de facto* primary custodian of the twins.

Nothing in *N.J.A.C.* 6A:22-3.1(a)(1.) compels a finding that the twins are domiciled in both Howell and Bergenfield, simply because their father lives in the latter municipality. That regulation provides that:

A student over five and under 20 years of age pursuant to *N.J.S.A.* 18A:38-1, or such younger or older student as is otherwise entitled by law to free public education, is eligible to attend school in a school district if the student is domiciled within the district.

(*N.J.A.C.* 6A:22-3.1(a))

And it explains that:

A student is domiciled in the school district when he or she is the child of a parent or guardian whose permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.

(*N.J.A.C.* 6A:22-3.1(a)(1.))

While the foregoing language bestows entitlement to a free public education upon a child in a district where his or her parent is domiciled, it does not mandate that a child whose parents are domiciled in separate districts must receive a free public education in both districts. To the contrary, *N.J.A.C.* 6A:22-3.1(a)(1.)(i) instructs that the domicile of a student with parents in separate school districts lies in “the school district of the parent or guardian with whom the student lives for the majority of the school year, regardless of which parent has legal custody” (emphasis added.) That provision contemplates that normally one, not both, of the parents’ districts of residence will provide the free public education. It further contemplates that the free

education will be provided by the district of the parent with the most jurisdiction over and contact with the student. In the present case it is the twins' mother.

By way of contrast, *N.J.A.C.* 6A:22-3.1(a)(1)(ii) addresses situations where separated parents accept truly equal responsibility for the physical care of their children, and the children spend an equal amount of time in the parents' respective districts of residence:

ii. Where a student's physical custody is shared on an equal-time, alternating week/month or other similar basis such that the student is not living with one parent or guardian for a majority of the school year, and where there is no court order or written agreement between the parents designating the school district for school attendance, the student's domicile is the present domicile of the parent or guardian with whom the student resided on the last school day prior to October 16 preceding the date of the application.

(1) Where such a student resided with both parents or guardians, or with neither parent or guardian, on the last school day prior to the preceding October 16, the student's domicile is the domicile of the parent or guardian with whom the parents or guardians indicate the student will be residing on the last school day prior to the ensuing October 16. Where the parents or guardians do not designate, or cannot agree upon, the student's likely residence as of that date, or if on that date the student is not residing with the parent or guardian previously indicated, the student shall attend school in the school district where the parent or guardian with whom the student is actually living as of the last school day prior to October 16 is domiciled.

Those provisions of the regulation are not at play in this case, since the twins' dominant parent is their mother, who is domiciled in Howell.

Nor can *N.J.A.C.* 6A:22-3.1(a)(1)(ii)(2) be construed to support petitioner's contention that respondent must retroactively reimburse petitioner for a portion of the twins' expenses at Bancroft. That provision directs that:

[w]here the domicile of a student with disabilities as defined in *N.J.A.C.* 6A:14 cannot be determined pursuant to this section, nothing in this section shall preclude an equitable determination of

shared responsibility for the cost of such student's out-of-district placement.

As the ALJ determined, the foregoing provision is permissive. It advises that the Commissioner is not precluded from making an equitable determination that two domiciles exist and that those districts should share responsibility for the student's education. Conversely, the Commissioner is not obliged to make such a determination.

The two cases relied upon by petitioner for the proposition that the Commissioner should divide the costs of the twins' educations between petitioner and respondent do not support petitioner's cause because they are not apposite to the instant controversy. The fact patterns in *Somerville Bd. of Educ. v. Manville Bd. of Educ.*, 332 N.J. Super. 6 (App. Div. 2000), *aff'd*, 167 N.J. 55 (2001)³ and *Cumberland Reg'l High Sch. Dist. Bd. of Educ. v. Freehold Reg'l High Sch. Dist. Bd. of Educ.*, OAL Dkt. No. EDS 2994-02 (July 27, 2005), *aff'd* 2007 U.S. Dist. LEXIS 44212 (June 18, 2007), *aff'd unpub. opinion* 293 Fed. Appx. 900 (3d Cir. September 29, 2008), disclose histories of equal legal and physical custody, with no clear evidence that one parent and/or home was dominant, or that the parents in those cases had manifested the intent that one parent would have primary custody or control. In this case the facts show not only that the twins' mother was the dominant parent, but that both parents intended her home to be the twins' home, and Howell to be the twins' domicile. Moreover, the facts as a whole not only show that the twins have had virtually no connection with Bergenfield, but also that their father has maintained the kind of significant connections with Howell that are often examined in the course of determinations about domicile.

For the above stated reasons, as well as those articulated by the ALJ, the Commissioner adopts the Initial Decision as the final decision in this case. Accordingly,

³ This case was superseded by regulatory amendments in 2010.

petitioner's motion for summary disposition is denied and respondent's motion for summary disposition is granted.

IT IS SO ORDERED.⁴



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/03/12

Date of Mailing: 2/06/12

⁴ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4590-07

AGENCY DKT. NO. 143-6/07

**BOARD OF EDUCATION OF THE
FREEHOLD REGIONAL HIGH SCHOOL
DISTRICT, MONMOUTH COUNTY,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF BERGENFIELD, BERGEN
COUNTY,**

Respondent.

John E. Croot, Jr., Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Zitomer, attorneys)

Vittorio S. LaPira, Esq., for respondent (Fogerty & Hara, attorneys)

Record Closed: November 7, 2011

Decided: November 17, 2011

BEFORE SOLOMON A. METZGER, ALJ t/a:

This matter arises out of a claim by petitioner, Freehold Regional High School District, that respondent, Bergenfield Board of Education, is obligated to share its cost of educating A.M. and M.M., twin brothers. The matter was first filed in the Superior

Court, Monmouth County, in March 2007, and was transferred to the Commissioner of Education in May 2007. The Commissioner in turn transmitted the file to the Office of Administrative Law (OAL) in June 2007 to be heard as a contested case, pursuant to N.J.S.A. 52:14F-1 to -23. The parties have filed cross-motions for summary decision.¹ N.J.S.A. 1:1-12.5; Brill v. Guardian Life Ins. Co. of Amer., 142 N.J. 520 (1995).

The facts are substantially undisputed. D.M., the father, and M.M., the mother, were married in 1987 and purchased a home in Howell Township the following year. A.M. and M.M. were born in July 1988 and have been diagnosed on the autism spectrum. They are both eligible for special education under the Individuals with Disabilities Education and Information Act (IDEIA), 20 U.S.C. § 1400 et seq. In January 2001 both children were placed at Bancroft NeuroHealth, a residential facility in Cherry Hill, New Jersey, by the Howell Township Board of Education, their elementary school district. Petitioner, their high school district, continued this placement, and the parents were in accord.

In October 2004, D.M. relocated to an apartment in Bergenfield and has since continuously resided in Bergenfield. In October 2007 he moved into a house in Bergenfield with another woman and her two children. D.M. and M.M. gave their depositions in 2007, which are generally consistent. The couple has not sought a divorce, and they were declared co-guardians of the twins when the boys reached age eighteen. Although he has not ruled it out, D.M. has no current intention of returning to his home in Howell Township. Nonetheless, he continues to vote there, his driver's license and vehicle registration reflect the Howell Township home as his address, he and M.M. file joint tax returns using the Howell address, D.M. pays the mortgage on the house, and they maintain joint checking and savings accounts using the Howell address. D.M. and M.M. maintain no separate bank accounts. They have traded cars because she drives the boys more often than he does, and he owns the safer vehicle.

¹ The case was assigned to me initially and made inactive to await the decision of the Third Circuit Court of Appeals in Cumberland Regional High School District Board of Education v. Freehold Regional High School District Board of Education, 293 Fed. Appx. 900 (3d Cir. N.J. 2008), which was issued in September 2008. Settlement discussions followed, and in April 2009 counsel notified me that they were ready to proceed and would submit supplemental briefs bearing on Cumberland. I retired in the midst of that briefing and the file was transferred to Israel Dubin, ALJ. He managed the file until his retirement, and the matter has recycled to me as a temporarily assigned administrative law judge. Given the passage of time, counsel were given an opportunity to add any final thoughts, and having heard nothing further, I closed the record on November 7, 2011.

The boys have a maternal aunt and cousins in the Howell area and holidays are celebrated together. M.M. stated in her deposition that both she and D.M. want the Howell house to be home for the twins.

M.M. visits the twins at least twice weekly at Bancroft, and they stay in the Howell home overnight on average about two nights a month. They overnight in Bergenfield five or six times a year, and D.M. generally visits them on Saturdays at Bancroft. On these occasions he often drives them to Howell in the morning for horseback-riding lessons at a stable in the area designed to accommodate the disabled. He then stops by the Howell house for a short visit, and in the afternoon returns the twins to Bancroft and participates in any of their scheduled activities. M.M. attends most if not all the meetings with Bancroft staff; D.M. does not generally attend. This is the substance of the record.

N.J.S.A. 18A:38-1 provides "persons" between ages five and twenty with an entitlement to a free public education. Since "free" in the statute really means that costs are shifted elsewhere, domicile is the mechanism of choice for determining which district will pay. In the main this is fair, as children generally live at home with their parents, who pay local school taxes. The section goes on to make provision for uncommon circumstances where domicile does not govern. N.J.A.C. 6A:22-3.1 expands the list, and here we are particularly concerned with the examples that relate to divorce. Though a person may have multiple residences, in general the law recognizes only one true home, or domicile, Lyon v. Glaser, 60 N.J. 259 (1972). The regulatory scheme works to remain true to this concept by attributing a child's rightful domicile to the home of one or another parent. Various criteria are used to make this assessment, such as the existence of a court order or written agreement between parents establishing a given district for school attendance, the home in which the child lives most of the time, or the district where the child most recently resided before October 16, a date used to determine school aid. Our facts do not fit squarely into these categories, as the twins do not reside with either of their parents.

There has now been some recognition that the single-domicile rule can create unacceptable levels of inequity in certain discrete situations, see Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6 (App. Div. 2000), aff'd, 167 N.J. 55 (2001); I.G. ex rel. L.G. v. Cumberland Reg. High Sch. Dist. Bd. of Educ., EDS 2994-02, Final Decision (July 27, 2005) <<http://lawlibrary.rutgers.edu/oal/search.shtml>>, aff'd sub nom., Cumberland Reg'l High Sch. Dist. Bd. of Educ. v. Freehold Reg'l High Sch. Dist. Bd. of Educ., 2007 U.S. Dist. LEXIS 44212 (D.N.J. June 18, 2007); N.J.A.C. 6A:22-3.1(a)(1)(ii)(2). The question here is whether this is such a case. For petitioner, the unitary-domicile rule is not threatened by cost sharing in the unusual circumstance where parents and children all live apart. To respondent, the recent cases are either wrongly decided or inapposite.

Taken as a whole, the regulatory scheme is firstly concerned that students have clear uninterrupted access to education, and then that costs be attributed by domicile. The statutory priority is clear when the two principles collide, as for example in N.J.S.A. 18A:38-1(d), where residence takes precedence over domicile in the interest of delivering education. Nonetheless, in general, costs are borne by the district of domicile, and where parents live apart the regulations favor single-district responsibility. Taking note of Somerville and Cumberland, the rules have been amended so as not to "preclude an equitable determination of shared responsibility for the cost of . . . out-of-district placement," N.J.A.C. 6A:22-3.1(a)(1)(ii)(2); 42 N.J.R. 179(b) (January 19, 2010). The language is carefully crafted. The rule does not extend to all cases where parents live in separate communities and children are in out-of-district residential settings. Even in this small cohort the facts must leave us without a sound foundation for invoking the unitary-domicile rule.

Though they live apart, D.M. and M.M. remain husband and wife and D.M. retains substantial ties to the Howell home. Whatever the nature of their personal relationship, their depositions make clear that D.M. and M.M. jointly desire to provide their two autistic sons with a sense of stability. They believe that maintaining the home in Howell where the boys were raised is a net positive toward that end. D.M. declined petitioner's invitation to enroll the boys in the Bergenfield school district. This united

intent draws the case closer to precedents in which parents make their intent known by written agreement, see Roxbury Twp. Bd. of Educ. v. West Milford Bd. of Educ., 283 N.J. Super. 505 (App. Div. 1995), certif. denied, 143 N.J. 325 (1996). Regulations at N.J.A.C. 6A:22-3.1(a) provide that separated or divorced parents living in different communities can by written agreement designate a district for school attendance. The Department considered eliminating this possibility in its most recent proposed re-adoption over concerns that parents in discord might manipulate this provision. On reflection the clause was retained; the Department was satisfied that disputes over the legitimacy of such documents were reviewable case-by-case, see 42 N.J.R. 179(b) cmts. (January 19, 2010). Our record presents no writing, but neither does it present much debate about the intent of these parents. In their conduct and in their depositions, D.M. and M.M. have made fairly plain that they want the house in Howell to be their children's home.

The home in which children spend most of their time is also used as a criterion by which to attribute domicile. Here the twins reside at Bancroft, but considerably more off time is spent in Howell than in Bergenfield. Taken alone this criteria is not well suited to our facts, but coupled with parental intent, it does further lean responsibility in petitioner's direction. N.J.A.C. 6A:22-3.1(a) generally strives for the bright lines that our facts blur. Yet, in this regulatory scheme an imperfect fit into the well-defined categories does not lead automatically to burden sharing, the default position.

The Somerville facts presented a divorced couple that had agreed to joint legal and physical custody and two school districts that had for a number of years voluntarily shared tuition costs. Personnel changes ended the accord. Equal parenting in that case seemed to play an important role in the decision. In our situation the mother and the Howell house are important factors in the twins' lives. Cumberland again presented parents with joint legal and physical custody and a child that lived out-of-district. Yet again the decisions of the ALJ, the United States District Court and the Third Circuit, the latter having labeled the opinion as non-precedential, give no sense that one parent and one home play a dominant role in the life of that child. Indeed the out-of-district

placements in that case were in Virginia and Florida; the child visited each parent equally but rarely.

Though a sincere effort must be made to find one domicile, the decision ought not to rest on marginal facts, or trivial distinctions. The courts in Somerville and Cumberland faced facts that did not substantively tip domicile in one or another direction. Our record points to the Howell Township home as the parental choice of domicile and it is the only home that these boys have ever known. Without diminishing the role of D.M., it does appear that the mother is the one most actively engaged in the boys' care.

Based on the foregoing, petitioner's cross-motion for summary decision is **DENIED**; respondent's cross-motion is **GRANTED**. Petitioner must bear the full cost of education for A.M. and M.M.

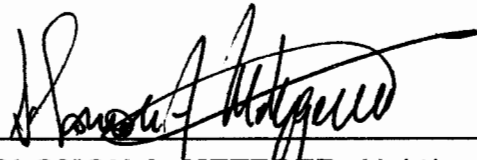
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 17, 2011

DATE



SOLOMON A. METZGER, ALJ t/a

Date Received at Agency:

11/17/11

Date Mailed to Parties:

11/17/11

mph

OAL DKT. NO. EDU 10203-11
AGENCY DKT. NO. 227-8/11

LINDA AMES, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE VILLAGE : DECISION
 OF RIDGEWOOD, BERGEN COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter, the parties' proposed Stipulation of Settlement, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/06/12

Date of Mailing: 2/08/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10203-11

AGENCY DKT. NO. 227-8/11

LINDA AMES,

Petitioner,

v.

**BOARD OF EDUCATION OF THE VILLAGE OF
RIDGEWOOD, BERGEN COUNTY,**

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Jeffrey R. Merlino, Esq., for respondent (Lindabury, McCormick & Estabrook, attorneys)

Record Closed: December 13, 2011

Decided: December 19, 2011

BEFORE **CAROL I. COHEN, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 26, 2011 this matter was received and filed with the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-

1 to-15 and N.J.S.A. 52:14F1 to -13. A hearing was scheduled for February 14, 2012, however, prior to the hearing date, the parties asked to engage in settlement discussions and were able to reach a settlement.

The parties had agreed to and submitted the attached Settlement Agreement and Release and Board resolution indicating the terms of the agreement.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached document.
2. The settlement fully disposes of all issues in controversy between them and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

12/19/11
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency:

December 21, 2011
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: December 21, 2011
db

— ∞ —
LINDABURY
McCORMICK, ESTABROOK & COOPER, P.C.
Attorneys at Law

jmerlino@lindabury.com
Fax: (908) 518-2967

December 6, 2011

Via Fax 973-648-6124 and regular mail

Honorable Carol I. Cohen, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Linda Ames v. Ridgewood Board of Education
Docket No.: EDU-10203-11
Agency Ref. No.: 27-8/11

Dear Judge Cohen:

Enclosed please find the fully executed Stipulation of Settlement and Board resolution in the referenced matter.

Please contact us if you have any questions or concerns.

Thank you.

Respectfully submitted,
LINDABURY, McCORMICK, ESTABROOK & COOPER, P.C.



Jeffrey R. Merlino
Jrm/cam

Enclosures

cc: Richard A. Friedman, Esq. (via fax; w/o enclosure)

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Attorneys for the Ridgewood Board of Education

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LINDA AMES,

Petitioner,

vs.

RIDGEWOOD BOARD OF EDUCATION

Respondent.

OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO: EDU 10203-11

AGENCY DKT. NO: 227-8/11

STIPULATION OF SETTLEMENT

WHEREAS, on or about August 9, 2011, a Verified Petition of Appeal was filed on behalf of Petitioner with the Commissioner of Education alleging violation of Petitioner's tenure rights within the District; and

WHEREAS, on or about August 19, 2011, the Respondent Ridgewood Board of Education (Board) filed an Answer to Petitioner's Verified Petition of Appeal denying the allegations; and

WHEREAS, the matter was assigned to the Office of Administrative Law and a conference was conducted on September 9, 2011; and

WHEREAS, the parties having a desire to settle the above matter in an amicable way, hereby agree as follows:

1. The Superintendent will recommend for Board approval the assignment of Petitioner to the half-time Class VIII 10-month secretarial position at Orchard Elementary School concurrently with Petitioner's present assignment (she is currently also a half-time Class VIII Ridgewood High School secretary), and the Petitioner (and her association, the Ridgewood Education Association (REA)) will withdraw her Petition of Appeal herein, as well as the pending grievance filed on behalf of Petitioner regarding

Petitioner's contractual seniority rights, with prejudice except as noted in Paragraph No. 8 below.

2. The Orchard School secretary position at issue here is a half-time Class VIII 10-month position whose sole function is to support the Orchard School Child Study Team (CST).

3. The half-time Orchard School secretary position is only temporarily open at present. Its incumbent remains employed by the district. Petitioner's initial assignment to this position will be as a long-term leave replacement covering for the incumbent; but this temporary assignment is made with the intention of having Petitioner' become permanent in the position if and when the incumbent's district employment terminates.

4. The parties agree the assignment of Petitioner to the half-time Orchard School secretary position is without prejudice to the parties' respective positions with respect to any re-filed grievance and/or a Petition before the Commissioner of Education, as described in Paragraph No. 8 below.

5. Upon the effective date of Petitioner' permanent appointment to the half-time Orchard School secretary position, all parties will consider Petitioner to hold a single full-time secretary position in the district that is assigned to split time between two schools. Accordingly, Petitioner's tenure and seniority rights will reflect Petitioner's assignment as a Class VIII full-time 10-month secretary.

6. The district will provide Petitioner with appropriate training and support in the procedures and systems used to fulfill the responsibilities of a secretary supporting a school CST. The district also understands that a reasonable amount of time will be necessary for Petitioner to learn and become proficient at fulfilling these responsibilities; and Petitioner will be allowed that reasonable time to progress through the "learning curve."

7. Petitioner will be always entitled to apply for, and potentially be appointed to, other secretary positions in the district.

8. If the incumbent in the half-time Orchard School secretary position returns to work in the district, and the district is unable to assign Petitioner to the Orchard School position permanently, Petitioner will be entitled to re-file a grievance asserting that Petitioner has a contractual seniority entitlement to full-time employment, and/or a Petition of Appeal before the Commissioner of Education asserting that Petitioner has a statutory tenure entitlement to full-time employment, based on the circumstances the current grievance and this current matter are based on, if she so chooses. The re-filing of such a grievance or Petition of Appeal would need to be done within timelines established by the applicable contract or regulations using the date Petitioner's assignment to the Orchard School position ended as the "trigger date."

9. Petitioner waives any claim for lost wages for the 2010-11 school year.

10. Petitioner waives any claim for reimbursement of attorneys' fees or other remuneration except as provided herein.

11. The parties have reached this compromise to avoid the expense, inconvenience, and potential acrimony of a hearing.

12. This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final Agreement on any and all issues.

13. This Agreement shall be governed by the laws of the State of New Jersey.

14. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

15. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. The parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they reviewed the Agreement in detail with their counsel or representative and fully understand its requirements and limitations. The parties acknowledge that they are represented by competent counsel and that they are fully satisfied with the legal representation provided by their respective counsel.

16. This Agreement shall remain confidential to the maximum extent permitted by law.

17. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.

18. This Agreement shall be incorporated as a proposed settlement agreement for review by the Office of Administrative Law and Commissioner of Education and if approved, resolves any and all claims that were raised or could have been raised in the captioned matter. If it is not approved by the Office of Administrative Law or Commissioner of Education, it is without prejudice to the parties' claims and/or defenses.

19. This Agreement is subject to ratification by the Board.

Linda Ames

Date: 12/5/11

Linda Ames, Petitioner

ON BEHALF OF THE RIDGEWOOD BOARD OF EDUCATION

Angelo DeSimone

Date: 12/15/11

Angelo DeSimone, Board Secretary

**EXCERPT FROM THE MINUTES OF THE REGULAR PUBLIC MEETING OF THE
BOARD OF EDUCATION OF RIDGEWOOD
BERGEN COUNTY, N.J. AS RECORDED IN THE
OFFICIAL MINUTE BOOK**

The Board of Education of Ridgewood, in the County of Bergen, New Jersey, convened in public session on Monday, December 5, 2011 at 7:31 p.m. in the Education Center, 49 Cottage Place, Ridgewood, New Jersey.

The following members of the Ridgewood Board of Education were present:

Ms. Sheila Brogan; Ms. Christina Krauss; Mr. Vincent Loncto; Mr. Robert Hutton, Vice-President; Ms. Michele Lenhard, Board President

The following members were absent: None

VI. CONSENT ITEMS

D. HUMAN RESOURCES

vii. Approval: Settlement Agreement

It is recommended that the Board approve a settlement agreement between the Board and Employee No. 010383 to resolve litigation.

Ms. Lenhard moved approval of Consent Item D – Human Resources, including the addendum.

Ms. Brogan seconded the motion, which carried by the following roll-call vote:

AYES: Ms. Brogan, Ms. Krauss, Mr. Loncto, Mr. Hutton, Ms. Lenhard

NAYS: None

I certify that this is a true and correct excerpt from the Ridgewood Board of Education minutes.

12/6/11
Date

Jennifer Ulman
Jennifer Ulman
Assistant Board Secretary

J.K., on behalf of minor child, P.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF SPRINGFIELD,	:	
UNION COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner sought reimbursement for P.B.'s senior year tuition at an out-of-district high school after unilaterally withdrawing her son from the Board's high school just prior to the beginning of the school year in September 2009. Petitioner alleged that the District had failed to address persistent intimidation, harassment and bullying of P.B. during his junior year. The specific allegations involved isolated incidents, one in P.B.'s sophomore year and three in April 2009 – the latter incidents all involving one other boy. The Board filed a motion for summary decision, which was denied. A hearing in the matter was held in June 2011, by which time P.B. had graduated from high school and attained majority. P.B. did not testify at the hearing.

The ALJ found that: pursuant to *N.J.S.A. 18A:37-13*, a board of education has an obligation to provide a safe environment in which a child can learn, and if it cannot provide this environment on its own school grounds, it has a responsibility to educate the student elsewhere; a district also has the responsibility to develop a plan to stop bullying in its schools; although most of the alleged incidents occurred off school property and protections for such incidents were not added to the legislation until November 15, 2010, respondent Board failed to adequately address petitioner's complaints of bullying and did not develop a written plan to stop the harassment until after J.K. removed her son from respondent's high school in September 2009; the plan developed to address J.K.'s concerns did not offer a solution to end the harassment, but rather shifted responsibility to P.B. for keeping himself safe; and the respondent Board's refusal to allow a transfer of P.B. to another school, together with the failure to devise a substantial plan to end the bullying, drove J.K. to remove her son from an unsafe environment. Accordingly, the ALJ concluded that: the actions of the Board to investigate and intervene in this matter were insufficient; the decision of J.K. to unilaterally place P.B. at an out-of-district school was appropriate; and the petitioner should be granted tuition reimbursement. The ALJ ordered that the Board reimburse J.K. – upon presentation of evidence – for the amount of tuition paid on behalf of P.B. for the 2009-2010 school year.

Upon comprehensive review of the record, the Commissioner rejected the Initial Decision, finding that the petitioner failed to sustain her burden to prove that: the alleged bullying actually took place; timely notice of the alleged harassing conduct was provided to the district; the board failed to take actions reasonably calculated to end the conduct; petitioner had exhausted all available administrative remedies with the district and had no alternative but to remove the student from the school environment; and that she in fact did so and enrolled him elsewhere at a specific cost to her. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 09972-09
 AGENCY DKT. NO. 219-8/09

J.K., on behalf of minor child, P.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF SPRINGFIELD,	:	
UNION COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.¹ The Board requested and was granted, over petitioner's objection, an extension of time within which to file exceptions to the Initial Decision. These exceptions were filed in accordance with the extended timelines pursuant to *N.J.A.C. 1:1-18.4*. The petitioner did not file a reply to the Board's exceptions.

In its exceptions, the Board first argues that the Commissioner is without jurisdiction to grant the monetary damages that the petitioner seeks since neither the prior nor current law provides a remedy for reimbursement of tuition in this forum. Title *N.J.S.A. 18A:37-18* (L.2002, c.83 §6), the applicable law extant at the time of the controversy, does not include the award of damages before the Commissioner; however, it does not limit recourse in this regard to other redress. Indeed, the statute directs an aggrieved person to pursue remedies under other available laws. Similarly, the New Jersey Law Against Discrimination (*NJLAD*) and the Anti-Bullying Act, effective 2010, specifically do not create or alter any tort liability or afford compensation for these

¹ P.B., the then minor child named in this action, submitted a hand-printed, post-hearing statement – signed but not notarized – which was contained in the file when it was returned by the OAL. This document was not considered in this review since P.B. did not appear at the hearing to testify and was, therefore, not subjected to cross-examination or credibility assessment.

damages before the Commissioner. The Division on Civil Rights and Superior Court are the appropriate forums in which to seek monetary relief under these laws or tort theory. Since the Legislature did not explicitly grant him power, the Board argues, the Commissioner is without the authority to award monetary damages. (Board's Exceptions at 8)

The Board next contends that the ALJ should not have relied on the holding in *L.W. v. Toms River Reg'l Schs. Bd. of Educ.*, 189 N.J. 381 (2007) because it is wholly distinguishable from the facts of this matter. Unlike *L.W.*, the petitioner here did not make a claim under *NJLAD* nor has she alleged that any putative bullying against P.B. was the result of his being a member of a protected class or possessing a protected characteristic. Petitioner did not present any facts to support such a claim, and the ALJ did not make any such determination, the Board points out. Additionally, since jurisdiction and the award of monetary damages in matters brought under *NJLAD* rest with the Division on Civil Rights or Superior Court, the Commissioner is without authority to grant such relief. (*Id.* at 10, 11, 12)

Respondent Board also maintains that petitioner's reliance on *M.P. and G.P. v. Delran Board of Education*, OAL DKT. NO. EDU 3446-85 (Dec. 30, 1985) is misplaced. In *M.P.*, the ALJ – in awarding monetary damages – determined that the Delran school and its administrators had failed in their duty to provide reasonable supervisory care, causing R.P. to be subjected to repeated and pervasive bullying, harassment, and isolation. The Delran school and its administrators did nothing. The ALJ in *M.P.*, *supra*, also determined that the parents had exhausted all administrative remedies available to them, and thus had no choice but to remove the student from the Delran School District. Under the unique circumstances in *M.P.*, the Commissioner awarded monetary damages for only a limited time until the Delran Board of Education created anti-bullying and harassment policies in preparation for R.P.'s immediate return to her regular school in Delran. (Board's Exceptions at 13, 14, 15)

Respondent asserts that in contrast to the Delran school, the Springfield school here maintained a district-wide, well-developed and fully enforced set of anti-bullying policies, which it disseminated to school administrators, staff, parents, and students alike. These policies were also set out on the District's website, and the schools complied with the policy requirements as the need arose. Before April 2009, in P.B.'s sophomore year, the school became aware of only one issue – which had to do with an invitation and attendance at a birthday party – involving P.B. and another student, M. The assistant principal met with both boys, and resolved the misunderstanding. No further conflicts occurred between the boys. In April 2009, late in P.B.'s junior year, school officials learned of the off-school grounds allegations of bullying or vandalism of P.B. and his property. Even though – under the law then in effect – the school was not required to take action on conduct occurring off school property, it did so anyway. Upon this notice, appropriate school personnel investigated the complaints, met with the aggressor, R.G., and his parents, and provided an “open door” to no less than five administrative individuals for P.B. to speak with and receive help from if he became upset or harassed. (*Id.* at 17)

Moreover, respondent argues that the officials were proactive in protecting P.B. by developing plans to ensure that nothing untoward occurred at the prom or after he injured his hand or in preparation for his to return to school in senior year. No other incidents of bullying were ever brought to the Board's attention, before that time or thereafter. Furthermore, the Board also asserts that J.K. did not avail herself of the administrative remedies the school offered when she refused to allow P.B. to take part in a supervised meeting with the student he claimed was harassing him or when she refused to at least consider a transfer to the school the superintendent suggested or when she failed to attend a scheduled meeting at the start of his senior year to discuss the plan to safeguard P.B. Instead, the Board charges that J.K. summarily and unilaterally enrolled P.B. into a “higher ranked” school of her choosing for P.B.'s senior year. It insists that school officials and

personnel in Springfield did all that it could do once they became aware of the incidents, and satisfied the very requirements that the Delran school was deemed to lack. (*Id.* at 18)

In further challenging the Initial Decision, the Board asserts that the ALJ erred by employing two specious conclusions in her ruling. First, it claims that the ALJ relieved J.K. from her burden of proof here by concluding – without support of law – that petitioner did not have to prove that the bullying occurred at all; instead, she only had to prove that the Board – once advised of the bullying – failed in its responsibility to provide a “safe and civil environment for her son.” The Board objects to this conclusion because without proof of harm, there is no reason to question the Board’s concomitant duty to act. Second, the ALJ determined that the evidence of bullying sufficient to displace a student is determined by subjective standards. The Board argues this flawed conclusion is inconsistent with prior and current anti-bullying provisions of Title 18A and with the NJ Supreme Court’s guidance in *L.W.*, *supra*. (*Id.* at 20)

The Board posits that the Court in *L.W.* provides an objective, “reasonable person” standard by which to judge a reasonable student’s reaction to a perceived harm, and a reasonable board’s response to known or anticipated incidents of harassment. The Court did not create a strict liability standard, requiring districts to “purge its schools of all peer harassment in order to avoid liability.” Instead that Court held “...school districts will be shielded from liability when their preventative and remedial actions are reasonable in light of the totality of the circumstances.” *L.W.*, *supra*, at 407, 412. The Board contends that an objective finding of bullying is necessary to make that assessment. (*Id.* at 21- 22)

The Board next argues that J.K., on behalf of P.B., failed to sustain her burden of proving by a preponderance of the credible evidence that her son endured the alleged harassment, intimidation and bullying. The Board charges that in advancing her claim here, only J.K. and her husband, D.K. – who had no firsthand knowledge – testified. Not one other witness for the

petitioner – not an expert, not the therapist, not a police officer, not a student, not a teacher, not a coach, and – most conspicuous by his absence – not P.B. himself. On cross-examination, it avers that when asked where his step-son was on that day, D.K. replied, “P. had other personal commitments today that would not allow him to be here.” (T1 at 112) The Board asserts that without a witness possessing first-hand knowledge of what actually happened, the record is bereft of any competent evidence. It points out that while *N.J.A.C.* 1:1-15.5 allows a modicum of hearsay, there must be some legally competent evidence to support each ultimate finding of fact. As such, it charges the record here does not support the ALJ’s findings. Moreover, the Board observes that J.K. and D.K. were able to testify only about their own impressions, about second- and third-hand conversations regarding what happened to and about P.B. or what they heard about what happened to him from P.B. himself or others. (*Id.* at 22, 31)

On the other hand, the Board stresses that the officials at the school testified to the facts they actually witnessed first-hand, which the petitioner and her husband were unable to provide. Of significance, the Board’s witnesses testified that P.B. was a good student and a member of the school’s ice hockey and football teams. They testified that they had no knowledge of any conflict between P.B. and R.G., the *only* alleged bully, until the students’ return from Spring break. Over the school recess, two incidents occurred off school property on or about April 8, 2009. Both episodes were reported to the police. When the assistant principal learned of these acts, he called in both boys, discussed the school’s position on bullying and warned them not to allow their dislike for each other to spill onto school grounds. No other reported incidents took place in or out of school until April 29th when, after an alleged “look” from R.G., P.B. injured the flat of his hand as he opened a door, shattering the glass pane instead of pushing the wooden frame. A review of the surveillance tape and a thorough investigation revealed nothing untoward. The Board’s unrebutted, competent evidence indicates that it was just an accident; P.B. said that he “didn’t mean to do that.”

(Davino T1 at 218) He “admitted that no one said anything to him or physically threatened him.”
(Board’s Exceptions at 24, 25.)

Preempting any concerns, the Board asserts that school officials made arrangements for P.B.’s comfortable return to class. The vice principal spoke with both R.G. and his parents; R.G. said that he and P.B. were avoiding each other and going their separate ways. (T1 at 149) The school allowed P.B. to leave class early so his hand would not be re-injured. They made sure P.B.’s prom went smoothly. From that point through June, he was invited to sit and talk at any time with the assistant principal, the principal, his guidance counselor, the affirmative action officer or the school superintendent to discuss any problems he was having. There were no other reported incidents on or off school property through the end of the school year. The Board contends that the two offsite incidents and the hand injury during the month of April 2009 do not satisfy the definition of “bullying” required by *N.J.S.A. 18A:37-18* (L.2002, c.83 §2), the applicable law at the time of these events. (*Id.* at 18)

The Board maintains that J.K. not only failed to state a claim upon which relief could be granted and failed to sustain her burden of proof by a preponderance of the credible evidence, but also failed to meet her burden of establishing her claim for reimbursement. J.K. neglected to provide the ALJ with evidence – by way of testimony, school records or an invoice – to substantiate her claim that P.B. actually attended Governor Livingston School during his senior year. The record is devoid of any proof of the cost of tuition, or that she even paid it. (*Id.* at 29, 35)

Finally, the Board contends that the ALJ did not consider all relevant testimony in the record and that her findings and conclusions of law are not supported by the substantial credible evidence adduced at trial. Further, it maintains, the ALJ relied on uncorroborated hearsay as well as documents not admitted into evidence at the hearing, and further ignored the Board’s multiple objections to petitioner’s hearsay testimony about facts that she herself did not witness or know

firsthand. Moreover, the ALJ did not require the petitioner to corroborate her testimony of third-party conversations or her perceptions about what P.B. felt or thought. (*Id.* at 34)

Upon consideration and review of the entire record – including a thorough reading of the transcript of the hearing held on June 6, 2011 at the OAL – the Commissioner rejects the Initial Decision.

The Commissioner agrees with the Board that neither *L.W. v. Toms River Reg'l Schools Bd. of Educ.*, 189 N.J. 381 (2007), nor *M.P. and G.P., parents of R.P., v. Board of Education of the Township of Delran, Burlington County*, 1985 S.L.D. 1817 is binding precedent in this case. Unlike *L.W.*, this matter was not pled as a New Jersey Law Against Discrimination (NJLAD) case, and there is no competent evidence that the student is a member of a protected class under the NJLAD. *M.P.* is a 1985 Commissioner decision which was not appealed to the State Board or the Appellate Division, and in administrative law the concept of *stare decisis*, i.e., adherence to precedent, is more “subject to the basic notion that experience is a teacher and not a jailer” than in a court. *In re Masiello*, 25 N.J. 590, 598-599 (1958). An agency is not irrevocably committed to its own precedents². Nevertheless, the opinions in those cases provide some guidance on the elements of a cause of action for bullying and harassment. Accordingly, the Commissioner concludes that it was petitioner’s burden to prove by a preponderance of the competent and credible evidence that the alleged bullying took place, that timely notice of the harassing conduct was provided to the district, that under all of the circumstances the Board failed to take actions reasonably calculated to remediate and end the conduct, that petitioner exhausted all available administrative remedies with the district and had no alternative but to remove the student from the

² The ALJ in *M.P.* analogized that Special Education regulations controlled the extraordinary set of circumstances in that case. The Commissioner does not hear special education matters brought under the IDEA and does not review the final decision of the Office of Administrative Law in those matters. Appeals from these decisions are heard in Federal District Court. Application or extension of IDEA principles in the case at bar would be inappropriate as the Commissioner does not have jurisdiction over those matters, and to the extent *M.P.* can be read to the contrary, it is hereby disapproved.

school environment, and that petitioner did in fact remove the student and educate him elsewhere at a specific cost to petitioner. Petitioner herein proved none of the above with the exception of notice to the Board on or about April 20, 2009 of an April 9, 2009 incident wherein the student's car was vandalized off school grounds and thereafter of a police report that the suspected vandals were following the student, tailgating his car. She also proved notice of an April 29 incident wherein the student's hand was injured when he put it through the glass part of the door after the person identified as the bully allegedly gave him a "look" in the hallway at school.

Unlike the competent evidence offered by respondent, all of petitioner's evidence concerning what her son had said about the alleged bullying is hearsay evidence, and although it is admissible in administrative proceedings, there nonetheless must be some residuum of competent evidence to support each ultimate finding of fact. *N.J.A.C. 1:1-15.5*. Here there is no competent evidence that any of the events alleged occurred, with the exception of the off-campus events memorialized in police reports. Although petitioner testified that she personally observed students harassing her son as he was coming out of school when she was there to pick him up and that the kids would give her the finger and tell her to "go 'f' yourself", no notice concerning that allegation was ever given to the district until the date of the hearing in this matter; petitioner testified that she had mentioned the incidents only to secretaries at the high school. Notwithstanding that the statute requiring districts to address bullying, intimidation and harassment incidents occurring off school grounds was not effective until September 2011 – long after any of the alleged conduct in the within matter – the competent evidence in this matter reveals that the district nevertheless responded promptly after receiving notice of the April 2009 off campus incidents, meeting with the parties involved and counseling against negative interactions within the school environment and school-sponsored activities. Petitioner rejected the district's offer for mediation between the two boys. She rejected their initial offer of a transfer to the choice school in Kenilworth. The fact pattern in

the within matter is nothing like the fact pattern in *M.P., supra*. The Commissioner concludes that respondent's attempts at remediation and prevention were reasonable in light of the totality of the circumstances herein. Even if petitioner had established the other elements of a cause of action, she offered neither one word of testimony nor any documentary evidence concerning payment of tuition or the cost of attendance at Governor Livingston High School. Decisions must be based upon facts in evidence, not speculation, conjecture or surmise.

Accordingly, the Commissioner rejects the recommended Initial Decision of the Office of Administrative Law and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.³



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/09/12

Date of Mailing: 2/09/12

³ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36*.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 09972-09

AGENCY DKT. NO. 219-8/09

J.K. ON BEHALF OF MINOR CHILD P.B.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF SPRINGFIELD, UNION
COUNTY,**

Respondent.

J.K., petitioner, pro se

Kerri A. Wright, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: August 30, 2011

Decided: October 13, 2011

BEFORE LESLIE Z. CELENTANO, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner J.K. requests reimbursement for tuition for her son, P.B.'s, senior year of high school at Governor Livingston High School in Berkeley Heights. J.K. unilaterally withdrew her son from Jonathan Dayton High School after what she claimed were bullying events. She asserts that under N.J.S.A. 18A:37-13, her son was entitled to a

safe and civil environment, in which the school would educate him, without disruption. She alleges that the administration of Jonathan Dayton failed to provide a safe haven for her son, leaving her no alternative but to remove him, when the school refused to develop an effective plan to end the intimidation and bullying or, in the alternative, to transfer him. On March 30, 2011, an Order was entered denying the respondent's motion for summary decision. The hearing was held on June 6, 2011, and, following the receipt of post-hearing submissions, the record was closed.

FACTUAL DISCUSSION

P.B. was a student at Jonathan Dayton High School in Springfield, New Jersey. He maintained good grades, and was active in the sports program. He was a member of both the ice hockey and football teams.

The petitioner alleges that throughout his high school career, P.B. was repeatedly taunted and harassed by other students, who called him "gay" and "fag." He confided in his mother, but was reluctant to report these episodes to the school because he feared retaliation. This verbal abuse escalated until, in April 2009, P.B.'s car was vandalized while parked on his mother's property during spring break. The police were contacted, and through an investigation it was determined that two of P.B.'s schoolmates, R.G. and S.B., were involved in the vandalism.

On April 20, 2009, the petitioner contacted the school to advise school personnel of the latest events and to let them know that there was ongoing bullying and harassment by these students, which culminated in the damage to P.B.'s car during spring break. That Friday, after school hours, P.B. was driving in the town of Westfield when he noticed he was being followed by the same individuals who vandalized his car, and who habitually harassed and bullied him. He drove to the Westfield Police Station and filed a report, because he was frightened for his safety.

When P.B. returned to school after spring break in 2009, some sort of altercation occurred between P.B. and his harassers. This resulted in P.B. driving his fist through a

wired glass window light in a door. He sustained some wounds on his hand that required medical attention.

There is some discrepancy in the stories of the parties concerning the efforts of school personnel to address the issues brought before them by the petitioner. In an e-mail exchange between the petitioner and Springfield Board of Education member Jeff Strumpf near the end of June 2009, the petitioner claimed to have contacted the school repeatedly and not received any calls back. Mr. Strumpf forwarded the e-mails to Mr. Davino, Springfield superintendent, who stated: "This letter is a complete and total misrepresentation of the truth." (Certification of Michael S. Williams, Esq., Ex. A.) Mr. Davino complained to Mr. Strumpf that the petitioner called the office of the Commissioner of Education, who in turn called the County superintendent's office. In his e-mail to Mr. Strumpf, Mr. Davino stated, concerning his response to the County superintendent: "I also advised her as a result of this parent's misrepresentations and all my prior efforts which she totally ignored, I **will not be contacting** the parent." (*Ibid.*; emphasis added.)

School personnel deny any reports of bullying involving P.B. and R.G. prior to the notification that P.B.'s car was vandalized. Norman Francis, the assistant principal, met with both P.B. and R.G. and notified P.B.'s guidance counselor. The school staff was contacted by a Springfield detective, who advised that he was investigating complaints leveled by the petitioner regarding incidents that occurred off school grounds and when school was closed.

After learning of the police involvement, Mr. Francis again met with P.B. and R.G., and also arranged a meeting with R.G. and his mother. He then referred the matter to the school district's affirmative action officer, and asked for the assistance of the school's student assistance counselor, Maria Sista, and P.B.'s guidance counselor, Lillian Abadir.

Petitioner was concerned that the prom might present an opportunity for an altercation between the alleged bullies and P.B., and she notified the school of her concern. Mr. Francis asked Mrs. Sista to handle the matter. She attempted to set up

mediation between P.B. and R.G., but the petitioner refused to allow her son to attend. Ultimately, Mrs. Sista did meet with the two boys separately. While no overt incidents occurred at the prom, P.B. related that R.G. made disparaging remarks about P.B.'s date, but not directly to P.B.

At some point during August 2009, the petitioner met with Mr. Davino; Ellyn Atherton, the District's director of Human Resources and Professional Development and affirmative action officer; and Dr. Carmen Centuolo, the Union County superintendent of schools. At that meeting, the subject of an alternate placement for P.B. was discussed. The officials from the school suggested that they could place P.B. at David Brearley High School, because it is the Union County "choice school."¹ However, Mr. Davino insisted that P.B. did not need to be transferred, that Springfield had taken all appropriate steps to address the issues, and that P.B. was not in danger. (Certification of Michael S. Williams, Ex. A, Respondent's Answers to Interrogatories #15.) The petitioner objected to the proposal of the choice school because Brearley and Dayton shared a sports program, and P.B. would have to fraternize with the same individuals who targeted him at Dayton.

SUMMARY OF THE TESTIMONY

The following summarizes the testimony or evidence admitted in this matter, relevant to the issues to be decided.

¹ The School Choice Program was a pilot program in which students could attend an alternate, designated school outside their district of residence at no cost to the parents or the home school district. School Choices <<http://www.state.nj.us/education/parents/choice.htm>>. However, it appears that the School Choice Program is only designed to accept students up to the tenth grade, and P.B. was looking for acceptance into the twelfth grade. This was therefore not a viable alternative. N.J.A.C. 6A:12-2.2, eligibility criteria for students, provides:

- (a) To be eligible to participate in the program, a student ***shall be enrolled at the time of application in grades K through nine in a public school of the sending district*** and have attended school in the sending district for at least one full year immediately preceding enrollment in a choice district.

[Emphasis added.]

Additionally, in a September 1, 2009, letter to J.K. in which Director Duncan liberally construed the pro se pleading J.K. filed, in a footnote she stated, "We recognize that Jonathan Dayton is Springfield's only high school, existing charter schools in Union County are K-8 schools, and the county's 'choice' school, David Brearley High School, does not presently have open seats in the appropriate grade. We are uncertain as to whether viable options may exist in neighboring counties."

J.K.

J.K. is P.B.'s mother and the petitioner in this case. She appeared pro se. She testified that her son had endured several school years, beginning in 2006, in which he was taunted by other students, particularly in regard to what those students perceived to be P.B.'s sexual, or affectional, preferences. In his junior year, the insults and the bullying escalated to such a degree that it was commonplace for her son to hide in the bathroom, call her, and plead with her to get him out of there. He avoided the lunchroom and would eat in the library. She was aware of which children were responsible for the bullying because there were occasions when she would pick her son up from school, and those students would ridicule and insult her with gestures, laughter, and words.

In April of P.B.'s junior year, the incidents culminated in the vandalism of his car. J.K.'s youngest daughter, age seven or eight at the time, looked out the window and saw that there was writing all over P.B.'s car. J.K. described this vandalism as "filthy, filthy drawings and expletives" referring to body parts and linked with P.B.'s name and the name of the girl he had been dating. The police were called and a report filed.

Subsequent to this incident, P.B. was driving in the town of Westfield and realized he was being followed by the suspected vandals. He was afraid that they were going to cause an accident, because they were following so closely behind him. He drove directly to the Westfield Police Department and filed a report.

When P.B. returned to school after the Easter break, the antagonism carried into school with remarks such as, "What did you call the police for, you fag" and threats such as, "You're going to have problems, asshole." She testified that the manner in which these things were communicated was very surreptitious, and out of sight and earshot of any adults. Once again, P.B. called his mother from the bathroom, asking her to pick him up because he couldn't take it anymore.

For about a week thereafter, J.K. left messages for Mr. Davino, stating that there was a problem, her son was hiding in the bathroom and eating in the library to avoid his harassers. Her calls were not returned. During this time, the harassment continued, ultimately culminating with P.B. rushing into a stairwell and pushing his flat, open hand through a wired door window. The broken glass injured his hand so severely that P.B. required hand surgery that night.

Following this incident, J.K. received a call from Mr. Francis, the assistant principal, who told her that there had been an accident, and they couldn't stop P.B.'s bleeding. J.K. rushed to the school, and when she saw the principal, the assistant principal and the superintendent standing in the hallway, she burst out verbally, accusing that this was their fault, because she had been trying to tell them for seven days that something was going to happen, and now her son was hurt.

J.K. testified that when P.B. was ready to return to school after the hand surgery, she called the school to ask what she needed to do, and was told by the secretary, "drop him off," a non-answer, at best. At that point, J.K. was concerned for her son's safety, so when the time came, she accompanied her son into the school building and went directly to the nurse's office. J.K. wanted to tell the nurse that P.B. needed to take medication and needed to take breaks. The nurse brought in the guidance counselor, who stated that she was unaware that there had been an incident. Some accommodations were made for the injury, insofar as arranging for P.B. to report to and leave early from his classes, so that the injured arm did not get jostled in the hallways.

J.K. testified that no written plan was prepared to address the bullying, or to protect P.B. from those who had been bullying him. P.B. attended school that day, and told his mother that the bullying had escalated and there was one primary student, R.G., who was tormenting him. The following day, P.B. would not go to school, and J.K. went to sit in the office and wait until someone had time to speak to her. Finally, after demanding a meeting with Mr. Francis, she met with Ms. Atherton. She went home and brought P.B. back with her. P.B. was told, "If someone is picking on you, duck into a classroom, tell the teacher, or go to your guidance counselor." J.K. thought this was "the usual that you would expect a child to do."

P.B. returned to school, but was not reassured that the bullying wouldn't continue, and was nervous every day. He felt as though no one "had his back," and he felt as though the administration did not believe him. J.K. asked Mr. Francis to call R.G.'s parents in so she could speak to them, but that did not happen.

J.K. testified that her son still attends therapy, and at one point the therapist actually spoke to Mr. Davino about this ongoing situation.²

J.K. testified that after the incidents "erupted" in April, when approached by the student assistant counselor (SAC) she did not give permission for P.B. to participate in mediation with both boys present. The SAC then met with both boys separately, and without P.B.'s mother's permission.

As J.K. was completely dissatisfied with the response from the school, she contacted the Union County superintendent's office. The superintendent then personally chaired a meeting among J.K., Mr. Davino and others. At that meeting, Mr. Davino suggested that whether or not he believed P.B. had been bullied, he would be willing to consider a transfer to the choice school for Union County, David Brearley, in Kenilworth. J.K. testified that she dismissed the suggestion out of hand because her son was active in sports, the two schools collaborated on some of their sports programs, and this was therefore not a viable solution.

On cross-examination, J.K. admitted that the only bullying incidents that were contemplated by her answers to interrogatories were those of April 2009 (the car vandalism, the tailgating, and the injury to her son's hand), although she maintained that the bullying had been going on for years, by a group of students. To her knowledge, subsequent to the vandalism to the car, and filing a police report, there may have been some ramifications resulting in community service for one of her son's

²There is a previously submitted letter from Patricia Delgado, LCSW, to Dr. Carmen Centuolo verifying that P.B. was in treatment with her since 2008 and drawing a corollary between P.B.'s depression and anxiety and his difficulty with his peers at Jonathan Dayton.

tormentors. She testified that she learned this "way after the fact" from the mother of the girl whose name was written on her son's car by the vandals.

J.K. testified that when she was called to the school after her son put his hand through the glass, she accused the members of the staff and administration of being at fault for this injury because she had warned them that he was at his breaking point. She has no knowledge as to whether the students named in the answers to interrogatories, except for R.G. and his girlfriend, were the same students who participated in the vandalism, and were present in the hallway the day P.B. put his hand through the door window in the stairwell. The other students were not on the hockey or football teams. She testified that she complained about them previously because they harassed her son while he was coming out of school, when she was there to pick him up, and they cursed and gestured toward her as well. She complained to the secretaries in the school office over the course of three years, and she had a discussion about them with the school principal, Mrs. Cresci.

J.K. testified that she contacted several schools regarding enrollment for P.B.'s senior year. The school that got back to her first was Governor Livingston in Berkeley Heights. Some schools had waiting lists. Summit had a six-month waiting list. If New Providence High School had gotten back to her first, she would have been happy for P.B. to go there. She based her selection of the schools to contact on the most convenient commute. The State educational rankings for Governor Livingston and New Providence were also higher than the ranking of David Brearley, and, notwithstanding that Brearley was not an appropriate option, if she were going to make a move she didn't want P.B. to go to a school with a lower ranking than Jonathan Dayton.

J.K. testified on cross-examination that her son began to see a therapist in 2008 for two reasons, the difficulty he was having with his father and because of the bullying he was enduring at school. She admitted that in a letter to the superintendent of schools in Berkeley Heights she wrote, "Throughout [P.B.'s] junior year ordeal, he has remained impressively optimistic and positive and is very motivated to undergo a productive senior year."

Norman Francis

Norman Francis is currently employed by the Parsippany Troy Hills school district as a principal. Previously, he was an assistant principal at Jonathan Dayton High School in Springfield. Discipline was his primary role, and any incident of bullying was investigated by him. An investigation consisted of receiving a report; speaking to the students involved; bringing in the guidance counselors, other teachers, and the school psychologist if necessary; notifying the parents; and then making a decision about discipline. If the events occurred outside of school, and involved one of the students, Mr. Francis would be in contact with the youth officer for Springfield, Det. Matt Lynch.

Mr. Francis identified the Springfield Schools' Policy on Harassment, Intimidation, and Bullying. He stated that each student gets a copy of the policy, and it is also available on the District website.

Mr. Francis testified that P.B. had a clean disciplinary record. He was involved in one incident in P.B.'s sophomore year in which P.B. had an issue with a particular boy, "M." Mr. Francis brought the two boys together, they let each other know how they were feeling, the conflict was acknowledged and dealt with, and they moved on. He was unaware that P.B. had any other ongoing conflicts with other students. He spoke to J.K. on several occasions and she never brought up other conflicts her son was experiencing during his sophomore year.

The next incident of which Mr. Francis was aware was the incident with R.G. during the spring of P.B.'s junior year. He was told by Detective Lynch that there was an incident of a car that was vandalized, and the incident of following that took place in Westfield. Prior to hearing from Detective Lynch, J.K. called him and gave him a heads up that this had happened and that she was concerned, and she asked him to keep an eye on things.

After learning of the incidents, Mr. Francis spoke to both the boys and reiterated that if the tension were building they needed to let him know. Neither of the boys told

Mr. Francis that there was an ongoing conflict between them. It was not presented to him by P.B. as "I am being bullied" or "I am being harassed." After he spoke to the boys, he spoke to both sets of parents.

On April 29, P.B. presented to the school nurse with an injured hand. First aid was administered and the EMTs were called. Mr. Francis called J.K.

Mr. Francis testified that he investigated the report from P.B. that R.G. gave him "a look." He determined where the incident took place and reviewed the videotape. There was nothing useful on the videotape. In fact, there was no footage of P.B. exiting the stairwell when he was injured. The girl who accompanied P.B. to the office did not witness anything and was only walking with him out of concern.

When P.B. was preparing to return to classes after his injury, Mr. Francis spoke with R.G. and with R.G.'s mother to make sure there would be no further issues. Before P.B.'s return, Mr. Francis met with P.B. separately from his mother, and Ms. Atherton also met with P.B. Mr. Francis, when questioned as to what measures would be in place to make sure there were no additional issues, testified that they needed to talk to P.B. and give him some steps to take if he felt issues "coming his way."

Mr. Francis also indicated that he spoke to J.K. regarding the junior prom and the potential for trouble, and that he suggested a "mediation," which R.G. agreed to; however, P.B. did not want to be in the same room with R.G. At the prom, Mr. Francis did not observe any interaction between the two boys. After the prom, P.B. reported that R.G. had made a comment about his date. When Mr. Francis spoke to R.G. about this, he denied making any remark at all.

From the prom until the end of the year, Mr. Francis did not receive any reports about bullying, intimidation or harassment, yet he recognized there were still concerns. He did not have an opportunity to speak with either P.B. or J.K. over the summer before P.B.'s senior year, because J.K. withdrew P.B. from school. A letter was sent to J.K. referencing an "action plan" developed in late August by Mr. Francis, the building

principal and P.B.'s guidance counselor. (R-11.) According to Mr. Francis, the plan was developed to provide P.B. with specific things he could do if he were faced with any bullying, intimidation or harassment. The letter was mailed to J.K. on September 1, the same day P.B. was withdrawn from school. The plan, however, was not provided to J.K. until discovery began in this matter.

Ellyn Atherton

Ellyn Atherton has been employed by the Springfield Board of Education since 2004. She is the director of Human Resources and Professional Development. She is also the affirmative action officer for the District. As the affirmative action officer she is responsible for all the staff training required by the State, especially the harassment, intimidation and bullying policy. She is also responsible for making staff, parents and students aware of the policy. It is distributed to the students in their handbooks, and available on the District website. It is also posted in all the school buildings.

Ms. Atherton was asked by Mr. Francis to participate in the conversation with J.K. that took place before P.B. returned to school following his hand injury. She acts as a resource to parents and students when bullying has been reported. She was present when J.K. went home and returned to the meeting along with P.B. Ms. Atherton assured J.K. and P.B. that P.B. would be "perfectly safe" at Jonathan Dayton for the remainder of the school year. P.B. was very quiet, so Ms. Atherton could not get a feel for what his mental state was. She thought J.K. felt better about the situation because she was reassured that there were people P.B. could go to if issues arose.

The next time Ms. Atherton had any involvement was when she was asked by Mr. Davino to sit in on a conversation with him, J.K., P.B. and the Union County superintendent, Dr. Centuolo. That meeting took place in late August before P.B.'s senior year. At the meeting, P.B. mentioned R.G. when asked who was bullying him.

At that discussion, J.K. brought up a transfer to Governor Livingston. Mr. Davino countered with the suggestion of the choice school, David Brearley. J.K. objected,

stating that P.B. would not be attending Brearley with "those students." Ms. Atherton understood her to mean that the sports teams of Brearley and Dayton had too many kids who knew one another.

She was not aware that the development of a plan was contingent upon whether or not P.B. came back to Dayton in September. Nor was she aware that Mr. Davino called J.K. to tell her that he was retaining P.B. as a student in late August. She was not aware of the date of September 1 as the date the letter was sent to J.K. regarding the development of an action plan to assist P.B. with peer conflicts. The meeting was set for September 8.

Michael Davino

Michael Davino has been the superintendent of schools for the Springfield Board of Education since 2004. As superintendent, he does not ordinarily mete out student discipline, until it reaches a very serious level, requiring expulsion, or situations of that nature. In terms of bullying, intimidation or harassment, he recognizes that there is a statutory requirement that schools provide a safe environment for students in which to attend school, and provide that regardless of "race, religion, sexual position or desire, gender or any other significant type or manner in which a student may or may not be singled out that those kinds of situations do not arise, do not impede the student's ability to have an appropriate and free public education and opportunity to explore and expand themselves to their greatest capacity, regardless of any of those factors." (Tr. at 202.)

Mr. Davino first came to know P.B. during his sophomore year when J.K. had some discussions with him regarding some academic concerns she had about P.B.'s difficulties. He recalled two specific times that P.B. made appointments to speak with him. He never had a conversation with P.B. in which P.B. related that other students were bothering him. The only student Mr. Davino was aware of as being the "protagonist" was R.G., and while he was aware that there was a girl involved in the described incidents, he was unsure exactly which girl that was. The first time he heard of R.G.'s involvement was when P.B. was injured and sitting in the office. Mr. Davino

was notified by the staff of the injury and asked what had happened. P.B. stated that R.G. had looked at him. When Mr. Davino asked what he meant by that, P.B. replied "Well, you know, I walked by and he gave me a look." Davino stated that P.B. was "not the type of kid to punch glass," and so was concerned, as it "didn't make sense."

Mr. Davino described the steps taken to investigate this incident. He stated that during an investigation they always review the videotape, and interview students who were passing by, separately so that the students do not have an opportunity to coordinate stories, to determine who the initiator was and whether there was a face-to-face confrontation, and to try to get the students to tell the administration what they saw and heard. He also testified: "Kids are smart. They know where the cameras are. So they may try to take themselves out of camera range, but because the cameras cover a large range, you can see the reaction of other students, how they respond to moments or situations and given time frames. . . . You may not know what is taking place off to the side, but you know something happened in that corner, because we could see student reaction." (Tr. at 220.)

Mr. Davino testified that the meeting with the County superintendent took place because J.K. wrote to the County superintendent regarding issues surrounding P.B.'s placement for his senior year. The meeting took place at Mr. Davino's office. He claimed not to have been aware that J.K. was requesting a transfer for P.B. prior to the time of the meeting. At the meeting, Mr. Davino brought up David Brearley High School in the context of a transfer, which he was opposed to, but was willing to consider in light of J.K.'s concern for the well-being of her son. He suggested Brearley because it was the choice school, because the schools in Kenilworth accept students from all of Union County, and because he didn't "want to shine a light" on P.B. transferring into the school in his senior year. He also felt the co-op nature of the sports teams would work as an advantage to P.B. But, upon further consideration, Mr. Davino thought it was in P.B.'s best interest to remain at Jonathan Dayton. He agreed to confer with P.B.'s counselor and therapist and make a determination and convey it to the County superintendent and J.K. It was his opinion that they would be able to provide P.B. with a "safe, appropriate and viable" education during his senior year.

On cross-examination, Mr. Davino, when asked about the incident that led to P.B.'s injury, admitted that he did not think that P.B.'s personality was such that he would purposely strike out in anger and put his hand through the glass of the door. P.B. perceived that the other student "made a face at him"; whether the other student actually did anything or not was irrelevant, because that was the way P.B. perceived it. However, Mr. Davino was surprised that, based upon information he received from P.B.'s coaches, he didn't have "a football team and a hockey team beating the hell out of a kid in the hallway," and that "if it was that level of bullying" the teams would have had some serious involvement. He agreed it could be an anomaly, but agreed that the lack of team backup went into his decision to not recommend a transfer.

Mr. Davino believes that P.B. could have been safe at Jonathan Dayton in his senior year. It is his opinion that in any school, even out of Union County or in a parochial school, the same situation would have evolved because with technology and Facebook, there is no way to escape those who were presumably bullying P.B.

Mr. Davino denied that cost had any bearing on his decision not to agree to the transfer to Governor Livingston, and stated that the only issue to him was the best interests of P.B.

ANALYSIS AND DISCUSSION

The legislative intent, as plainly stated in N.J.S.A. 18A:37-13, is that a school needs to be a "safe and civil environment" in which children can learn. A broad reading of this can reasonably be interpreted to mean that the school has an obligation to provide that environment. If it cannot provide safety and civility for a child on its own school grounds, that does not obviate it from its responsibility to educate the student in a safe and civil environment.

When faced with allegations of bullying, intimidation or harassment, schools have the ponderous responsibility to provide a safe and civil learning environment, to stand in the shoes of the parents, and to protect children while in the custody and care of the

schools. Most importantly, the school has a responsibility to develop a plan to stop the bullying.

I **FIND** that P.B.'s and his mother's complaints of bullying, supplemented by police reports, were met by the District's woefully inadequate response. Although the most serious acts of menacing and vandalism occurred off school property, those acts were substantiated by police reports from Springfield and Westfield. These acts occurred in April of P.B.'s junior year. No plan was developed for the remainder of the school year, and when J.K. expressed some apprehension about the possible volatility of the prom, she was placated with assurances that there would be teachers and security there. While there were no overt acts at the prom, there was no preemptive plan in place, either.

The plan was not even reduced to writing until after J.K. had removed her son from the rolls at Jonathan Dayton. She claims never to have seen it until this case commenced. The plan, such as it was, shifted most of the responsibility to P.B. for keeping himself safe, suggesting that he employ avoidance techniques (which he most likely was already doing) and that he report to his guidance counselor, which he was already doing; offered the services of the student assistance counselor or the school psychologist, at P.B.'s initiation; changed P.B.'s schedule so as not to put the boys in the same class (recognizing that at least one student was positively identified as the firebrand for these incidents); and imposed a reporting responsibility on him for every time the bullying happened, even in face of the likely retaliation, which he had already experienced, and the escalation that he feared most. I **FIND** that what the plan did **not** do was offer a solution to end the harassment and bullying.

The Current State of the Anti-Bullying Law

In 2002, New Jersey introduced the nation's most comprehensive anti-bullying legislation. In 2007 it was amended to include cyber-bullying, and in 2008 it was again amended to include a requirement that each school district post the school's policy to its website, as well as distribute the policy to all the families of students enrolled in the district. N.J.S.A. 18A:37-13.1.

The legislation was updated on November 15, 2010, P.L. 2010, c. 122, and extends the protections for incidents that occur off school grounds. Were the vandalism of P.B.'s car and the intentional tailgating incident in Westfield to have occurred in the 2011–2012 school year, perhaps the school's response would have been very different than it was, which was to effectively ignore those incidents, even in the face of police involvement. The legislative intent of P.L. 2010, c. 122, was to strengthen the standards for preventing, reporting, investigating and responding to incidents of bullying, and reduce the risk of suicide among students.³

Decisional Law

Bullying, and a school's overarching responsibility to end the harassment, while not a new problem, is a developing area of law. Reported decisions that address the issue of reimbursement for parental placement in a new school district to remove the child from his tormentors are scant. In M.P. and T.P. v. Delran Board of Education, OAL Dkt. No. EDU 3446-85 (December 18, 1985), a middle-school girl, R.P., was persistently harassed, on and off school property, by a specific group of students. The school was aware of the problems from the outset. After a particularly disturbing incident following a school-sponsored sporting event, R.P. refused to return to school and her parents decided to keep her out of school until the board of education resolved the matter. The board proposed rescheduling R.P.'s classes so that she could return to school. No discipline was meted out to the offending students. R.P.'s mother was denied any opportunity to meet with the parents of the children who were bullying her daughter. R.P.'s parents were unconvinced that what the board proposed would ameliorate the situation, and so, unilaterally, they removed R.P., and she began attending the Cinnaminson school district. Because the administrative law judge (ALJ) found that the board failed in its supervisory duty to R.P., he found authority for the

³ Because the stated intent is to "strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises," Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.1(f), this may be considered curative or ameliorative legislation, and may meet the standards proscribed in the "Time of Decision Rule." The legislation takes effect at the beginning of the 2011–2012 school year. This case was pending at the time of the passage of this legislation, and the statute contains this language: "The Commissioner of Education may take such anticipatory administrative action in advance thereof as shall be necessary for the implementation of this act."

board to pay the out-of-district tuition owed to Cinnaminson by analogizing the situation to special education cases, and noting the fact-sensitive circumstances where such a remedy would apply.

The respondent attempts to distinguish Delran by claiming that here, the bullying did not take place on school grounds, and if bullying on school grounds existed, it was minor or unreported. But Delran also offers support for the position that the school must bear some responsibility for students' safety off school grounds. It is ludicrous to think that bullying is limited to off-campus events when these students see each other daily at school. This dovetails with the language in P.L. 2010, c. 122, which, in acknowledging that bullying and harassment can no longer be confined by the metes and bounds of school property, school functions, or school buses, added the essential element of "on or off school premises."

The central issue in Delran was the ineffective response of the school, once there was notice of this activity taking place. Here, there is documentation that at least by April 2009 there was an alleged pattern of harassing behavior, and yet, despite police involvement, which was indicative of the seriousness of those acts, the school seems to minimize the conflict, adopting an out-of-date "boys will be boys" attitude, bolstered by the detective's purported statement that the incidents were relatively minor, and typical of boys of their age and level of maturity. Yet, the Board seems to give little weight to the written statement of Patricia Delgado, LCSW, with whom P.B. had been in therapy since the summer before his junior year. Mr. Davino testified that at the meeting with the County superintendent, he agreed to confer with P.B.'s therapist, yet no testimony was elicited describing the content of that conversation, or if it ever took place at all.

In the Delran case, the ALJ crafted a remedy, and looked to special education law to find analogous authority for such relief. However, he specifically stated:

Here special education regulations obviously do not govern. However, in like fashion, the Commissioner should exercise his constitutionally and statutorily based powers . . . to carve out an exceptional remedy. He should require

reimbursement for past expenses in the Cinnaminson school district, because of the board's failure to provide R.P. with a thorough and efficient education.

[Delran, supra, OAL Dkt. No. EDU 3446-85.]

In the context of a civil rights case, there is mention of parents unilaterally removing a child from a school district because of bullying, and the financial responsibility to pay the bullied student's tuition fell to the home district. While there may not be an explicit private right of action to seek relief under the statute, there is some precedent for shifting the financial onus off the parents and putting it on the school that cannot meet the student's basic need for safety and security of property and person. In L.W. v. Toms River Board of Education, 189 N.J. 381 (2007), the Supreme Court considered the case of a student who was harassed based upon his perceived sexual orientation, some of the same grounds as alleged here. The Supreme Court upheld the decision of the Appellate Division that under the Law Against Discrimination, there was a cause of action against a school district if the school district failed to reasonably address student-on-student affectional or sexual-orientation harassment. In a recitation of the facts, the Court stated: "Within days of entering high school, the abuse culminated with a pair of physical attacks. Ultimately, L.W.'s unease prompted him to withdraw from his local high school and enroll elsewhere, at the expense of his school district." L.W., supra, 189 N.J. at 389.

The Court went on to explain: "During the following month, his mother attempted to find alternative placement for L.W., without assistance from the District. After his mother expressed an interest in Red Bank Regional High School, the District agreed to subsidize L.W.'s attendance and transportation expenses." Id. at 396.

When L.W. was decided, the school administrators, and the Court, had had the benefit of the intervening twenty plus years since the Delran Initial Decision. Although tuition reimbursement was not an issue to be decided in the L.W. case, it is persuasive that the school district had already capitulated to such a demand from L.W.'s parents. The Director of the Division on Civil Rights, in a review of the evidence adduced at the OAL hearing, stated:

The hearing testimony supports the finding that, in an effort to ensure L.W.'s safety, Respondent suggested that L.W. remain on school grounds during lunch period and ride the school bus instead of walking. However, Assistant Schools Superintendent John Gluck testified that it was Complainant L.G., rather than Respondent, who suggested that L.W. attend the Red Bank school and subsequently suggested that he transfer to the new vocational school, and that Respondent cooperated in carrying out the transfer arrangements at L.G.'s request (Tr. 4/15/03, p. 209, 213–214, 224) .

[L.G. o/b/o L.W. v. Toms River Reg'l Schs. Bd. of Educ., CRT 8535-01, Final Decision (July 26, 2004) <<http://lawlibrary.rutgers.edu/oal/search.shtml>>.]

Despite meeting with the County superintendent, and initially mentioning transfer as a possible solution, Springfield Superintendent Davino would only entertain a transfer to David Brearley, in Union County's choice school district in Kenilworth. Brearley, however, was not an option in any event, as the choice-school statute, which requires no tuition expense to the sending school district or the parents, only covers students entering kindergarten through tenth grade. P.B. was about to enter twelfth grade. Moreover, Director Duncan confirmed that there were no appropriate grade-level seats open at Brearley (see n. 1). Superintendent Davino then recanted his offer of transfer completely, immediately after this meeting with the County superintendent.

In a special education case, H.S. and N.S. on behalf of A.S. v. Moorestown Board of Education, EDS 10210-07, Decision (March 20, 2008) <<http://lawlibrary.rutgers.edu/oal/search.shtml>>, a child who was intelligent, and had achieved well in school, became psychologically and physically injured by bullies at his school. He shut down emotionally and refused to attend school. He was on home instruction for his eighth-grade and ninth-grade school years. He was accommodated by the board of education consistent with his 504 plan, but the board argued against his classification. The petitioners' experts concluded that the bullying, to a large extent, contributed to the child's disability, which mandated that he receive services and not be returned to the Moorestown school district. The ALJ stated:

Petitioners' experts point out that it does not matter if the bullying was real or perceived by A.S. Both physicians testified that it is clear that A.S. believes the bullying occurred and that A.S. is terrified of going back to the Moorestown school. I agree with petitioners' experts in this regard and, although I make no finding of fact regarding whether the bullying occurred, there is no doubt from the evidence that A.S. believes the bullying occurred and is in fact opposed to going back to the Moorestown school.

[Moorestown, supra, EDS 10210-07, Decision (March 20, 2008) <<http://lawlibrary.rutgers.edu/oal/search.shtml>>.]

The severity of the bullying incidents, then, should be regarded subjectively, from the target's point of view. The school should not, in the face of expert evidence, make a determination as to the severity of the bullying. Here, the school was notified that P.B. was in therapy for a year at the time, and the therapist advised that the depression and anxiety were exacerbated by difficulties with his high school peers. (Certification of Michael S. Williams, Exhibit B.) Superintendent Davino in fact acknowledged as much when testifying about the injury P.B. sustained, stating:

[H]e may have seen a face made at him. I am not going to dispute that. Whatever [P.B.] perceived is what really happened to [P.B.] . . . Whether the other kid did it or not is irrelevant. [P.B.] perceived it, that's my concern and his perception led him to feel whatever he felt.

[Tr. at 244.]

Yet in the next breath, he diminishes the validity of those feelings by stating:

What I find peculiar in this case is that a kid who was so involved with his teammates in hockey and football . . . I am surprised I didn't have a football team and a hockey team beating the hell out of a kid in the hallway, and so what it says to me is that that really wasn't what was going on, that there are many other factors playing into [P.B.'s] issues and emotionality.

[Id. at 247.]

I don't believe that the level of bullying and harassment could take place, and I didn't have an all-out war with football players and hockey players involved on a variety of levels. I just can't see it.

[Id. at 248.]

CONCLUSION AND ORDER

In the face of a touted "zero-tolerance" policy for bullying, harassment and intimidation, Superintendent Davino seems to have substituted his experience, both professional and personal, for the incidents reported to him by J.K. and by the student himself, and determined that they did not rise to the level that constituted bullying.

That is not allowable under the law in effect at the time, and certainly not allowable under the current law, which would have taken the off-school-grounds events into the evaluation of the totality of the circumstances. I **FIND** that the District's intractable position not to allow a transfer, and yet, failure to devise a substantial plan to end the bullying, drove P.B.'s mother to do what she undoubtedly felt she was obligated as a parent to do, and that was remove her son from an unsafe environment.

J.K.'s burden is not to prove that the bullying took place, but that in the face of the reported incidents, the school did not respond in a manner that would provide a "safe and civil environment" for her son. No plan was developed until after P.B. was enrolled in Governor Livingston, and no attempt was made to end the bullying; in fact, the coping mechanisms the plan provided for P.B. were developed with the presumption that the bullying *would* continue. I **CONCLUDE** that the actions of the Board to investigate, and measures taken to intervene in this matter, were insufficient, and **CONCLUDE** that the decision of J.K. to unilaterally place P.B. at the Governor Livingston School was appropriate. Based upon all of the foregoing, I **CONCLUDE** that petitioner should be granted tuition reimbursement.

It is hereby **ORDERED** that the District reimburse J.K. upon presentation of evidence of the amount of tuition paid to Governor Livingston School on behalf of P.B. for the 2009–2010 school year.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 13, 2011
DATE

Date Received at Agency:

Date Mailed to Parties:
dr

OCT 14 2011


LESLIE Z. CELENTANO, ALJ

10-13-11

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner:

J.K.

D.K.

For Respondent:

Norman Francis

Ellyn Atherton

Michael Davino

Exhibits

For Petitioner:

P-1 Photograph of hand injury

For Respondent:

R-1 Not in evidence

R-2 Not in evidence

R-3 Police Reports

R-4 Not in evidence

R-5 Email to Board members

R-6 Letter from petitioner to Rattner, dated August 27, 2009

R-7 P.B.'s attendance records

R-8 Map of Union County

R-9 BOE policy on harassment, intimidation and bullying

R-10 School floor plans

R-11 Letter from Francis to petitioner, dated September 1, 2009

IN THE MATTER OF THE TENURE :
 HEARING OF IRANDOKHT TOORZANI, : COMMISSIONER OF EDUCATION
 (A/K/A IRANDOKHT TOORZANI) : DECISION
 SCHOOL DISTRICT OF THE BOROUGH :
 OF ELMWOOD PARK, BERGEN COUNTY. :

SYNOPSIS

The petitioning Board certified tenure charges of unbecoming conduct, insubordination and/or other just cause against respondent – a teacher of mathematics – for conducting herself inappropriately on various occasions over a protracted period of time, including, *inter alia*, making numerous inappropriate, insubordinate and unprofessional statements or comments to and in the presence of parents, staff, administrators; repeatedly failing to comply with administrative directives; leaving assigned duties under false pretenses; expressing that she had problems teaching classified students, claiming that they were unmotivated and unable to learn; and continuing to engage in a pattern of misconduct notwithstanding numerous admonitions, directives, and intermediary disciplinary actions. The Board sought removal of respondent from her tenured position. Petitioner, acting *pro se*, submitted multiple filings denying the charges, but did not answer the Board's interrogatories and failed to appear or testify at the hearing despite appropriate notice of the hearing date. The Board presented *ex parte* proofs at the hearing, in accordance with *N.J.A.C. 1:1-14.4(d)*

The ALJ found, *inter alia*, that: the evidence presented at the *ex parte* hearing showed that respondent repeatedly violated the implicit standard of good behavior that is expected of a teacher; respondent's behavior evidenced a lack of respect for authority, a refusal to obey directives, and a combativeness that undermined the morale and efficiency of the district's high school; respondent repeatedly criticized the district administration and her colleagues by challenging their honesty and integrity; and her claims of mistreatment were not directed at one source, but rather at seven separate supervisors and administrators, and one union representative. The ALJ concluded that the Board has established good cause that between 2003 and 2011, respondent repeatedly conducted herself in an insubordinate manner, and has met its burden of proving that respondent repeatedly engaged in conduct unbecoming a teacher. Accordingly, the ALJ determined that such a persistent pattern of unacceptable behavior cannot be tolerated in a school setting, and ordered respondent dismissed from her tenured teaching position.

Upon independent review of the record, the Commissioner concurred with the findings of the ALJ, and adopted the Initial Decision as the final decision in this matter. Respondent was dismissed from her tenured employment, and a copy of this decision was forwarded to the State Board of Examiners for action against her certificate(s) as that body deems appropriate.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 9713-11
 AGENCY DKT NO. 170-6/11

IN THE MATTER OF THE TENURE	:	
HEARING OF IRANDOKHT TOORZANI,	:	COMMISSIONER OF EDUCATION
(A/K/A IRANDOKT TOORZANI)	:	DECISION
SCHOOL DISTRICT OF THE BOROUGH	:	
OF ELMWOOD PARK, BERGEN COUNTY.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. By way of a 6-page facsimile – dated January 9, 2012 and entitled “Request for Extension” – respondent requested a 13-day extension to file exceptions to the Initial Decision.¹ Respondent was granted her requested extension. Upon expiration of the 13-day extension period on January 30, 2012 – rather than submitting exceptions – respondent hand delivered a 90-page document entitled “Motion for Emergency Relief Due to Lack of Jurisdiction in Lieu of Response to Judge Strauss’ Correspondence/Order Dated January 3, 2012, Which is Void Due to Officials [sic] Misconduct, Denial of My Due Process and Fraud Upon the Court.” In that there is no provision for emergent relief after the issuance of an Initial Decision,

¹ This submission additionally included a number of arguments/allegations including, *inter alia*,: “The Elmwood Park BOE’s correspondence dated November 17, 2011, [which respondent claims she received on November 19, 2011] has been called a ‘Post Hearing Submission’ WHILE there has not been any hearing for the instant matter to have a post hearing submission since by October 18, 2011, my appeal to the Commissioner of Education for motion to dismiss the instant matter, Judge Strauss’ recusal (*because of Judge Strauss’ misconduct and blatant partiality*) and disqualification of complainant Elmwood Park BOE’s attorneys (*because of their continuous misconduct and fraudulent conduct, included but not limited to making false certification*) had not yet been responded by [sic] Commissioner of Education (*I received the Commissioner’s response on [October] 25, 2011*) and both Elmwood Park BOE and Judge Strauss were aware of that.” (Respondent’s Request for Extension at 2)

respondent's submission is being deemed her exceptions. The Board replied to respondent's filing² and both of these submissions were fully considered by the Commissioner.

The procedural history of this matter is as follows: On June 30, 2011, the District certified 28 tenure charges against respondent to the Commissioner, alleging unbecoming conduct, insubordination and/or other just cause. Upon receipt of respondent's Motion to Dismiss in Lieu of Answer, the matter was transmitted to the OAL for hearing. On September 12, 2011, the Administrative Law Judge (ALJ) conducted a pre-hearing telephone conference with the parties. During this conference the ALJ denied respondent's Motion to Dismiss the Tenure Charges,³ denied her motion that he recuse himself from the proceedings,⁴ and orally established hearing dates in this tenure matter of October 18 and 19, 2011 at 9:00 a.m.

² Respondent attempted to file a response to the Board's reply exception. As there is no provision for such a submission, it has not been reviewed here. Similarly, the Board attempted to file a reply to respondent's reply. Again, there is no provision for this submission. It likewise was not reviewed.

³ Respondent's Motion to Dismiss the Tenure Charges was primarily predicated on her argument that the tenure charges were precluded by the doctrines of *res judicata* and collateral estoppel because of a prior suit she brought against the Board and certain of its employees in the United States District Court for the District of New Jersey. In this suit, respondent asserted claims which included retaliation and discrimination based on disability, ethnicity, religion and national origin. It is noted, however, that this suit was never litigated on the merits of her claims, but was instead dismissed – with prejudice – by the Court because she repeatedly failed to submit to depositions as ordered by the Court. The ALJ determined that, as *res judicata* and collateral estoppel attach only if there is a prior judgment on the merits in another forum, these doctrines are inapplicable here. An alternative basis for respondent's motion was a claim of invalidity of the tenure charges because they are based on fabrication of the facts, false and falsified information, and false and falsified statements. The ALJ found that respondent – by her own pleading – claims that the District's charges are based on a fabrication of facts, thereby raising genuine issues of material fact which can only be resolved in a plenary hearing.

⁴ The record reveals that subsequent to the ALJ's oral denial of her motion to dismiss, respondent continued to argue that there was a final disposition in her District Court case and, therefore, *res judicata* and collateral estoppel must apply. The ALJ again explained his ruling. Respondent continued reiterating her argument. The ALJ explained that he had ruled and would be setting forth his ruling in writing and if respondent disagreed with it she could seek review of the ruling. Respondent continued advancing her argument, interrupting the judge. At some point, the ALJ firmly advised respondent to stop talking and stated that if she did not do so he would terminate the telephone conference and establish the hearing dates solely through consultation with the school board attorney. At this point, respondent requested that the ALJ recuse himself from this matter, indicating that she was distressed that he would not let her speak and that she wished an impartial judge to hear the case. The ALJ denied the recusal motion stating that he was impartial and interested in achieving the correct result as evidenced by the fact that he had fully read her submissions. He advised respondent that he had no reason to either believe or disbelieve her or her arguments or the arguments of the school district and, therefore, ruled that respondent had not advanced a valid reason for his recusal.

at the OAL, 33 Washington Street, 7th Floor, Newark, N.J.⁵ These oral rulings of the ALJ were memorialized in his Prehearing Order dated September 19, 2011, which further specified with respect to the scheduled hearing dates: “[n]o adjournments will be granted except in strict accordance with the requirements of *N.J.A.C.* 1:1-9.6. Additionally, the timing of these hearing commencement dates are mandated by *N.J.S.A.* 52:14B-10.1.” (ALJ’s September 19, 2011 Prehearing Order, Motion to Dismiss Order, Motion to Recuse Order, at #4.) Finally, this Order set October 14, 2011 as the date discovery in this matter must be completed.⁶ Further submissions of respondent indicate she received this Order on September 20 or 21, 2011.

On September 28, 2011 respondent filed a request for Interlocutory Review by the Commissioner of Education of that portion of the ALJ’s Prehearing Order which denied her motion for dismissal of the tenure charges.⁷ By letter decision dated October 21, 2011 the Commissioner declined to grant interlocutory review. By letter dated September 18, 2011 to Laura Sanders, Acting Director and Chief Administrative Law Judge, OAL (“Acting Director of OAL”) respondent alleged an improper relationship between the Elmwood Park Board of Education, its attorney, and the ALJ, and requested an investigation. A second document, received at the OAL on September 30, 2011, appealed ALJ Strauss’s Order denying her motion

⁵ A notification of the date, time and location of the scheduled hearing was additionally mailed to the parties on September 16, 2011 by the Deputy Clerk, OAL.

⁶ Notwithstanding the ALJ’s Order in this regard, rather than answering the Board’s proffered interrogatories, respondent instead returned them to the Board in late September, unanswered.

⁷ It is additionally noted that on October 5, 2011, respondent attempted to file a Motion to Disqualify Board Counsel with the Commissioner. She was advised – by letter dated October 7, 2011 from the Director, Office of Controversies and Disputes – that such a motion was not properly before the Commissioner but, rather, must be first made to the judge assigned to the case in accordance with *N.J.A.C.* 1:1-5.3. In the event she is dissatisfied with that judge’s ruling, respondent may appeal that ruling to the Acting Director and Chief Judge of the OAL, pursuant to *N.J.A.C.* 1:1-14.10.

for recusal.⁸ On October 6, 2011 the Acting Director of OAL agreed to interlocutorily review ALJ Strauss's denial of respondent's motion for his recusal from her tenure matter and by decision dated October 11, 2011, she affirmed Judge Strauss's Order denying respondent's motion for recusal. Pursuant to a letter to the parties dated October 21, 2011, the Acting Director of OAL advised that after a thorough review she found no basis to conclude the existence of any type of improper relationship or conduct on the part of the Board, its attorney and the ALJ.

As scheduled, the hearing in this matter took place on October 18, 2011. On that date counsel for the District appeared with witnesses. Respondent neither appeared nor contacted the OAL with an explanation for her failure to appear. In accordance with *N.J.A.C. 1:1-14.4* (dealing with the failure of a party or his or her representative to appear at a scheduled proceeding), the ALJ did not take any evidence on October 18 but, rather, held the matter for a day in order to provide respondent with an opportunity to explain her non-appearance as required by *N.J.A.C. 1:1-14.4(a)*. No explanation for respondent's non-appearance was received. On October 19, 2011, pursuant to *N.J.A.C. 1:1-14.4(d)* – because an Initial Decision is required in tenure charge cases – the ALJ accepted *ex parte* proofs from the District. At this *ex parte* hearing the District requested the opportunity to submit a brief and proposed findings of fact, based on the October 19, 2011 hearing. Pursuant to *N.J.S.A. 52:14B-10 (d)*, the ALJ granted this request, received the District's brief on November 17, 2011, closed the record of this matter on that date, and issued his Initial Decision on December 28, 2011.

Turning to respondent's voluminous exception submission in this matter, such exceptions, *inter alia*,:

⁸ The basis for respondent's two motions before the OAL was substantially identical – that the ALJ erroneously dismissed her motion to dismiss the tenure charges, that he intimidated her during the prehearing conference, that he misstated the law and facts during the prehearing conference, and that all of this was an attempt to assist the Elmwood Park Board of Education.

- Present an extensive recitation of her version of the **entire history** of this matter. Throughout her papers she charges the Board, its administrators, its attorneys, and the ALJ with knowing and intentional misrepresentation of the facts and the law, fraud, false statements and deprivation of her due process rights. She further contends that “[a]ll of these fraudulent conducts and violations of laws and rules have been willfully and intentionally condoned and permitted to be continued by both the OAL and Department of Education officials involved in the instant matter while I have been constantly informing them about all these fraudulent conducts.” (Respondent’s Exceptions, quote at 86)
- Continue to maintain that the tenure charges against her are barred by the Doctrine of *Res Judicata* and lays out an elaborate, albeit disjointed, argument as to why this is the case and presents reasons – such as bias and incompetence – as to why her motion to dismiss in this regard was denied.
- Maintain that she explained to the ALJ and the officials at the Department of Education – on at least three occasions – the reasons she would not attend the October 18 and 19, 2011 hearings:

“For the first time during the phone conference of September 12, 2011.

After I realized Judge Strauss was misrepresenting the facts and laws during that phone conference and I noticed that he was ignoring me and was not hearing me out, I told Judge Strauss (*when he was setting up an [sic] schedule for tenure hearing*) that because of my emotional distress and lack of concentration which had also affected on my speech and memory, I would not be able to attend and defend myself in any type of verbal conversation and hearing but I had provided them with the evidences attached to my motion to dismiss in lieu of answer to the tenure charges as Exhibits which could be reviewed by them. Judge Strauss asked me to stop talking and he did not respond [to]my concern and he said that if I had any trouble concentrating he would be issuing a prehearing order that would reflect what was discussed in that phone conference and also setting for [sic] hearing dates, which proves that Judge Strauss even was not listening to me when I was talking about my concerns.” (Respondent’s Exceptions at 41)

“For the second time in my appeal (*dated September 26, 2011*) to the Commissioner of Education regarding Judge Strauss’ order denying my motion to dismiss in lieu of answer to the tenure charges and denying and [sic] my motion for his recusal. In that appeal I stated:

*I feel that I (as an unrepresented party who is not even competent to defend herself verbally because of severe anxiety as Judge Strauss was witness of it during the phone conference of September 12, 2011) am being forced against the law by Judge Strauss into proceeding which is in the first place is [sic] barred by the law. **No person with a [sic] common sense appears before a court and a judge who does not follow the law, misrepresent [sic] it and rules against it.** Therefore I am respectfully requesting the Commissioner of Education **to stay the proceeding of this case due to blatant prejudice against me[,]** and for all of the reasons stated in this letter and Respondent’s Certification (attached) ...” (*Ibid.*)*

“For the 3rd time in my letter (*dated October 12, 2011*) which I wrote to Commissioner of Education.... In that letter I stated that:

*I believe as every other citizen I have the right to defend my constitutional rights and immunity under the 14th Amendment of [the] constitution which guarantees the fundamental rights of citizens to due process and fair and impartial trial and equal protection of the laws...**All these injustices have been poisoning my health and I have had enough of Fraud upon the Court in the Federal Court for almost two years. Now, again if I am not supposed to be entitled to equal protection of the Laws and due process, I prefer not to participate in any proceeding in which I do not have any right since I do not want to be harassed and get injured more, physically and emotionally...**”(Id. at 42)*

(Respondent’s Exceptions at 41-42)

- Again allege that the tenure charges against her are false or falsified and – with respect to each of them – raises what she alleges are factual discrepancies and alternate theories as to what actually occurred.

- Object to the *ex parte* hearing conducted on October 18 and 19, 2011 and the ALJ's January 3, 2012 decision⁹ that included statements that there were no witnesses or exhibits presented on behalf of Ms. Toorzani. Her exceptions take issue with these facts: "NO Exhibits and witnesses for Toorzani (me, Respondent) despite the fact that I had furnished the Department of Education and accordingly Judge Strauss with about 460 pages of brief and direct physical evidences included [sic] [a] CD of recorded voice (*Motion to Dismiss in Lieu of Answer to the Tenure Charges*) which prove that the instant matter had been initially procured by perjury and by violating the OPMA and refute all the tenure charges (one by one) which had been brought against me by Richard D. Tomko, Superintendent, who had perjured himself to bring me up on those tenure charges." (Respondent's Exceptions at 46) Respondent charges that the ALJ should have denied the District's request to proceed with the hearing as she submitted her explanation as to why she would not attend. (*Id.* at 59) She charges that the ALJ "abandoned proper procedure by abusing his judicial power and authority and deprived me of my rights." (*Id.* at 80)

Upon full review and consideration of the entire record in this matter, the Commissioner is in accord with the ALJ's determination – for the reasons clearly presented on pages 19-23 of his decision – that the District has established its charges of unbecoming conduct, insubordination, and other just cause against respondent. In so determining, the Commissioner fully agrees that – under the circumstances existing in this matter – the ALJ's proceeding with an *ex parte* hearing was entirely appropriate. The record here evidences that with the ALJ's denial of her motion to dismiss the tenure charges and her motion for his recusal, respondent unilaterally determined to defy all of his directives. Such defiance is clearly apparent by 1) her

⁹ It is noted that the ALJ's Initial Decision was dated December 28, 2011, and mailed to the parties on January 3, 2012.

ignoring of the ALJ's established date of October 14, 2011 for completion of discovery when – rather than answering the Board's interrogatories – she returned them to the Board unanswered, and 2) her self-admitted adamant refusal to attend the scheduled hearings on the established dates. Notwithstanding respondent's exception claim that she sought a "stay" of the instant proceedings from the Commissioner in her request for interlocutory review of the ALJ's denial of her motion to dismiss the tenure charges or, alternatively, that she harbored a belief that her interlocutory appeals automatically resulted in the cancellation of the scheduled hearing dates established by the ALJ in this tenure matter, the OAL provision governing stays pending Interlocutory Review, *N.J.A.C. 1:1-14.10(h)*, clearly dictates:

An agency head's determination to review interlocutorily an order or ruling *shall not delay the scheduling or conduct of hearings*, unless a postponement is necessary due to special requirements of the case, because of probable prejudice, or for other good cause. Either the presiding judge or the agency head may order a stay of the proceedings, either on their own or upon application. *Applications for stays should be made in the first instance to the presiding judge.* If denied, the application may be resubmitted to the agency head. Pending review by the agency head, a judge may conditionally proceed on an order or ruling in order to complete the evidential record in a case or to avoid disruption or delay in any ongoing or scheduled hearing. (emphasis added)

It is noted that no application for stay of the hearing dates – in accordance with the dictates of this provision – was ever made or granted in this matter. As respondent filed two requests for interlocutory review pursuant to *N.J.A.C. 1:1-14.10*, she must be presumed to have knowledge of all of this regulation's provisions.¹⁰ More importantly, it is readily apparent on this record that respondent was not – in reality – seeking a "stay" of her tenure hearing but, rather, elimination of a hearing altogether. Respondent's proffered arguments make it abundantly clear that what she was seeking – or, better stated, demanding – was resolution of this matter in her favor either

¹⁰ Indeed, it is noted that respondent's materials submitted to the Commissioner contain specific references to various portions of this regulatory provision.

through the grant of her motion to dismiss the charges as being barred by *res judicata* and/or collateral estoppel or summary decision based solely on her submitted factual recitations and exhibits, written arguments and accusations. The Commissioner concurs with the ALJ's cogent, comprehensive analysis contained in his September 19, 2011 Prehearing Order concluding that this matter is not amenable to resolution under either of these theories. Initially, with respect to the applicability of *res judicata* and/or collateral estoppel the ALJ found:

Res Judicata and collateral estoppel are analogous legal doctrines designed to promote the conclusiveness of adjudications by precluding a party from relitigating issues previously decided by a tribunal. *Res judicata*, or claim preclusion, requires that a judgment in a prior action must be valid, final and on the merits; the parties in the later action must be identical or in privity with those in the prior action; and the claim in the prior action must grow out of the same transaction or occurrence as the claim in the earlier one. (citations omitted)

As indicated above, only a judgment on the merits in another forum will preclude a later action on the same claim. *Res judicata* does not apply if the prior action has been dismissed on grounds that do not go to the merits of the matter asserted. In her Motion to Dismiss, Respondent relies on a suit she initiated in the United States District Court for the District of New Jersey asserting claims which included retaliation and discrimination based on disability, ethnicity, religion and national origin. See, *Toorzini v. Elmwood Pk. Bd. of Educ. et al.*, No. 09-4262 (D.N.J. May 19, 2011) and *Order No. 09-4242* (D.N.J. May 19, 2011), *aff'd. Toorzani v. Elmwood Pk. Bd. of Educ., et al.*, No. 11-1858 (3rd Cir., July 12, 2011) As set forth in an Opinion and Order of the Honorable Stanley Chesler, U.S.D.J., this suit was never litigated on the merits of Respondent's claims. It was, instead, dismissed with prejudice because she was "repeatedly ordered to appear for her deposition, and the record reflects [that she has] repeatedly failed to attend." *Id.* at 2. As there never was a trial on the merits of respondent's claims, no court ever made any factual determinations. In the absence of a judgment on the merits in the matter relied upon by Respondent, an essential element of *res judicata* claim, I CONCLUDE that there is no basis for dismissal of the instant matter on the basis of *res judicata*.

Collateral estoppel, or issue preclusion, "is that branch of the broader law of *res judicata* which bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." *State v. Gonzalez*, 75 N.J. 181, 186 (1977) (citing *Mazzilli v. Accident and Cas. Ins. Co., etc.*, 26 N.J. 307, 313-14 (1958); *Kelley v. Curtiss*, 16 N.J. 265, 273 (1954); *Miraglia v. Miraglia*, 106 N.J. Super. 266, 271 (App. Div. 1969). Again, there was no factual determination in the prior action upon which Respondent relies. Therefore, I CONCLUDE that there is no basis for dismissal of this matter under the doctrine of collateral estoppel. Additionally, the tenure charges which respondent claims to bar by

the District Court action could not have been brought in that tribunal. Tenure charges are within the exclusive jurisdiction of the Commissioner of Education. "What constitutes grounds for a tenure dismissal is a question of fact and within the exclusive jurisdiction of the Commissioner of Education, who has the duty to conduct the hearing and render a decision." [emphasis supplied] *In re Cardonick*, 1990 S.L.D. 842, 849, citing *In re Fulcomer*, 93 N.J. Super. 404, 412 (App. Div. 1967).

(ALJ's Prehearing Order, Motion to Dismiss Order, Motion to Recuse Order, September 19, 2011, at 5-6)

As to respondent's claim of invalidity of the tenure charges because they are based on fabrication of the facts, falsified information and statements, the ALJ correctly concluded that a dismissal on this ground must satisfy the requirements of a Motion for Summary Decision:

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

The standard for granting summary judgment (decision) is found in *Brill v. Guardian Life Insurance Co. of America*, 142 N.J. 520 (1995). In *Brill*, the Court looked at the precedents established in *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), wherein the Supreme Court adopted a standard that "requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict, *i.e.*, 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Brill, supra* at 533 (quoting *Liberty Lobby, Inc., supra*, 477 U.S. at 251-252). The Court stated that under the new standard:

A determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." (*Id.* at 540 (quoting *Liberty Lobby, Inc., supra*, 477 U.S. at 251-252)).

The *Brill* standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the

evidentiary standard to be applied to the case or issue if it went to trial. “To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose.” *Id.* at 541

In addressing whether the *Brill* standard has been met in this case, further guidance is found in *Rule* 4:46-2:

An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issues to the trier of fact.

Respondent, by her own pleading, emphasizes her view that the allegations raised by the District in its tenure charges are based on a fabrication of facts, thereby raising genuine issues of material fact that can only be resolved in a plenary hearing. Each and every fact alleged and relied upon by Respondent in her Motion is in dispute. For each and every tenure charge, Respondent raises factual discrepancies and alternate theories as to what allegedly occurred. I CONCLUDE that the existence of genuine issues of fact defeats a Motion to Dismiss.

(ALJ’s Prehearing Order, September 19, 2011, at 4-5)

It is well established that tenure protects teachers from arbitrary dismissal for “unfounded, flimsy or political reasons.” *Spiewak v. Rutherford Bd. of Educ.*, 90 N.J. 63, 73 (1982) (quoting *Zimmerman v. Newark Bd. of Educ.*, 38 N.J. 65, 71 (1962)) Because of the due process concerns that inform tenure proceedings – in matters like the instant case, with numerous recognized genuine issues of material fact – respondent may only be dismissed for unbecoming conduct, insubordination or other just cause after a hearing in compliance with the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et. seq.*, where respondent is entitled to present witnesses and evidence on her behalf and the District has the burden of proving the charges against her by a preponderance of the credible evidence. Here, however, respondent has steadfastly taken the position that this matter will proceed the way she wishes or not at all. She deliberately defied the Order of the ALJ with respect to discovery, the establishment of the

hearing dates of her tenure case,^{11 12} the clear dictates of *N.J.A.C.* 1:1-14.10(h), and, rather, elected not to defend herself at the evidentiary hearing to adjudicate the tenure charges filed against her. As such, because the District required an Initial Decision on its tenure charges, the ALJ was well within his authority, pursuant to *N.J.A.C.* 1:1-14.4(d), to take *ex parte* proofs from the District with respect to its charges and to render his Initial Decision based on these *ex parte* proofs. As this situation is solely attributable to the actions/inactions of respondent, she cannot – at this point in time – be heard to complain about the consequences of her own actions.

The Commissioner is in complete agreement with the ALJ that – based on the testimony of its witnesses and its advanced evidentiary proofs – the District has established its charges of unbecoming conduct and insubordination against respondent, as detailed on pages 21-22 of the Initial Decision. Similarly, with respect to the penalty to be imposed, the Commissioner concurs with the ALJ’s cogent analysis in this regard:

...the nature and circumstances of each of the incidents, when viewed singularly, are troubling rather than alarming. However, Toorzani’s prior record is a poor one. Although she has never previously been suspended, there are many written warnings and reprimands. Yet, her conduct continued unabated. Her present attitude is as inappropriate as it has consistently been in the past. The testimony and documentary evidence elicited from a wide range of administrators is overwhelming. The effect of her conduct on the maintenance of discipline among staff is evident. Simply, she has created a toxic work environment for her various supervisors and administrators. Finally, her repeated failure to respond favorably to many attempts to elicit appropriate and professional behavior suggests that her past conduct was not an aberration but instead leads to a reasonable prediction that such behavior is likely to recur. The proofs here “are not trivial but rather reflect a pattern of professionally unacceptable conduct which cannot be tolerated in a school setting.” (citation omitted) Accordingly, I CONCLUDE that Irandokht Toorzani should be dismissed from her tenured teaching position with the School District of the Borough of Elmwood Park. (Initial Decision at 23)

¹¹ As a consequence of the Acting Director of OAL’s October 11, 2011 Order, respondent was well aware – prior to the scheduled hearing dates of her tenure matter – that her Interlocutory Review request seeking Judge Strauss’s recusal from this case had been denied.

¹² Indeed, respondent’s submissions in this matter make it abundantly clear that she had no intention, whatsoever, of attending *any* hearing in this tenure matter.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. Irandokht Toorzani is hereby dismissed from her tenured position with the School District of the Borough of Elmwood Park. A copy of this decision will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.¹³


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/08/12

Date of Mailing: 2/09/12

¹³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 09713-11

AGENCY DKT. NO. 170-6/11

**IN THE MATTER OF THE TENURE HEARING
OF IRANDOKHT TOORZANI (A/K/A IRANDOKT
TOORZANI), SCHOOL DISTRICT OF THE BOROUGH
OF ELMWOOD PARK, BERGEN COUNTY.**

Nicholas Celso, III, Esq., for petitioner, School District of the Borough of
Elmwood Park (Schwartz, Simon, Edelstein, Celso, attorneys)

Irاندokht Toorzani (a/k/a Irاندokht Toorzani), pro se (failed to appear)

Record Closed: November 17, 2011

Decided: December 28, 2011

BEFORE JESSE H. STRAUSS, ALJ:

STATEMENT OF THE CASE

The School District of the Borough of Elmwood Park (District) brought charges against tenured teacher Irاندokht Toorzani (a/k/a Irاندokht Toorzani) (Toorzani) for conduct unbecoming a teaching staff member, insubordination and/or other just cause. A tenured employee of a public school system shall not be dismissed except for inefficiency, incapacity, unbecoming conduct or other just cause. N.J.S.A. 18A:6-10. The District certified charges alleging that, on various occasions over a protracted

period of time, Toorzani conducted herself inappropriately, repeatedly interacting with colleagues, supervisors, parents, and students in a manner unbecoming a professional, and continued to engage in a pattern of misconduct notwithstanding numerous admonitions, directives, and intermediary disciplinary actions. The issues are whether Toorzani engaged in the alleged conduct, and, if so, what is the appropriate penalty.

PROCEDURAL HISTORY

The District certified charges against Toorzani to the Bureau of Controversies and Disputes of the Department of Education (Commissioner) on June 30, 2010. The Commissioner granted, until August 8, 2010, Toorzani's application for an Extension of Time to File a Motion to Dismiss or Answer. Upon the receipt of Toorzani's Motion to Dismiss in lieu of an Answer on August 15, 2011, the Director of the Bureau of Controversies and Disputes referred the tenure charges to the Office of Administrative Law (OAL) on that date, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

I conducted a telephone conference with Toorzani and counsel for the District on September 12, 2011, in accordance with the expedited requirements of N.J.S.A. 52:14B-10.1. At that conference I orally denied Toorzani's Motion to Dismiss because she raised issues of disputed facts and erroneously relied on the doctrines of res judicata and collateral estoppel[s] to contend that the tenure charges must be dismissed because of the prior dismissal with prejudice of a federal suit Toorzani had initiated against the District. I also denied at that time Toorzani's request that I recuse myself from this proceeding. Those rulings were memorialized in a Prehearing, denial of Motion to Dismiss, and denial of Motion to Recuse Order which issued on September 19, 2011. The Prehearing Order also provided that Toorzani's submission in support of her Motion to Dismiss would serve as her Answer in this matter. The Prehearing Order established October 14, 2011, for the completion of discovery. Rather than answer the District's interrogatories, Toorzani, by letter received on September 23, returned them to the District unanswered.

On October 11, 2011, Laura Sanders, Acting Director of the OAL, affirmed my Order denying Toorzani's Motion for Recusal. On October 21, 2011, the Acting Director determined not to grant interlocutory review to my determination that the principles of res judicata and collateral estoppel[s] did not bar the prosecution of the tenure charges.

At the time of the September 12, 2011, Prehearing Conference, in accordance with the statutory timeline for the commencement of a tenure hearing within thirty days of the completion of discovery, I established October 18 and 19, 2011, as hearing dates in this matter. The parties were notified of these dates (1) orally on September 12, 2011, (2) in the Prehearing Order of September 19, 2011, which stated, "the hearing is scheduled for October 18 and 19, 2011, at 9:00 a.m. at the Office of Administrative Law, 33 Washington Street, 7th Floor, Newark, New Jersey" and (3) by a Notice of Hearing that issued on September 16, 2011, advising that the hearing in this case will be held on October 18 and 19, 2011, and setting forth the hearing location as "Office of Administrative Law, 33 Washington Street, 7th Floor, Newark, N.J. 07102." The Prehearing Order and the Notice of Hearing were sent by first class mail to Irandokht Toorzani, 175 Oxford Terrace, Apt. 2, River Edge, N.J. 07661. Neither mailing was returned as undelivered. Counsel for the District appeared on October 18 with witnesses. Toorzani neither appeared nor contacted my office that day with an explanation for her failure to appear. I did not take evidence on October 18. In accordance with N.J.A.C. 1:1-14.4, I held the matter for one day before taking any action. I received no explanation for the nonappearance from Toorzani within one day as required by N.J.A.C. 1:1-14.4(a). In accordance with N.J.A.C. 1:1-14.4(d), because an Initial Decision is required in tenure charge matters, I took ex parte proofs from the District on October 19, 2011. At the ex parte hearing, the District requested, and I verbally granted as allowed by N.J.S.A. 52:14B-10.1(d), the opportunity to submit a brief and proposed findings of fact by November 21, 2011, based on the hearing of October 19. I received the District's submission on November 17, 2011, and closed the record on that day.

FINDINGS OF FACT

The District presented the following witnesses: Former Supervisor of Guidance Joseph Hulbert; Director of the Department of Testing and Assessment and former Supervisor of Social Studies, Music and Family/Consumer Science Anthony Iachetti; current High School Principal and former Assistant High School Principal David Warner; current Elementary School Principal and former High School Supervisor of the Math and Business Department Allison Jackter; High School Assistant Principal Corinne DiMartino; and current Superintendent of Schools and former High School Principal Richard Tomko. Neither Toorzani nor a representative on her behalf appeared. No witnesses or evidence were presented on her behalf.

There was no basis presented in the record to consider the testimony and supporting documentation to be anything but credible. Accordingly, based upon a review of the totality of the evidence including many memoranda memorializing various situations and warnings, and having had the opportunity to assess the demeanor and credibility of the witnesses who testified, I make the following critical **FINDINGS OF FACT**.

1. Toorzani, made numerous inappropriate, insubordinate and unprofessional statements and/or comments to and in the presence of parents, staff, administrators, and students.
 - a. On December 1, 2003, Toorzani refused to meet with Thomas Bierman, mathematics supervisor, in private to discuss a Teacher Observation Report and, instead, persisted in engaging him in inappropriate conversation in the school hallway. Bierman warned Toorzani, "most of the behaviors that I have documented in this memo are examples of your uncooperative and unprofessional behavior. It is this very type of behavior that I am insisting must change in the future. I have explained this to you in person and I hope to observe a substantial change in behavior as we move

forward and continue to work together during this school year.”
(Exhibit P-1.)

- b. On Friday June 16, 2006, Toorzani entered Guidance Supervisor Hulbert’s office accompanied by multiple students and questioned Hulbert in an inappropriate, unacceptable, accusatory and aggressive manner regarding the scheduling of final examinations. She questioned Hulbert’s authority in front of students and a secretary rather than addressing in private her complaint as to the location for taking final exams. She knew of the schedule a week earlier. Hulbert, in a memorandum, advised Toorzani that her presentation and method was extremely inappropriate and unacceptable. Hulbert also counseled that, “it would behoove you to present these types of questions in a much less accusatory manner and certainly in a more appropriate location.” (Exhibit P-2.)
- c. On November 30, 2006, Toorzani stated to then Assistant High School Principal Warner, that “I’m not complaining [about an alleged odor problem in the classroom] because of me but these are American students, you should take care of them.” [Toorzani has an Iranian background.] Then, Principal Tomko advised Toorzani on December 13 that “your accusations that we are refusing to help you because of your ethnicity are not only false, but inappropriate, insubordinate and unsubstantiated.” He added that “your accusations are harassing and intend to cause harm to my authority and the authority of others.” (Exhibit P-4.)
- d. On December 13, 2006, in the High School main office, Toorzani approached, Social Studies, Music and Family Consumer Science Supervisor Iachetti, regarding an alleged odor in her classroom and stated “If not for me, then do it [resolve the odor] for the American students” Iachetti considered the statement to be inappropriate and of a prejudiced nature. He had made no

statement to her that he was distinguishing between American students and others. (Exhibits P-3, P-4.)

- e. On December 13, 2006, in the presence of parents, Toorzani stated that a letter she had received from Supervisor Iachetti "was all lies." (Exhibit P-5.)
- f. Also, on December 13, 2006, Toorzani approached Warner and interrupted him while he was speaking to a parent. She was agitated and ignored his request to wait until he had finished with the parent and he would then speak to her. She instead told the parent that she has many personal problems with the administration and has "had enough with this school district." Warner was embarrassed by this public encounter. (Exhibit P-5.) Toorzani was formally warned at a January 8, 2007, meeting regarding the reprimand by Warner, that any concerns or comments she had with regard to "problems" with the administration are not to be conveyed to a parent while engaged in a conversation with an administrator in a public area. (Exhibit P-6.) She became argumentative at this meeting, kept interrupting and claimed that the administration had not handled the odor issue properly.
- g. In March of 2007, as evidenced by her Personnel Evaluation prepared by Supervisor Jackter, "Ms. Toorzani responds negatively to suggestions from the supervisor. During observation post-conferences Ms. Toorzani responds in an extremely defensive manner toward suggested areas of improvement." (Exhibit P-7.)
- h. On March 28, 2007, in conjunction with Jackter arriving late for a meeting as a result of a delay caused by a school assembly, Toorzani accused Jackter of being disrespectful for not notifying her that she would be late and then speaking to her in a disrespectful

- manner. Jackter did not speak to Toorzani in a disrespectful manner despite her claim to the contrary. Jackter advised Toorzani that "this behavior is unacceptable." (Exhibit P-8.)
- i. On February 6, 2008, in response to Warner informing Toorzani that a special education student cannot be removed from her class because he was placed there as a result of his Individual Education Plan (IEP), Toorzani stated to Warner in his capacity as vice principal that "You [Mr. Warner] do not care about the education of the students." (Exhibit P-11.) She had previously had this student removed from her class due to attendance and behavior problems. Rather than accept his reassignment to her class, she met the student in the hall and sent him away without arranging for anyone to accompany that student to another location.
 - j. Also on February 6, 2008, when Warner informed Toorzani that she should express her concerns to the Child Study Team, she responded "I am not walking to that office." (Exhibit P-11.) On numerous occasions, Toorzani had expressed that she had a problem teaching classified students claiming they were unmotivated and could not learn. In his memorandum Warner stated that "these comments and your attitude are disturbing and need to be changed immediately. All students have the right to be educated. It has been suggested to you on numerous occasions to seek professional development opportunities regarding teaching students with disabilities. To my knowledge you have not made an effort to attend any workshops." (Exhibit P-11.)
 - k. On February 6, 2008, Toorzani abruptly left Warner's office and stated, "like I told Mr. Iachetti, I guess I will just go to my class, shut the door and play with the students." (Exhibit P-11, P-12.)

- l. On February 8, 2008, in an e-mail correspondence sent by Toorzani in response to a memorandum sent by Warner, Toorzani accused Warner of falsifying information. He did not falsify any information. (Exhibit P-12.)
- m. On October 19, 2008, in an e-mail circulated to several supervisors and administrators, Toorzani accused Jackter of failing to provide instruction resources, stating that, "... I cannot use same material that other teachers use in Math Department to improve the quality of teaching and learning" Electronic correspondences sent to Toorzani, as well as Jackter's testimony, prove that this Toorzani allegation regarding instructional material has no merit. (Exhibits P-19, P-21, P-22.) In Jackter's view, Toorzani's accusations created a volatile situation.
- n. In that same October 19, 2008, e-mail correspondence, in response to a written reprimand from then Principal Tomko regarding her failure to provide proper notification when absent from school, Toorzani accused him of treating her differently because of her ethnic and religious background. "I have learned my lesson from all the incidents which have happened, that because I am Iranian Muslim, no matter what my conditions are, I cannot sign out early because I am being accused of being deceptive and putting the welfare of students in danger and as a result I have to get disciplined by partial-day docking of my salary" (Exhibits P-21, P-23.)
- o. On November 14, 2008, Toorzani and a custodian argued after he had removed a wood prop she was using to hold her classroom door open. He claimed it could damage the door. As she did not know his name, Toorzani informed Warner that she had a verbal confrontation with "the big fat" custodian. (Exhibits P-25, P-26, P-

- 27.) She was agitated and speaking quickly and went off on tangents rehashing prior disputes with administrators.
- p. On November 17, 2008, in an e-mail memorandum sent to the central office supervisors and administrators, among others, Toorzani accused Warner of being "dishonest and disinterested." Tomko admonished her for making hurtful and derogatory remarks against a staff member [the custodian] by choosing to identify him, out of anger, by his appearance. Tomko found this remark unprofessional but interesting in view of " . . . consistently made complaints against faculty and administrators for treating you specific ways because of your race, ethnicity and place of birth." (Exhibits P-26, P-27.) Toorzani responded with a November 19, 2011, e-mail to Warner advising him that she would not pick up any envelopes stamped "confidential" from her office mailbox until the end of each day because they cause her too much stress. She asked that confidential matters be relayed to her by e-mail. (Exhibit P-28.)
- q. On January 29, 2009, Toorzani confronted Jackter in an inappropriate manner during an in-service day outside of an articulation meeting and caused the session to be delayed. Other staff members could hear Toorzani's raised voice. (Exhibits P-31, P-33.) The assistant superintendent had asked staff to gather around their respective supervisors. Although the rest of Jackter's staff assembled around her, Toorzani walked past the group and continued to walk away after Jackter had called her. Toorzani then interrupted the training meeting by insisting that she needed to speak to Jackter privately. Toorzani then complained over what she claimed were inappropriate statements made to her in the auditorium. Jackter ended her January 29, 2009, memorandum to Toorzani with "in the future, you must follow directives and communicate more clearly with me. Be cautious of your tone and

delivery when discussing matters with me. Your 'scolding' borders insubordination and will not be tolerated." (Exhibit P-31.)

- r. On February 1, 2009, in an e-mail circulated to various administrators and the mathematics department, Toorzani accused Supervisor Jackter, of "treating her like a slave," stating that when she was "hired in Elmwood Park district my [her] title was 'Teacher' not 'Slave.'" (Exhibits P-32, P-33, P-34.) She embarrassed and shocked Jackter by copying all of Jackter's superiors as well as fellow teachers.
- s. Additionally, on February 1, 2009, in that same e-mail correspondence, Toorzani accused Jackter of making up "false stories to justify themselves [herself] . . . [to] cover up their [her] wrong doing" as well as insinuating that Jackter is not "brave enough to tell the truth." (Exhibits P-32, P-33, P-34.) As set forth in Jackter's detailed response to Toorzani, none of Toorzani's complaints in her widely disseminated e-mail were accurate. Jackter's response concluded with, "Ms. Toorzani, your insubordination, fabricated conversations and personal attacks will not be tolerated as this behavior is unacceptable." (Exhibit P-33.) Moreover, Jackter never spoke to Toorzani in an offensive manner as Toorzani claimed. Tomko provided Toorzani with an additional written warning on February 3, 2009, expressing his dissatisfaction with derogatory statements in Toorzani's e-mail, calling them unbecoming and another documented event "in which you were insubordinate, made inappropriate remarks, false accusations and unsubstantiated reports to defame someone's character." Tomko further advised her that he was requesting the superintendent to investigate and pursue a formal tenure charge and appropriate employment dismissal on the basis of unbecoming conduct. (Exhibit P-34.)

- t. In March of 2009, Toorzani informed her students that she was upset because “they are bringing me up on tenure charges” and that the students may not see her anymore because the administration is trying to get rid of her. Jackter and Warner told Toorzani that these types of discussions were completely inappropriate to conduct with students. Tomko then met with Toorzani on March 23, 2009, with regard to these discussions with students and advised her that “this attempt to curry favor by including students in confidential matters with regard to your employment and other contents of my memoranda continues to be insubordinate.” (Exhibits P-35, P-37.) The meeting with Jackter and Warner was called because students were upset that Toorzani was reading their grades aloud in class. She became defensive, claiming that she read only certain grades. She was instructed not to read grades aloud at all.
- u. Also, in March of 2009, Toorzani engaged in inappropriate verbal dialogue with at least one student, E.H., concerning E.H.’s family members’ alleged opinions of the school principal. (Exhibits P-36, P-37, P-39.)
- v. On March 16, 2009, during a meeting held with Warner and Jackter, Toorzani stated that she, “still feels like a slave” and “I [she] don’t want to be treated like a slave.” (Exhibits P-35, P-38.)
- w. On March 29, 2009, in an e-mail correspondence sent to various administrators, Toorzani accused Tomko of authoring a memorandum “full of falsified information.” (Exhibits P-38, P-39.)
- x. On September 28, 2009, in a disciplinary referral sent home to student R.V.’s parents, Toorzani willfully misrepresented the alleged “consequences” to herself for sending a student disciplinary referral to Assistant Principal Warner when she stated that

"[b]ecause of consequences of sending her to Mr. Warner's office, I tried to handle the situation by myself" As Warner documented in a September 28, 2009, memorandum to Toorzani, her accusation was untrue and insubordinate in that he did not reprimand or discipline Toorzani for dealing with a student disciplinary issue. (Exhibit P-41.)

- y. In January 2010, a student, who had been tutoring another student, reported to Jackter that she felt uncomfortable when Toorzani ordered the tutor to meet with her. Tomko gave Toorzani the letter. On January 28, 2010, in an e-mail correspondence to Jackter with copies to various administrators in response to the comments attributed to a student and administrative follow-up related thereto, Toorzani stated that " . . . I am shocked that you call yourself an administrator who is following district policy" Toorzani further wrote, "(Even you let yourself to follow me around the school and pull me out of my classroom in front of my students to check my shoes to see if they were based on the district policy [when they were based on the district policy]) but you let yourself to allow a student to give you a letter (that there is no word in the world to describe it) about a teacher (me) and then you gave this letter to Mr. Tomko to arrange a fact finding meeting for the teacher (me) regarding this abusive letter. I am so sorry that I have to work in such a condition that a person who is math supervisor let a student to be discourteous, offensive, abusive, rude and impolite . . . toward a teacher." (Exhibits P-42, P-43.)
- z. On October 25, 2010, the Administration received a letter from student E.A.'s mother stating that Toorzani "belittles the students in front of each other and speaks to them in a very demeaning manner." (Exhibit P-45a.) Warner set up a conference with the parent, but Toorzani refused to attend. Warner then advised Toorzani that it is part of her job description to have open

correspondence with parents about their child's academic performance and/or behavior in class. He added that, if she felt uncomfortable with a parent, a member of the administrative staff would provide assistance. (Exhibit P-45.)

- aa. In December 2010, in an e-mail correspondence sent to student A.F.'s parent, Toorzani willfully mischaracterized information that had been communicated to her by Warner, by informing A.F.'s parent that "I [Toorzani] was told by Mr. Warner that school cannot spend money to mail these reports to parents!" (Exhibit P-46.) The parent had e-mailed Toorzani complaining that Toorzani had spoken to A.F. in front of the class about Toorzani's communication to the parent concerning A.F.'s academic performance. Warner by memo, reminded Toorzani that there had been several documented situations in which students and/or parents had complained about her discussing grades and attendance in class and that he and Jackter had directed her not to discuss such matters in front of the class. Warner also criticized Toorzani for inaccurately characterizing to A.F.'s parent in an e-mail a discussion Warner and Toorzani had had about mailing progress reports. He had instead told Toorzani that it was not cost-effective for every teacher in the District to send out their own individual progress report and that there were alternate ways through e-mail or student courier to send out progress reports besides the official mid-point marking period reports. Warner warned Toorzani that "your inaccurate communication with this parent is also insubordinate."
- bb. On January 5, 2011, by memorandum, now Principal Warner asked Toorzani for a medical note for missing a meeting scheduled for that afternoon, since he found it unreasonable and unacceptable that she medically could not attend a meeting, but was able to teach and perform her daily responsibilities. Earlier that day Toorzani had told Warner in the hallway that she would not attend a

meeting he had scheduled with her because of a medical condition of anxiety. (Exhibit P-47.) In response to the memo, Toorzani came into the main office of the High School, and in the presence of various members of the office staff as well as in the presence of at least one student, Toorzani stated that "I have a lawsuit against Mr. Warner and he is a defendant," and "I do not want his lawyers questioning my doctor." (Exhibit P-48.) Through a January 6, 2011, memorandum, Warner informed Toorzani that her public statements were inappropriate because, "these individuals are definitely not privy to this confidential information and this revelation has compromised my position as principal causing rumors and innuendos."

- cc. On February 24, 2011, during a meeting with Warner regarding Toorzani's repeated disregard of a prohibition of propping open the classroom door, Toorzani refused to answer Warner's questions and instead had an emotional outburst. Moreover, Toorzani was confrontational and attempted to control the meeting. Warner advised Toorzani that "once again, your willful, insubordinate and oppositional attitude" was demonstrated. (Exhibit P-52.)
- dd. On February 28, 2011, in an e-mail correspondence copied to various members of the administration in response to the reprimands issued by members of the administration, Toorzani stated that "issuing these reprimand letters constantly and maliciously to falsely accuse me and reprimand me for no cause with the intention of defaming my professional reputation and character, and anguishing me mentally to push me to nervous breakdown is abusing the authority." (Exhibit P-53.) Warner did not write the memoranda to harass Toorzani. She refused to meet with him to address the issues of various memoranda.

- ee. In March of 2011, in a meeting held with Warner and Connie Sudol, Elmwood Park education association president, Toorzani was extremely uncooperative, confrontational and simply unwilling to listen. (Exhibit P-54.)
- ff. On March 02, 2011, in an e-mail correspondence sent to Sudol and copied to various members of the administration, Toorzani accused the administration of using Sudol "as the local Union president to act as their witness to falsely accuse me [her] and place false and falsified information in my [her] personnel file. First time that you acted as the administrators' witness and I asked you to tell the truth, you told me that Mrs. Spina had asked you to stay silent, but this time Mrs. Spina is not involved therefore everything is up to you." (Exhibit P-55.)
- gg. In March of 2011, in a rebuttal directed to Director of Curriculum and Instruction Corinne DiMartino to her February 24, 2011, Observation Report, Toorzani accused members of the administration of "a continuing pattern of placing false and falsified information in my personnel file for the last several years to injury my professional reputation and character." (Exhibits P-56, P-62.) DiMartino had become upset that Toorzani was questioning her integrity and honesty, particularly since she had only been the director for one year and had not obtained tenure in that position. She did not put any false information into the evaluation as Toorzani had alleged and had not missed the first five minutes of the class as also alleged. When DiMartino had met with Toorzani after her classroom observation, Toorzani disagreed with the areas where she suggested improvement. Tooranzi refused to accept constructive criticism and DiMartino was compelled to terminate the meeting.

- hh. On March 26, 2011, in an e-mail correspondence sent to the High School and Central Office administrators, Toorzani accused the administration of issuing "reprimand letters contain[ing] false and falsified information" and directed the administration to cease leaving reprimand letters in her mailbox. (Exhibit P-57.)
 - ii. In April of 2011, Toorzani made comments concerning a private meeting between student K.S.'s parent and Toorzani in front of K.S.'s classmates. (Exhibit P-58.)
 - jj. In June of 2011, in a memorandum, Toorzani responded to a directive from DiMartino to conform her annual performance evaluation to required specifications, by informing DiMartino that she was considering filing a complaint with the Department of Education concerning DiMartino and accused DiMartino of "falsifying the facts." (Exhibit P-61.)
2. Toorzani has repeatedly failed to comply with administrative directives.
- a. On December 1, 2003, Toorzani refused to meet with her supervisor, Thomas Bierman, to discuss a Teacher Observation Report and, instead persisted in engaging him in an inappropriate conversation in the school hallway. She started to talk in the hallway about being fired from her job and was told by Bierman to stop making such comments as it was neither the time nor place to do so. In his memorandum to Toorzani regarding this incident as well as his overall observation of her, Bierman warned her that her uncooperative and unprofessional behavior must change in the future. (Exhibit P-1.)
 - b. At the end of the 2006-2007 school year, Toorzani did not complete the 2006-2007 checkout list; failed to comply with all of the directives set forth by the administration regarding "sign-out"; and

- failed to respond to the written correspondence sent to her to rectify this situation. (Exhibit P-9.)
- c. On or about March 16, 2009, Toorzani informed her students during class, among other things, that she was upset because, “. . . they are bringing me up on tenure charges” and that the students may not see her anymore because the “administration is trying to get rid of me,” despite a previous written directive issued on January 10, 2007, to not discuss her “problems” with administration and/or staff “in any hallway or public area and” and “that your [her] concerns, comments and allegations are not to be conveyed to any parent, guardian, . . . guest” or student. (Exhibits P-6, P-35, P-37.)
- d. On October 14, 2008, Toorzani failed to contact the Main Office when she was absent from work, despite prior written directive on November 19, 2007 and July 1, 2008 for all staff to call the Main Office in addition to the substitute-caller service when they were going to be absent from school. (Exhibits P-10, P-14, P-20.)
- e. On January 29, 2009, during an in-service day, Toorzani failed to comply with then Assistant Superintendent Pratt’s directive to meet with her supervisor and instead left the auditorium prematurely. (Exhibit P-31.)
- f. On September 23, 2009, Toorzani read a student’s grade aloud in front of the class despite a prior warning on March 16, 2009, from Warner and Jackter that “no individual student’s grades should be mentioned in front of class.” (Exhibits P-35, P-40.)
- g. In January of 2011, Toorzani spoke to student A.F. in front of her class about the student’s academic performance, despite prior warnings not to do so on September 23, 2009, and March 16, 2009. (Exhibits P-35 P-40, P-46.)

- h. On January 7, 2011, Toorzani failed to contact the substitute service or principal when she was absent from school despite previous directives to do so on October 14, 2008, November 19, 2007, and July 1, 2008. (Exhibits P-10, P-14, P-20, P-49.) Warner informed her that her failure to follow the call-out procedures were insubordinate.
 - i. In or around February of 2011, Toorzani repeatedly failed to follow administrative directives from both Superintendent Tomko and Principal Warner to not prop her classroom door open in violation of building code and State monitoring. (Exhibit P-50.)
 - j. On April 12, 2011, in an e-mail correspondence, Toorzani stated that she refused to attend a meeting with the principal to discuss an e-mail correspondence received from a student's parent. Toorzani wrote, "In regards to attending in the meeting (about my response Mrs. [S]'s e-mail in which she had falsely accused me), respectfully I just wanted to say that I am not going to attend in this meeting since I have not done anything wrong or out of the scope of my authority as a teacher. I am done with attending these interrogatory meetings and being subjected to abusive and harassing conduct and language." (Exhibit P-58.)
 - k. In or around June of 2011, Toorzani failed to comply with written directives from the Director of Curriculum and Instruction DiMartino to conform her annual performance evaluation in five specific areas. (Exhibit P-60.)
- 3. In or around February 6, 2008, Toorzani engaged in conduct unbecoming when, according to Mr. Warner, she "made it clear on numerous occasions that you [she] have a problem teaching classified students." (Exhibit P-11.)

4. On or about February 15, 2008, Ms. Toorzani engaged in conduct unbecoming when she left her assigned duties at approximately 11:30 a.m. under the false pretense of "very bad back pain" and, instead of going to her home, promptly visited the Board Office in an attempt to obtain a copy of her personnel file. According to then Principal Tomko, "this created a decreased amount of supervision in important areas and could have potentially endangered the welfare and safety of our students." (Exhibit P-13.)
5. On November 18, 2008, rather than devoting her full attention to her assigned teaching duties, Toorzani sent an electronic correspondence concerning a non-instructional matter to then Principal Tomko twice: fourteen and twenty-three minutes into the class period. (Exhibits P-15, P-16, P-28, P-29, P-30.)
6. On May 6, 2010, Toorzani called in "sick" and utilized a day from her sick bank in order to attend a legal proceeding. (Exhibit P-44.)
7. On October 25, 2010, Toorzani became "defensive and angry" during a meeting with student E.A.'s parent and then "stormed out of the room." (Exhibit P-45a.)

LEGAL ANALYSIS AND CONCLUSIONS

The District has brought tenure charges against Toorzani alleging unbecoming conduct, insubordination and/or other just cause. Under N.J.S.A. 18A:6-10, tenured teaching staff members may be dismissed for inefficiency, incapacity, unbecoming conduct, or other just cause.

The District bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., L. and W. R.R., 111 N.J.L. 487, 490

(E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

The statutory status of a tenured employee may not be lightly removed. Tenure protects teachers from arbitrary dismissal for "unfounded, flimsy or political reasons." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982). It is designed to aid in the establishment of "a competent and efficient school system" by affording teachers a measure of security in the ranks they hold after years of service. Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949).

"Unbecoming conduct" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Unbecoming conduct is particularly troubling in public education where teachers should set the good example rather than engage in activity, which is inimical to the public interest and which is designed to impede the orderly process of public education. In re Sammons, 1972 S.L.D. 312, 321. The Commissioner in Sammons stressed that teachers are professional employees "to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each

individual child. 'This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.' Ibid.

I **CONCLUDE** that the District has met its burden of proving that Toorzani engaged in conduct unbecoming a teaching staff member. Examples of unbecoming conduct were her expression of having a problem teaching classified students; leaving assigned duties under false pretenses; sending electronic correspondence concerning a non-instructional matter during a class period; using a sick day to attend a legal proceeding; and becoming defensive and angry and storming out of the room during a meeting with a parent. In each instance, Toorzani has violated the implicit standard of good behavior that is expected of a teacher.

Black's Law Dictionary 802 (7th ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

"Insubordination" is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.

[Ricci v. Corporate Express of the East., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. For the purpose of a tenure proceeding, insubordination is an action which demonstrates a willful refusal to comply with a supervisor's directive. In re Ingram, EDU9068-01, Initial Decision (May 17, 2002), adopted, Comm'r (June 27, 2002), <http://lawlibrary.rutgers.edu/oal/search.html>. Insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of an educational

facility. Insubordination is always a serious matter, especially in an educational setting where the complexity of providing a comprehensive curriculum and education to students requires interaction with the various components of the process such as staff, supervisors, administrators, students, and parents/guardians.

I **CONCLUDE** that the District has met its burden of establishing good cause that Toorzani has conducted herself in an insubordinate manner. The above findings abound with examples of acts of insubordination between 2003 and 2011. They reflect a lack of respect for authority, a refusal to obey directives and a combativeness which has undermined the morale and efficiency of the District's High School. Toorzani has criticized the administration and colleagues repeatedly by challenging their honesty and integrity, depriving them of the dignity to which they are entitled, creating an uncomfortable work environment and impairing the ability of the individual targets of her behavior to effectively discharge their duties. See In re Young, EDU 9771-09, Final Decision (October 15, 2010), <http://lawlibrary.rutgers.edu/oal/search.html>. Despite measured responses from the administration, Toorzani chose a course of conduct intended to antagonize, belittle, deride, and defame various administrators. She exacerbated her insubordination by disseminating her grievances, merit aside, to colleagues, administrators, students and parents, who were unrelated to those grievances. This could only be an attempt to embarrass the sources of her distress. It is noteworthy that her claims of mistreatment of her are not directed at one source, but rather at no less than seven separate supervisors and administrators and one union representative.

With respect to the appropriate penalty, each allegation against Toorzani, standing alone over the course of eight years, gives rise to concern about her behavior and temperament. However, the persistence and repetitiveness of Toorzani's behavior over an extended period of time, despite exhaustive attempts by various administrators through meetings, discussions, memoranda, and warnings to redirect her unacceptable behavior, gives rise to alarm. She has demonstrated an unconscionable and uncorrectable level of insubordination and unbecoming conduct. The District has meticulously memorialized Toorzani's history of contumacious misbehavior and has given her ample warning and opportunity to improve. Rather than foster a cooperative

relationship, Toorzani repeatedly turned every criticism of her into an accusation against a superior. Factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring. Young, supra, EDU 9771-09 In re Suitt-Green, EDU 7071-96, Final Decision (October 14, 1997), aff'd, State Bd. of Educ. (February 4, 1998), <<http://www.state.nj.us/education/legal/index.html>>.

As already indicated, the nature and circumstances of each of the incidents, when viewed singularly, are troubling rather than alarming. However, Toorzani's prior record is a poor one. Although she has never previously been suspended, there are many written warnings and reprimands. Yet, her conduct continued unabated. Her present attitude is as inappropriate as it has consistently been in the past. The testimony and documentary evidence elicited from a wide range of administrators is overwhelming. The effect of her conduct on the maintenance of discipline among staff is evident. Simply, she has created a toxic work environment for her various supervisors and administrators. Finally, her repeated failure to respond favorably to many attempts to elicit appropriate and professional behavior suggests that her past conduct was not an aberration but instead leads to a reasonable prediction that such behavior is likely to recur. The proofs here "are not trivial but rather reflect a pattern of professionally unacceptable conduct which cannot be tolerated in a school setting." Suitt-Green, supra, EDU 7071-96. Accordingly, I **CONCLUDE** that Irandokht Toorzani should be dismissed from her tenured teaching position with the School District of the Borough of Elmwood Park.

ORDER

I **ORDER** that the tenure charges against Irandokht Toorzani be **AFFIRMED**.

I further **ORDER** that Irandokht Toorzani be **DISMISSED** from her tenured teaching position with the School District of the Borough of Elmwood Park.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 28, 2011

DATE

Jesse H. Strauss

JESSE H. STRAUSS, ALJ

Date Received at Agency:

December 28, 2011
John P. Barile

Date Mailed to Parties:

JAN - 3 2012

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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APPENDIX

LIST OF WITNESSES

For Petitioner:

Joseph Hulbert
Anthony Iachetti
David Warner
Allison Jackter
Corinne DiMartino
Richard Tomko

For Respondent:

None

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

- P-1 Memorandum by Thomas E. Bierman to Irandokht Toorzani, dated December 3, 2003
- P-2 Memorandum by Joseph Hulbert to Irandokht Toorzani, dated June 19, 2006
- P-3 Memorandum by Anthony Iachetti to Irandokht Toorzani, dated December 13, 2006
- P-4 Memorandum by Richard D. Tomko to Irandokht Toorzani, dated December 13, 2006
- P-5 Memorandum by David Warner to Irandokht Toorzani, dated December 13, 2006
- P-6 Memorandum by Richard D. Tomko to Irandokht Toorzani, dated January 10, 2007
- P-7 Elmwood Park School District Personnel Evaluation for Irandokht Toorzani, dated March 21, 2007

- P-8 Memorandum by Allison Jackter to Irandokht Toorzani, dated April 5, 2007
- P-9 Memorandum with attachments by Richard D. Tomko to Irandokht Toorzani, dated September 10, 2007
- P-10 Memorandum by Richard D. Tomko to All Staff, dated November 19, 2007
- P-11 Memorandum by David Warner to Irandokht Toorzani, dated February 6, 2008
- P-12 Memorandum by David Warner to Irandokht Toorzani, dated February 11, 2008
- P-13 Memorandum by Richard D. Tomko to Irandokht Toorzani, dated February 27, 2008
- P-14 Memorandum by Richard D. Tomko to Joseph F. Casapulla, dated July 1, 2008
- P-15 2008-2009 Teacher Schedule for Irandokht Toorzani
- P-16 Bell Schedule and Passage to Classes 2008-2009 School Year
- P-17 Elmwood Park Board of Education with Elmwood Park Education Association Agreement, 2005-2008
- P-18 Elmwood Park Board of Education with Elmwood Park Education Association Agreement, 2008-2011
- P-19 E-mail correspondence by Allison Jackter to Irandokht Toorzani, Connie Sudol, et al. October 10, 2008
- P-20 Letter by Richard D. Tomko to Irandokht Toorzani, dated October 14, 2008
- P-21 E-mail correspondence by Irandokht Toorzani to Richard D. Tomko, dated October 19, 2008
- P-22 Memorandum by Allison Jackter to Irandokht Toorzani, dated October 20, 2008
- P-23 Memorandum by Richard D. Tomko to Irandokht Toorzani, dated October 21, 2008
- P-24 Memorandum by David Warner to Richard D. Tomko, dated November 14, 2008

- P-25 E-mail correspondence by Irandokht Toorzani to David Warner, dated November 17, 2008
- P-26 Memorandum by Richard D. Tomko to Irandokht Toorzani, dated November 17, 2008
- P-27 Memorandum by David Warner to Irandokht Toorzani, dated November 18, 2008
- P-28 E-mail correspondence by Irandokht Toorzani to David Warner, dated November 19, 2008
- P-29 E-mail correspondence by Irandokht Toorzani to David Warner, dated November 19, 2008
- P-30 Memorandum by Richard D. Tomko to Irandokht Toorzani, dated November 20, 2008
- P-31 Memorandum by Allison Jackter to Irandokht Toorzani, dated January 29, 2009
- P-32 E-mail correspondence by Irandokht Toorzani to Allison Jackter, dated February 1, 2009
- P-33 Memorandum by Allison Jackter to Irandokht Toorzani, dated February 3, 2009
- P-34 Memorandum by Richard D. Tomko to Irandokht Toorzani, dated February 3, 2009
- P-35 Memorandum by Allison Jackter to Richard D. Tomko, dated March 17, 2009
- P-36 E-mail correspondence by Irandokht Toorzani to Richard D. Tomko, David Warner and Allison Jackter, dated March 22, 2009
- P-37 Memorandum by Richard D. Tomko to Irandokht Toorzani, dated March 26, 2009
- P-38 E-mail correspondence by Irandokht Toorzani to Richard D. Tomko, dated March 29, 2009
- P-39 Memorandum by Richard D. Tomko to Irandokht Toorzani, dated March 30, 2009
- P-40 Memorandum by David Warner to Irandokht Toorzani, dated September 24, 2009

- P-41 Memorandum with attachment by David Warner to Irandokht Toorzani, dated September 28, 2009
- P-42 E-mail correspondence by Irandokht Toorzani to Allison Jackter, dated January 28, 2010
- P-43 E-mail correspondence by Irandokht Toorzani to Richard D. Tomko, dated January 29, 2010
- P-44 Memorandum by Richard D. Tomko to Irandokht Toorzani, dated May 10, 2010
- P-45 Memorandum by David Warner to Irandokht Toorzani, dated November 9, 2010
- P-45a Letter from parent D.A. to Administrators, dated October 25, 2010
- P-46 Memorandum by David Warner to Irandokht Toorzani, dated January 4, 2011
- P-47 Memorandum by David Warner to Irandokht Toorzani, dated January 5, 2011
- P-48 Memorandum by David Warner to Irandokht Toorzani, dated January 6, 2011
- P-49 Memorandum by David Warner to Irandokht Toorzani, dated January 7, 2011.
- P-50 Memorandum by David Warner to Irandokht Toorzani, dated February 23, 2011
- P-51 Observation Report for Irandokht Toorzani, dated February 24, 2011
- P-52 Memorandum by David Warner to Irandokht Toorzani, dated February 25, 2011
- P-53 E-mail correspondence by Irandokht Toorzani to David Warner, dated February 28, 2011
- P-54 Memorandum by David Warner to Irandokht Toorzani, dated March 1, 2011
- P-55 E-mail correspondence by Irandokht Toorzani to Connie Sudol, dated March 2, 2011
- P-56 Memorandum by Richard D. Tomko to Irandokht Toorzani, dated March 25, 2011

- P-57 E-mail correspondence by Irandokht Toorzani to High School and Central Office Administrators, dated March 26, 2011
- P-58 E-mail correspondence by Irandokht Toorzani to David Warner, dated April 12, 2011
- P-59 Elmwood Park Public Schools Personnel Summative Evaluation for Irandokht Toorzani, dated May 3, 2011
- P-60 Memorandum by Corinne DiMartino to Irandokht Toorzani, dated June 2, 2011
- P-61 E-mail correspondence by Irandokht Toorzani to Corinne DiMartino, dated June 2, 2011
- P-62 Memorandum by Irandokht Toorzani to Corinne DiMartino, undated

For Respondent:

None

#50-12E

OAL DKT. NO. EDU 1271-12
 AGENCY DKT. NO. 16-1/12

L.B., on behalf of minor children, J.K.B.,
 L.B. and J.B.,

PETITIONER.

V.

BOARD OF EDUCATION OF THE
 CITY OF LINDEN, UNION COUNTY.

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON

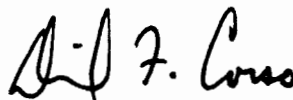
APPLICATION FOR EMERGENT RELIEF

The record of this emergent matter – which included a digital recording of the hearing conducted at the Office of Administrative Law (OAL) on February 3, 2012 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed by the Assistant Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34.

Upon full consideration of the entire record, the Assistant Commissioner adopts the recommended Order granting emergent relief as he concurs with the ALJ – for the reasons fully presented in her decision – that petitioner has satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, petitioner's emergent application is granted. The Board of Education of the City of Linden is hereby ordered to immediately allow the attendance of J.K.B., L.B. and J.B. in its schools during the pendency of this appeal. This matter shall proceed to plenary hearing on its merits, scheduled for February 24, 2012, as directed by the ALJ.

IT IS SO ORDERED.*



ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 2/10/12
 Date of Mailing: 2/10/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENCY RELIEF

OAL DKT. NO. EDU 01271-12

AGENCY DKT. NO. 16-1/12

L.B. ON BEHALF OF MINOR CHILDREN,

J.K.B., L.B. & J.B.,¹

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY

OF LINDEN, UNION COUNTY,

Respondent.

L.B., pro se, for petitioner

**Katherine A. Gilfillan, Esq., for respondent Board of Education of the City of
Linden, Union County (Weiner Lesniak, attorneys)**

BEFORE KELLY J. KIRK, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the action of the Board of Education of the City of Linden (Board), removing her three children from Linden public schools.

¹ For ease of reference, the children shall hereinafter be identified by fictitious names as follows: J.K.B. as John, L.B. as Lucy and J.B. as Joseph.

On January 9, 2012, petitioner filed a Pro Se Residency Appeal with the Department of Education. On January 11, 2012 and January 23, 2012, M. Kathleen Duncan, Director, Bureau of Controversies and Disputes, Department of Education (Department), issued to petitioner letters relative to deficiencies in the filing.

The January 11, 2012 letter acknowledges receipt of materials from L.B. on January 9, 2012, and it states:

It is also noted that more than 21 days have passed since the Linden board of education sent you notification of the children's disenrollment. Consequently, if you would like the students to attend school in Linden during the pendency of this appeal, you must file an application for emergent relief – pursuant to N.J.A.C. 6A:3-1.6 – explaining why you believe the Commissioner should grant such relief. In the motion you must address the four issues set forth in N.J.A.C. 6A:3-1.6(b).

Additional documents were filed by petitioner with the Department on January 10, 2012. A "Request for Relief Stay" was filed by petitioner with the Department on January 24, 2012. On January 24, 2012, the Department transmitted the case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the rules of procedure established by the Department of Education to hear and decide controversies and disputes arising under school laws, N.J.A.C. 6A:3-1.1 to -1.17. Jurisdiction is conferred under N.J.S.A. 18A:6-9. The case was filed at the Office of Administrative Law (OAL) on January 26, 2012. Oral argument was heard on February 2, 2012.

LEGAL ANALYSIS AND CONCLUSIONS

Where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a

contested case, emergency relief pending a final decision on the whole contested case may be ordered upon the application of a party. N.J.A.C. 1:1-12.6(a).

Where the subject matter of the controversy is a particular course of action by a district board of education or any other party subject to the jurisdiction of the Commissioner, the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case. N.J.S.A. 6A:3-1.6(a). A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

N.J.S.A. 6A:3-1.6(b)

In order to prevail on an application for emergent relief, Petitioner must meet all four conjunctive prongs set forth in Crowe.

The Board argues that the application for emergent relief is deficient on its face. However, it is noted that the petitioner's January 24, 2012 filing includes the previously missing language.

It appears from the "Student Tracker" printouts, that the children had attended Roselle schools from August 30, 2006 until September 5, 2007, and it appears, based upon authorizations for school and health records, request was made for the children's records to be transferred from Roselle to Linden on July 11, 2007. John is scheduled to

graduate from high school in 2012, and Lucy and Joseph each have Individualized Education Programs (IEP). An IEP is a written statement for each child with a disability that is developed, reviewed and revised in accordance with 20 U.S.C.A. § 1414(d). 20 U.S.C.A. § 1401(14); 20 U.S.C.A. § 1412(a)(4). When a student is determined to be eligible for special education, an IEP must be developed to establish the rationale for the student's educational placement and to serve as a basis for program implementation. N.J.A.C. 6A:14-1.3, -3.7. At the beginning of each school year, the District must have an IEP in effect for every student who is receiving special education and related services from the District. N.J.A.C. 6A:14-3.7(a)(1). All three children have been attending Linden public schools for the past five years, and two are special education students with IEPs that would have been established and implemented by Linden.

L.B. was notified by letter dated December 20, 2011 that the Board determined that pursuant to N.J.S.A. 18A:38-1, the children were not eligible to attend Linden public schools because they were not domiciled or residing in Linden. In pertinent part, the letter states:

If you believe the Board's determination is in error, you have the right to appeal this decision to the Commissioner of Education within twenty-one (21) days of this notice. [John], [Lucy] and [Joseph] will be permitted to attend school during this period, and to continue in attendance while the appeal is pending before the Commissioner. However, if no appeal is filed by the 21st day following the date of this notice, your children will be removed from their respective schools and you will be asked to indicate where they will be educated. Information on how to appeal to the Commissioner is included with this letter.

Twenty-one days from the "date of this notice" would have been January 10, 2012. Review of the letters from the Commissioner reveals that the Commissioner did receive some materials from L.B. on January 9, 2012, and the documents stamped received on January 10, 2012 are titled "Pro Se Residency Appeal." Per Duncan's January 11, 2012 letter, it appears that the filing was defective and petitioner missed

the filing deadline. However, it is noted that petitioner is pro se, and she did file an appeal, albeit a defective one, within the twenty-one days.

Pursuant to N.J.S.A. 18A:38-1, the children could not be removed from their current school during the twenty-one day period, nor could the children be removed during the pendency of the proceedings before the Commissioner. Thus, had petitioner timely filed a complaint appeal, a motion for emergent relief would not have been necessary and the children would have been permitted to attend the Linden schools during the pendency of the proceedings.

With regard to the merits of the underlying claim, per the Board's December 20, 2011 letter, the Board voted to disenroll the children from Linden public schools pursuant to N.J.S.A. 18A:38-1 for failure to meet the residency requirements and the children were removed in January 2012, because petitioner failed to timely file an appeal. However, petitioner argues that residency is inapplicable to the within matter because the children were transferred to Linden by Roselle, because Lucy was sexually assaulted on the grounds of Roselle public schools. The Board conversely argues that this is strictly a residency case, and that the children had attended Linden public schools pursuant to an Order for Temporary Custody and Visitation (Custody Order), entered by the Honorable David J. Issenman, J.S.C., dated July 23, 2007, but an investigation revealed that the children did not reside with C.P., the family friend awarded residential custody of the children. It appears from a facsimile transmittal at Exhibit A to the Board's brief that the Board was provided a copy of the Custody Order on March 29, 2011.

Petitioner argues that the Custody Order was separate and apart from the school transfer, and that she refused to sign the residency affidavits sent in 2011, because her children did not reside exclusively with C.P. and that the Linden school district was fully aware that petitioner resided in Roselle for the duration of the time her children attended Linden public schools, and that petitioner's address was reflected as Roselle, New Jersey in Linden's school records. There were no official school records

presented, thus it was not possible to verify what address(es) were on file in the children's records, or what addresses were reflected in the IEPs.

In support of her argument that the children were transferred to Linden by Roselle because of a sexual assault on Lucy, petitioner has presented correspondence between petitioner and the Roselle public schools, including the following:

- A May 1, 2007 letter ostensibly from L.B. to Elnardo Webster, Superintendent, states that L.B. wanted to file a written complaint regarding the incident, and was "still awaiting a response to [her] request regarding a safety school option transfer."
- A May 14, 2007 letter, ostensibly from Katie B. LaMar, Director of Special Services for Roselle Public Schools, to L.B., which references the allegation of Lucy "being allegedly kissed by an unknown Hispanic male"; a police report; a report to DYFS; "the possibility of a personal aide who could travel with [Lucy]," which was "rejected by L.B."; and "home instruction temporarily until all information was received to support [L.B.'s] concern." Additionally, the letter references L.B.'s delivery of an internet document entitled "Unsafe School Choice Option Policy," which "[LaMar] told [L.B.] that [LaMar] would have the Board Attorney review the document in regard to this matter and this is still in process."
- A May 19, 2007 letter, ostensibly from L.B. to LaMar,² states that "Due to [Lucy's] learning disabilities as well as her "traumatic state" caused by [the school's] gross negligence, I adamantly stated that [Lucy] would not be returning to [the school]."
- Another May 19, 2007 letter ostensibly from L.B. to LaMar states that "My concerns about a transfer was not met or addressed. In addition to our previous conversation you assured me that your office would work with my

² The letter is addressed to LaMar, but the salutation states "Dear Mrs. Hansen:" and the body of the letter states "I am formally requesting that you the case manager, Elizabeth Hansen" be removed from my child's case." Additionally, LaMar is noted as a carbon copy at the bottom of the letter.

schedule. This was necessary because the incident that occurred with [Lucy] at [the school] has changed her living arrangement.”; that “In reference to the police report, although a police report was made the responsibility for the Board of Education to obtain a copy is not mine.”; that because “[Lucy] is a minor I would prefer certain details not be entered in her [permanent] file. I would be happy to provide an updated copy once I am aware of my rights on this matter.”; that “whenever I speak to Ms. Hansen about the arrangements she informs me that the arrangement can not take place.”; and that “In closing, I would like to resolve this issues also however, I made it clear that because of this incident [Lucy] would not be returning to [the school.]”

- A June 4, 2007 letter ostensibly from LaMar to L.B. states that “the district could not consider or address [the] request for a transfer until [it] received a statement from the therapist, the police department, and D.F.Y.S.”
- Another June 4, 2007 letter ostensibly from LaMar to L.B. states that “In reviewing your letter in regard to [Lucy’s] IEP, it appears you are in disagreement with her program and placement. Again her current IEP is home instruction until there is resolution to the matter of the alleged incident of the unidentified male kissing [Lucy]. Again we still need the therapists’ findings[,] the DYFS report and the police report as documentation to substantiate your allegations. Once these are provided we will consider your request for outside placement, based on the review and recommendations of the above.”

- Per a June 14, 2007 facsimile transmittal sheet, the Roselle Police Juvenile Investigation Report was ostensibly faxed from LaMar to Heather Mills-Pevonis.³

No correspondence was presented subsequent to June 14, 2007, so it is unclear whether the issue of the transfer was ever formally resolved. Petitioner argues that her own records were destroyed in Hurricane Irene, and that Roselle has not responded to her requests for copies of documents relating to this incident or other school records. Petitioner provided documentation that a tree fell on her residence, which destroyed the roof and second floor, and due to heavy rains and structural damage the family was not allowed to remain in the residence. Thus, review of the correspondence presented implicates various issues, including a request for a transfer pursuant to the Unsafe School Choice Option⁴ provision. In addition, petitioner argues that she is now homeless, which imposes other legal considerations.

It is of utmost concern that John has not attended school since January 20, 2012, and that Lucy and Joseph, both special education students with IEPs, have not attended school since December 2011. Petitioner has presented documentation to support her argument that the underlying issue is not residency, but a transfer for safety reasons. Balancing the equities and interests of the parties, the petitioner will suffer the greater harm if the emergent relief is not granted. Linden should not be responsible for tuition for children not entitled to attend its public schools, but the harm to Linden is monetary, and if the petitioner's appeal is unsuccessful on the merits, she is liable for

³ Although Mills-Pevonis's title is not referenced in the facsimile, it is observed that a June 4, 2007 letter from LaMar carbon copied 'Heather Mills-Pevonis, County Supervisor of Child Study.'

⁴ Review of the website for the State of New Jersey Department of Education reveals an "Unsafe School Choice Option Policy", which states, in part that the Unsafe School Choice Option Provision (Title IX, Part E, Subpart 2, SEC. 9532) under the federal No Child Left Behind Act (NCLB) of 2001. Said policy reflects that "Each State receiving funds under this Act shall establish and implement a statewide policy requiring that a student attending a persistently dangerous public elementary school or secondary school, as determined by the State in consultation with a representative sample of local education agencies, or who becomes a victim of a violent criminal offense, as determined by State law, while in or on the grounds of a public elementary school or secondary school that the student attends, be allowed to attend a safe public elementary school or secondary school within the local educational agency, including a public charter school." (italics added)

tuition. Conversely, if the relief requested is denied, the harm to the children is greater as it impacts upon their daily lives and education.

In light of the foregoing, I **CONCLUDE** that the children should immediately commence attendance at their former respective schools in Linden, New Jersey, during the pendency of the proceedings in this matter. I note that pursuant to N.J.S.A. 18A:38-1, if the evidence does not support petitioner's claims, petitioner will be responsible for tuition for the time of the children's ineligible attendance in Linden.

ORDER

It is hereby **ORDERED** that petitioner's application for emergency relief is **GRANTED**. It is further **ORDERED** that the three children should immediately commence attendance at their former respective schools in Linden, New Jersey, and remain there during the pendency of appeal, unless enrolled elsewhere by their parents.

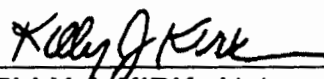
It is further **ORDERED** that an expedited plenary hearing has been scheduled for February 24, 2012 at 9:00 a.m. at the Office of Administrative Law, 33 Washington Street, 7th Floor, Newark, New Jersey.

This order on application for emergency relief may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who is authorized by law to make the final decision in this case. The final decision shall be issued without delay but no later than forty-five days from the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify, or reject this order within those forty-five days, this recommended order shall become the final decision on the issue of emergency relief under N.J.S.A. 52:14B-10.

February 6, 2012

DATE

jb


KELLY J. KIRK, ALJ



State of New Jersey

DEPARTMENT OF EDUCATION

PO Box 500

TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHRISTOPHER D. CERF
Acting Commissioner

February 10, 2012

Howard C. Long, Jr., Esq.
Wade, Long, Wood & Kennedy
1250 Chews Landing Road
Laurel Springs, NJ 08021

David T. Garnes, Esq.
Greentree Executive Campus
3001 Lincoln Drive West, Suite E
Marlton, NJ 08053

Dear Counsel:

I have reviewed the papers filed in connection with the Petition for Declaratory Ruling in the matter captioned *Board of Education of the Township of Winslow, Camden County v. Mark Benjamin*, Agency Dkt. No. 340-11/11. Therein petitioning Board seeks a declaration as to whether the receipt of unemployment benefits from the District by Joanne Masciocchi, a member of the Board of Education is a disqualifying conflict of interest as alleged by Mark Benjamin, another Board member. Please be advised that I have determined not to consider this matter as one for declaratory ruling, pursuant to my discretionary authority under *N.J.A.C. 6A:3-2.1(a)*. I find, instead, that this matter should proceed as a Petition of Appeal.

Accordingly, this matter will be transmitted to the Office of Administrative Law (OAL) for hearing consistent with *N.J.A.C. 6A:3-1.1 et seq.* Additionally, I note that another petition of appeal, *Mark Benjamin, Sr. v. Joanne Masciocchi*, Agency Dkt. No. 285-9/11, OAL Dkt. No. EDU 14102-11, on the same issue, was transmitted to the OAL on November 25, 2011. The instant matter will be transmitted recommending possible consolidation with that case.

Sincerely,

A handwritten signature in black ink, appearing to read "Cerf", written over a horizontal line.

Christopher D. Cerf
Acting Commissioner of Education

CDC/MKD/MH
County Superintendent

Mailed 2/14/12

BUSINESS AUTOMATION TECHNOLOGIES, :

PETITIONER, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE TOWNSHIP :
OR BERNARDS, SOMERSET COUNTY,
AND OPTIMUM LIGHTPATH, :

RESPONDENTS. :

SYNOPSIS

Petitioner, Business Automation Technologies, challenged the rejection of its bid for a voice and data services contract with respondent Board, which instead awarded the contract to Optimum Lightpath (Optimum). Petitioner alleged that the Board improperly scored the bids, resulting in the award of the contract to Optimum. Respondent contended that it acted at all times in full compliance with applicable laws and regulations, and filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; pursuant to *N.J.S.A.* 18A:18A-4.5(d), respondent Board properly evaluated proposals in accordance with the methodology described in the RFP, and in all ways complied with the requirements of Public School Contracts Law; Optimum's proposal received the highest score of all the interested vendors, and provided the maximum benefit to the District; petitioner failed to show that the Board improperly weighted the price criterion; Optimum was the most responsive to the technical requirements of the RFP; and petitioner received a low score in terms of financial stability. Accordingly, the ALJ concluded that the Board awarded the contract to Optimum in accordance with Public School Contracts Law and granted the Board's motion for summary decision.

Upon full review and consideration of the record, the Commissioner concurred with the ALJ that the Board did not act in an arbitrary, capricious or unreasonable manner in awarding the bid for voice, data and telecommunication services to Optimum. Accordingly, the Commissioner granted summary decision to the respondents and dismissed the petition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 2/10/12
Mailed 2/14/12

OAL DKT. NO. EDU 6304-11
 AGENCY DKT. NO. 101-4/11

BUSINESS AUTOMATION TECHNOLOGIES, :
 PETITIONER, : COMMISSIONER OF EDUCATION
 V. : DECISION
 BOARD OF EDUCATION OF THE TOWNSHIP :
 OR BERNARDS, SOMERSET COUNTY, :
 AND OPTIMUM LIGHTPATH, :
 RESPONDENTS. :

The Commissioner has reviewed the record of this matter and the Initial Decision of the Office of Administrative Law (OAL) on the Board's motion for summary decision. Respondent Optimum Lightpath (Optimum) joined in the Board's motion. No exceptions were filed by any party as provided by *N.J.A.C. 1:1-18.4*.

Upon his considered review, the Commissioner concurs with the Administrative Law Judge (ALJ) that this matter is ripe for summary decision as there are no genuine issues of material fact to resolve. For the reasons cogently presented in the ALJ's decision, the Commissioner agrees that the Board – in anticipation of the district's growing and future requirements for voice, data and telecommunication services – did not act arbitrarily, capriciously or unreasonably in awarding the bid for these services to Optimum.

Accordingly, summary disposition is granted to the respondents and the petition is dismissed.

IT IS SO ORDERED.¹



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/10/12

Date of Mailing: 2/14/12

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (N.J.S.A. 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING

SUMMARY DECISION

OAL DKT. NO. EDU 6304-11

AGENCY DKT. NO. 101-4/11

**BUSINESS AUTOMATION
TECHNOLOGIES,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF BERNARDS,
SOMERSET COUNTY,
AND OPTIMUM LIGHTPATH,**

Respondents.

Issac Fajerman, appearing pursuant to N.J.A.C. 1:1-5.4(a)(5), for petitioner

Erin E. Healy, Esq., for respondent Bernard Township Board of Education,
(Adams, Stern, Gutierrez & Lattiboudere, LLC., attorneys)

Sidney A. Sayovitz, Esq., for respondent Optimum Lightpath (Schenck, Price,
Smith & King, attorneys)

Record Closed: November 21, 2011

Decided: December 27, 2011

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

STATEMENT OF THE CASE

Petitioner Business Automation Technologies (petitioner) seeks a determination that respondent Board of Education of the Township of Bernards (Board) improperly scored bids for an internet and communications technology contract. The Board counters that it at all times acted in full compliance with applicable laws and regulations. The Board brings a motion for summary decision.

PROCEDURAL HISTORY

Petitioner filed a petition for due process dated April 27, 2011, with the Bureau of Controversies & Disputes of the New Jersey Department of Education (DOE). On May 17, 2011, an Answer was filed by respondent Board, and on June 3, 2011, an answer was filed by respondent Cablevision Lightpath-NJ, Inc. The matter was transmitted for a hearing to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-2(b) and N.J.A.C. 4A:2-2.9(b), where it was filed on June 6, 2011.

The Board filed a Motion for Summary Decision on October 18, 2011. Respondent Cablevision Lightpath-NJ, Inc joined in the motion on October 11, 2011. Responsive briefs and replies were filed by all parties on or before November 21, 2011, and on that date the record closed.

FACTUAL DISCUSSION

This matter arises from respondent Board's award of a Voice and Data Services contract (contract) to respondent Optimum Lightpath (Optimum) instead of petitioner Business Automation Technologies. On October 28, 2010, the Board released a Request for Proposals (RFP) for Voice and Data Services. Markarian Cert., ¶ 6. The RFP was prepared by Nick Markarian, the Board's Business Administrator, and James

Rollo, the Board's Technology Manager (Markarian and Rollo).¹ Markarian Cert., ¶ 3. The RFP stated in boldface that "[p]roposals must be cost neutral relative to the district's current voice, data and telecommunications costs. Preference will be given to solutions that can be most easily scaled up to facilitate the consolidation of the 6 schools [in the district] into a single data center." Board's Exhibit A, p. 8. The RFP included the following criteria, and the weight accorded to each, on which interested vendors would be evaluated: vender experience and references (100 points); price (400 points); quality and usability of online ordering, billing, and network management tools (50 points); responsiveness to the technical requirements of the RFP (150 points); E-rate references (100 points); assessment of the vendor's Service Level Agreement (SLA) (100 points); and assessment of the vendor's financial stability (100 points). Id. at p. 14.

On December 7, 2010, the Board received six vendor proposals, including one from petitioner and one from Optimum. Markarian Cert., ¶ 7. Subsequently, Markarian and Rollo issued to the Board a report evaluating the proposals in accordance with the methodology described in the RFP. Board's Exhibit D. The report included tables reflecting the scores given to each vendor based on the criteria included in the RFP. Ibid. Petitioner received the following scores: 100 out of 100 points for vendor experience and references; 400 out of 400 for price (noting that petitioner proposed the "best price at minimum spec, moderate scalability"); 45 out of 50 points for quality and usability of online ordering, billing, and network management tools (noting that "online billing tools not yet available"); 145 out of 150 points for responsiveness to technical requirements (noting that "most scalable solution is most expensive"); 100 out of 100 points for E-rate references; 100 out of 100 points for assessment of SLA; and 50 out of 100 points for financial stability (noting "concerns related to accountant's comments regarding financial statements"). Ibid. Petitioner received a total score of 940 out of 1000 points. Ibid.

¹ While the Board is a party to this matter, and as employees of the Board, Markarian and Rollo's actions are the Board's actions, Markarian and Rollo are distinguished from the Board in this memo, when appropriate, because they, in particular, devised the RFP and evaluated the proposals.

Optimum received the following scores: 100 out of 100 points for vendor experience and references; 400 out of 400 points for price (noting "best price at largest scale"); 45 out of 50 points for quality and usability of online ordering, billing, and network management tools (noting "realtime utilization not available in web portal"); 150 out of 150 points for responsiveness to technical requirements; 100 out of 100 points for E-rate references; 100 out of 100 points for assessment of SLA; and 100 out of 100 points for financial stability. Ibid. Optimum received a total score of 995 out of 1000 points. Ibid.

In their report, Markarian and Rollo noted that petitioner and Optimum submitted the most relevant proposals because each included "a solution that would help consolidate data center services." Ibid. Markarian and Rollo also noted that petitioner's solution for data center consolidation "is \$6,698 more per month [than Optimum's], while, at the same time, apparently offering half the Internet access [50 Mbps vs. 100 Mbps from Optimum]." ² Ibid. They concluded that Optimum's proposal "provided the maximum benefit and scalability while still costing the district less than its current monthly spend." Ibid.

Based on their evaluation, Markarian and Rollo recommended to the Board the awarding of the contract to Optimum. Ibid. On January 24, 2011, the Board by resolution awarded the contract to Optimum. Markarian Cert., ¶ 12.

LEGAL DISCUSSION

Standard for Summary Decision

N.J.A.C. 1:1-12.5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The provisions of N.J.A.C. 1:1-12.5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. An

² See Footnote 5, infra.

adverse party does not bear an obligation to oppose the motion, but to survive summary decision, there must be "a genuine issue which can only be determined in an evidentiary proceeding." Ibid. The non-existence of one entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). Moreover, even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536. "Applying this standard, the ALJ must determine whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." 1106 Ocean Ave. v. Governing Body of Point Pleasant Beach, ABC 4355-02, initial decision, (October 25, 2004) (citing Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 122 (App. Div. 1995)). I am therefore required to do "the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial." Brill, supra, 142 N.J. at 539-40. Like the New Jersey Supreme Court's standard for summary judgment, the language for summary decision is designed to "liberalize the standards so as to permit summary [decision] in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Id. at 539 (citation omitted).

The Public School Contracts Law, N.J.S.A. 18A:18A-1 to -59, allows boards of education to use competitive contracting "in lieu of public bidding for procurement of specialized goods and services the price of which exceeds the bid threshold."³ N.J.S.A. 18A:18A-4.1. One of the purposes of competitive contracting is "to provide . . . boards of education with greater discretion in entering into contracts with qualified vendors than is permitted under the normal requirements of public bidding." Sponsors' Statement to Assembly Bill No. 3519, at 104 (November 15, 1999); Sponsor's Statement to Senate Bill No. 2203, at 104 (November 8, 1999) (http://law.njstatelib.org/law_files/njlh/lh1999/ch440.htm). In particular, competitive

³ See N.J.S.A. 18A:18A-3 (bid threshold).

contracting "permits a less detailed specifications [sic] with a request for proposals (RFP) approach and uses evaluation criteria and ranking of proposals to determine the contractor who is the 'most advantageous, price and other factors considered,' instead of an award to the 'lowest responsible bidder.'" Local Finance Notice AU 2000-1R, New Jersey Department of Community Affairs (May 1, 2000) (http://law.njstatelib.org/law_files/njlh/lh1999/ch440.htm); N.J.A.C. 5:34-4.3(d).

The Public School Contracts Law requires a board to follow certain procedures during the competitive contracting process. The process must be administered by a qualified purchasing agent, legal counsel, or school business administrator of the board (responsible board employee). N.J.S.A. 18A:18A-4.3(b); N.J.S.A. 40A:11-9 (purchasing agent qualifications). The responsible board employee or employees shall prepare an RFP that includes "all requirements deemed appropriate and necessary to allow for full and free competition between vendors; information necessary for potential vendors to submit a proposal; and a methodology by which the board of education will evaluate and rank proposals from vendors." N.J.S.A. 18A:18A-4.4(a). Also, "[t]he methodology for the awarding of competitive contracts shall be based on an evaluation and ranking, which shall include technical, management, and cost related criteria, and may include a weighting of criteria, all developed in a way that is intended to meet the specific needs of the contracting unit," without discriminating against an otherwise capable vendor. N.J.S.A. 18A:18A-4.4(b).⁴ Technical, management, and cost related criteria "are not intended to be limiting or all-inclusive, and they may be adapted or supplemented in order to meet a contracting unit's individual needs as competitive contracting may dictate." N.J.A.C. 5:34-4.2(a).

When evaluating a proposal, the responsible board employee(s) must follow the methodology described in the RFP. N.J.S.A. 18A:18A-4.5(d). After the evaluation of the proposals, the responsible board employee(s) shall prepare a report that ranks the vendors' proposals, recommends a vendor for a contract, and clearly states the reasons for selecting a particular vendor among others considered. Ibid. The board must award any such contract by resolution. N.J.S.A. 18A:18A-4.3(b); N.J.S.A. 18A:18A-4.5(e).

⁴ If a board weights criteria, it must notify the vendors prior to the submission of proposals. Ibid.

Competitive contracting may be used for “telecommunications transmission and switching services.” N.J.S.A. 18A:18A-4.1(d). For the following reasons, the Board’s motion for summary decision is **GRANTED**. First, the Board properly determined that Optimum’s proposal would be the most advantageous to the Board based on the evaluative criteria included in the RFP. Second, petitioner has failed to raise a genuine issue of material fact with respect to the evaluation of the proposals.

I. The Board properly awarded the contract to Optimum.

The Board properly awarded the contract to Optimum because the Board determined that Optimum’s proposal was the most advantageous, price and other factors considered. Under the Public School Contracts Law, the responsible board employee must evaluate proposals in accordance with the methodology described in the RFP, rank the vendors’ proposals, recommend a vendor for a contract, and clearly state the reasons for selecting a particular vendor among others considered. N.J.S.A. 18A:18A-4.5(d). Markarian and Rollo followed these requirements as follows:

First, Markarian and Rollo evaluated the proposals in accordance with the methodology described in the RFP. The report shows that Markarian and Rollo evaluated proposals based on the following criteria: vender experience and references (100 points); price (400 points); quality and usability of online ordering, billing, and network management tools (50 points); responsiveness to the technical requirements of the RFP (150 points); E-rate references (100 points); assessment of the vendor’s Service Level Agreement (SLA) (100 points); and assessment of the vendor’s financial stability (100 points). This is the methodology described in the RFP.

Second, Markarian and Rollo ranked the proposals based on the methodology described in the RFP. Petitioner received a total score of 940 points; Optimum received a total score of 995 points.

Finally, Markarian and Rollo recommended Optimum for a contract and clearly stated the reasons for their recommendation. Optimum received the highest score of all the interested vendors, and Markarian and Rollo determined that Optimum’s proposal

would be the most advantageous to the Board. The RFP informed interested vendors that “[p]roposals must be cost neutral relative to the district’s current voice, data and telecommunications costs” and that “[p]reference will be given to solutions that can be most easily scaled up to facilitate the consolidation of the 6 schools into a single data center.” In their report, Markarian and Rollo clearly stated that petitioner’s proposal for data center consolidation was more expensive than Optimum’s proposal, and that given “[a]ll factors considered, Optimum Lightpath’s proposal provided the maximum benefit and scalability while still costing the district less than its current monthly spend.”⁵ Based on this recommendation, the Board resolved to award the contract to Optimum. Thus, the Board properly awarded the contract to Optimum in accordance with the Public School Contracts Law.

II. Petitioner has failed to raise any genuine issue of material fact.

Petitioner has failed to raise a genuine issue of material fact with respect to Markarian and Rollo’s evaluation of the proposals in terms of price, responsiveness to technical requirements, assessment of SLA, and assessment of financial stability. Under the Public School Contracts Law, “[t]he methodology for the awarding of competitive contracts shall be based on an evaluation and ranking, which shall include technical, management, and cost related criteria, and may include a weighting of criteria, all developed in a way that is intended to meet the specific needs of the contracting unit,” without discriminating against an otherwise capable vendor. N.J.S.A. 18A:18A-4.4(b).⁶ However, technical, management, and cost related criteria “are not

⁵ Petitioner’s proposal with respect to data center consolidation is confusing. In one price quote, petitioner stated that the monthly cost for consolidation would be \$18,397. Board’s Exhibit B, Bates # 000005. However, in a breakdown of the cost for consolidation, petitioner quoted a monthly cost of \$14,342. Id. at Bates #000009. In their report, Markarian and Rollo cited \$18,397 as the monthly cost. Also, petitioner did not specify in its consolidation proposal whether petitioner would provide Internet access at 50 Mbps or 100 Mbps. Board’s Exhibit B, Bates #000009. Markarian and Rollo assumed 50 Mbps, but petitioner argues that it stated elsewhere in its proposal that it could provide Internet access at 100 Mbps for a cost of \$4,500.

It is unclear which price quote is accurate, or whether the cost of providing Internet access at 100 Mbps is included in either quote. Regardless of which quote is accurate, with or without the cost of Internet access at 50 Mbps or 100 Mbps, Optimum’s proposal for consolidation was less than petitioner’s. Optimum’s proposal was \$11,699 with Internet access at 100 Mbps. Thus, even if Markarian and Rollo mistakenly cited \$18,397 as petitioner’s price quote, there is no evidence that they improperly concluded that Optimum’s proposal was the most advantageous, price and other factors considered.

⁶ If a board weights criteria, it must notify the vendors prior to the submission of proposals. Ibid.

intended to be limiting or all-inclusive, and they may be adapted or supplemented in order to meet a contracting unit's individual needs as competitive contracting may dictate." N.J.A.C. 5:34-4.2(a).

Petitioner has not shown that the Board improperly weighted the price criterion. The Board had discretion under N.J.S.A. 18A:18A-4.4(b) to weight criteria, provided it notified interested vendors before the submission of proposals. The RFP clearly indicated the weight accorded to each evaluative criterion. And, the Board, in its discretion, accorded price a weight of 40% (400 out of 1000 total points).

Contrary to petitioner's statement that "everything [the Board] wants to do can be accomplished with the lower priced BAT alternatives," the proposals show, and the Board concluded, that Optimum was the most responsive to the technical requirements of the RFP because Optimum could provide data center consolidation at a lower cost. There is no genuine issue in this regard.

There is no genuine issue with respect to Optimum's compliance with the RFP's SLA requirements. The RFP included an SLA requirement that "loss of service for 8 consecutive hours results in a credit for 1 month," and Optimum's proposal provided for a credit of 2/5 of a day. However, in accordance with N.J.A.C. 5:34-4.3(a)(3), the Board gave Optimum the opportunity to clarify its submission prior to the completion of evaluating proposals. The Board asked Optimum about the credit, and Optimum agreed to satisfy the SLA requirement for a loss-of-service credit. Rollo Cert., p. 2 of attachment. Therefore, the Board did not have to reject Optimum's proposal for lack of compliance.

There is no genuine issue with respect to the Board's request for financial statements from the interested vendors. As stated above, technical, management, and cost related criteria "are not intended to be limiting or all-inclusive, and they may be adapted or supplemented in order to meet a contracting unit's individual needs as competitive contracting may dictate." The Board determined that, with respect to its individual needs, "financial statements were required to help [the Board] assess the vendor's viability of the delivery of any solution that would require a large capital

construction project, such as a fiber-optic network.” Rollo Cert., p. 2 of attachment. Moreover, Markarian, the school business administrator, and Rollo, who holds a School Business Administrator Certificate of Eligibility, were qualified to assess the financial statements they requested. Petitioner received a low score in terms of financial stability because the CPA who prepared petitioner’s financial statements stated that petitioner did not engage in full financial disclosure and that, as such, the CPA could not express an opinion on or offer any assurance with respect to the statements. As a result, Markarian and Rollo concluded that they were not confident that the statements could be useful in assessing petitioner’s financial stability.

Finally, there is no support for the accusation that the Board favored Optimum because it is part of a large and recognizable company, Cablevision, and disfavored petitioner as a smaller company. Petitioner had a contract with the Board for several years prior to the awarding of the instant contract to Optimum. Moreover, Verizon, another large and recognizable provider, received a higher total score than petitioner, but was still not as highly considered.

CONCLUSION

This matter is ripe for summary decision. The Board’s motion for summary decision is **GRANTED** because there is no genuine issue of material fact and the Board is entitled to prevail as a matter of law. The Board awarded the contract to Optimum in accordance with the Public School Contracts Law.

ORDER

I **ORDER** that respondent Board’s motion for summary decision be **GRANTED**.

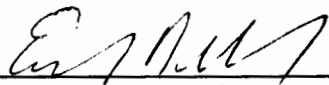
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 27, 2011

DATE



EDWARD J. DELANOY, JR., ALJ

Date Received at Agency:

12-27-11

Date Mailed to Parties:

12-27-11

/lam

JAY J. CHOI,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
THE NEW JERSEY JAPANESE SCHOOL,	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH	:	
OF OAKLAND, BERGEN COUNTY, AND	:	
NEW JERSEY DEPARTMENT OF EDUCATION,	:	
	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner – a resident of Rivervale, Bergen County, a taxpayer, and a Korean-American – challenged the provision of State funds to the New Jersey Japanese School (NJJS), a nonpublic school, by the Board of Education of Oakland and the New Jersey Department of Education (Department) for textbooks pursuant to *N.J.S.A.* 18A:58-37.3 and nursing services pursuant to *N.J.S.A.* 18A:40-25. Petitioner also challenged the designation of the NJJS as a nonpublic school recognized by the Department. Petitioner's challenge is based upon a passage in a civics textbook used by NJJS which sets forth that a small group of islets in the Sea of Japan – sovereignty over which has historically been disputed between Japan and South Korea, but which is currently administered by South Korea – is part of territory that belongs to Japan and is being occupied illegally by Korea. Petitioner contends, *inter alia*, that this view of the Japanese-Korean dispute is inappropriate, biased, and a form of propaganda that teaches NJJS students only the political perspective of Japan. The respondents in this matter all filed motions to dismiss in lieu of an answer to the petition.

The ALJ found, *inter alia*, that: dismissal of a petition very early in litigation is warranted if there is no relief upon which this forum or the Department can act, or no relief to which petitioner is entitled as a matter of law; petitioner has only a tenuous, hypothetical personal interest in the offending paragraph from the NJJS civics textbook; granting petitioner standing to pursue this action to appeal the content of one sentence or paragraph in a textbook used by a private school – and from there to argue that NJJS should be deprived of recognition as a legitimate private school – would be to open a Pandora's box of litigation whereby any general State taxpayer could assert the right to question every line of text in every textbook in any New Jersey school, public, private, or charter; and parents have a right to choose an education for their children which teaches different concepts than are taught in the public schools. The ALJ concluded that petitioner does not have standing to challenge the provision of textbooks and nursing funds to the NJJS, and fails as a matter of law to state a claim upon which relief can be granted. Accordingly, the ALJ granted respondents' motions, and dismissed the petition.

The Assistant Commissioner, to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-34, fully concurred with the ALJ's findings, and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

February 17, 2012

OAL DKT. NO. EDU 13294-11
 AGENCY DKT. NO. 278-9/11

JAY J. CHOI,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
THE NEW JERSEY JAPANESE SCHOOL,	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH	:	
OF OAKLAND, BERGEN COUNTY, AND	:	
NEW JERSEY DEPARTMENT OF EDUCATION,	:	
	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of petitioner and replies to these from each of the respondents – submitted in accordance with the dictates of *N.J.A.C. 1:1-18.4* – were fully considered by the Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A. 18A:4-34*, in reaching his determination herein.

Petitioner's exceptions – in relevant part – recast and reiterate his arguments advanced below. In that it is determined that these were fully considered and addressed by the Administrative Law Judge (ALJ) in her Initial Decision, further elaboration on them is unnecessary here.

Upon careful review and consideration, the Assistant Commissioner fully concurs with the ALJ that the respondents' Motions to Dismiss are appropriately granted as petitioner fails to meet the threshold requirements for standing and he fails as a matter of law to state a claim upon which relief can be granted.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter – for the reasons comprehensively stated therein – and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

D-17. Cuso

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 2/17/12

Date of Mailing: 2/21/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON
MOTIONS FOR DISMISSAL

OAL DKT. NO. EDU 13294-11

AGENCY DKT. NO. 278-9/11

JAY J. CHOI,

Petitioner,

v.

**THE NEW JERSEY JAPANESE SCHOOL,
BOARD OF EDUCATION OF THE BOROUGH
OF OAKLAND, BERGEN COUNTY, AND
NEW JERSEY DEPARTMENT OF EDUCATION,**

Respondents.

Bong June Kim, Esq., for petitioner Jay J. Choi (Kim & Bae, attorneys)

Richard Spitaleri, Jr., Esq., for respondent The New Jersey Japanese School
(Bingham McCutchen, attorneys)

Stephen R. Fogarty, Esq., for respondent Board of Education of Borough of
Oakland (Fogarty & Hara, attorneys)

Farha Ahmed, Deputy Attorney General, for respondent New Jersey
Department of Education (Jeffrey S. Chiesa, Acting Attorney General of
New Jersey, attorney)

Record Closed: December 19, 2011

Decided: January 6, 2012

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Jay J. Choi (petitioner or Choi) is a resident of Rivervale, Bergen County, and a taxpayer. As set forth below, petitioner is also a Korean-American. Under date of September 21, 2011, petitioner filed a Petition to the Commissioner of the New Jersey Department of Education (Commissioner) challenging the provision of State funds to the New Jersey Japanese School (NJJS), a nonpublic school, by the Board of Education of the Borough of Oakland (Oakland) and the New Jersey Department of Education (Department) for textbooks pursuant to N.J.S.A. 18A:58-37.3 and nursing services pursuant to N.J.S.A. 18A:40-25. He also challenged the designation of the NJJS as a nonpublic school recognized by the Department. Choi named as respondents the NJJS, Oakland and the Department.

The matter was transmitted by the Department of Education to the Office of Administrative Law (OAL), where it was filed on November 3, 2011, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The transmittal noted that each of the three respondents had already filed Motions to Dismiss in Lieu of Answers. Accordingly, I advised the parties by letter dated November 18, 2011, that the motions would be decided once perfected with additional briefs, prior to any case management conferences or the scheduling of any plenary hearings which might prove unnecessary.

FACTUAL FINDINGS

The facts as alleged in the Petition, or that reasonably can be presumed therefrom, can be enumerated thusly:

1. Petitioner lives at 810 Westwood Avenue, Rivervale, N.J. 07675.

2. Petitioner pays taxes through his municipality to both Bergen County and the State of New Jersey.
3. NJJS is located at 117 Franklin Avenue, Oakland, N.J. 07436.
4. Petitioner states that he lives three miles from the NJJS.¹
5. NJJS is registered with the Department and is a nonpublic school for grades kindergarten through ninth grade that caters to children whose primary language at home is Japanese or who are otherwise fluent in Japanese.
6. As a nonpublic school, NJJS receives State funds for textbooks pursuant to N.J.S.A. 18A:58-37.3 and for nursing services pursuant to N.J.S.A. 18A:40-25.
7. As a nonpublic school, the local Board of Education where NJSS is located—in this case, Oakland—administers those textbook and nursing funds to NJSS.
8. There is an island, or more accurately a group of two small islets and thirty-five smaller rocks, that is known in Japan as Takeshima, in Korea as Dokdo and in Franco-English as Liancourt Rocks.²

¹ While I could, on notice to all parties, take judicial notice pursuant to N.J.R.E. 201 of the fact that public internet mapping programs universally place the distance between the Choi residence and the NJJS to be at least fourteen miles, I do not find this fact to be material to the within determination.

² Wikipedia, an open-edited website the contents of which I will not take judicial notice or premise any reliance upon, see, e.g., Jones v. Synthes USA Sales, 2010 U.S. Dist. LEXIS 85744 (D.N.J. Aug. 19, 2010), nevertheless provides some background to the present contested matter which appears consistent with the undisputed facts presented by each party:

The Liancourt Rocks, also known as Dokdo or Tokto (독도/獨島, literally “solitary island”) in Korean or Takeshima (たけしま/竹島, literally “bamboo island”) in Japanese, are a group of small islets in the Sea of Japan (East Sea). Sovereignty over the islets is disputed between Japan and South Korea. The islets are currently administered by South Korea, which has its Coast Guard stationed there. The Franco-English name of the islets derives from *Le Liancourt*, the name of a French whaling ship which came close to being wrecked on the rocks in 1849. Both the Korean and Japanese names have changed over time, a testament to the historical confusion over the subject which led to today’s heated dispute. The Liancourt Rocks consist of two main islets and 35 smaller rocks. The total surface area of the islets is 0.18745 square kilometres (46.32 acres), with the highest elevation of 169 metres (554 ft) found at an unnamed location on the west islet. Two Korean citizens—an octopus fisherman and his wife—are permanent residents on the islets. A small Korean

9. The islets are currently administered by South Korea, which has a Coast Guard station there.
10. The official position of Japan is that the islets are part of Japan and are being illegally occupied by Korea.
11. NJJS utilizes a civics textbook that sets forth that Takeshima is part of territory that belongs to Japan and is being occupied illegally by Korea.³
12. NJJS actively promotes this view.
13. This view of the Japanese-Korean dispute over the Liancourt Rocks is inappropriate, biased, intellectually dishonest, and a form of propaganda, and teaches the children who attend NJJS only the political perspective of Japan.
14. This curriculum promotes separatism and the political agenda of the government of Japan and demonstrates intolerance to cultural diversity in general and the Korean-American community in particular.
15. This curriculum is neither consistent with nor equivalent to the social studies curriculum being instructed in the public schools.

The facts that are not alleged in the petition but concerning which there can be no dispute can be enumerated thusly:

police detachment, administrative personnel, and lighthouse staff are stationed in non-permanent supporting positions on the islets. South Korea administers the islets as Dokdo-ri, Ulleung-eup, Ulleung County, North Gyeongsang Province. Japan classifies them as part of Okinoshima, Oki District, Shimane Prefecture.

As a former civil mediator, it would certainly be tempting to suggest that this historic Asian-Pacific dispute, which apparently remains the cause of wide-ranging emotions and politics on both sides, be settled through a designation of one islet to each country. Clearly, if the solution were that simple, it would have occurred before today.

³ It is not clear whether all students in all grades use the same textbook or whether different textbooks for different educational levels all contain variations of the offending passage. NJJS presented a photocopy of one civic textbook with a translation that describe Takeshima as "Japanese inherent sovereign territory," while petitioner presents a

1. Petitioner has no children in any school, public or nonpublic, in the Borough of Oakland.
2. Petitioner has no children in any school, public or nonpublic, in the County of Bergen.
3. No child attending NJJS has had any interaction with petitioner, whether negative or positive.
4. There is no allegation that NJJS or any of its students has harassed petitioner or any other member of the Korean-American community of New Jersey.

LEGAL ANALYSIS

This case is presented at this time on motions to dismiss the complaint for failure to state a claim upon which relief can be granted by each of the three respondents. Such a motion must be based on the pleadings themselves. Roa v. Roa, 200 N.J. 555, 562 (2010). This forum must accept as true the facts alleged in the complaint and all reasonable inferences of fact flowing from those allegations, to ascertain whether there is or could be a claim upon which relief can be granted. Malik v. Ruttenberg, 398 N.J. Super. 489, 494 (App. Div. 2008). “[M]otions to dismiss should be granted in ‘only the rarest [of] instances.’” Banco Popular N. America v. Gandi, 184 N.J. 161, 165 (2005) (quoting Lieberman v. Port Auth. of N.Y. and N.J., 132 N.J. 76, 79 (1993)).

In evaluating a motion to dismiss a petition at the very earliest stage in the litigation, “courts are cautioned to search the complaint ‘in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement[.]’” Ibid. (quoting Printing Mart-Morristown v. Sharp Electronics Corp., 166 N.J. 739, 772 (1989)). “The test is whether a cause of action is suggested by the facts alleged in the complaint.” Russo v. Nagel, 358 N.J. Super. 254, 262 (App.

photocopy of a different civic textbook that references the island as “illegally occupied by Korea.” Either way, it is just this one portion of the textbook that forms the heart of the present dispute.

Div. 2003). Phrased another way, if there is no relief upon which this forum or the Department can act or no relief to which petitioner is entitled as a matter of law, even viewing the pled allegations in a light most favorable to him, then dismissal of the petition is warranted.

Specifically, petitioner objects to the provision of State funds, supported by his tax dollars, to the NJJS for the purchase of textbooks when, he claims, NJJS utilizes textbooks that promote the political and propagandistic teaching that Korea is illegally occupying the Liancourt Rocks. N.J.S.A. 18A:58-37.3. That statute provides:

a. The board of education in each school district in the State in which a nonpublic school is located shall have the power and duty to purchase and to loan textbooks upon individual request, to all students attending school in such district, who are enrolled in grades kindergarten through 12 of a public or non-public school.

b. No board of education shall be required to expend funds for the purchase and loan of textbooks in excess of the amounts provided in State aid pursuant to this act.

Textbooks which are loaned to students enrolled in grades kindergarten through 12 of any nonpublic school shall be textbooks which are used in any public elementary or secondary school of the State or are approved by any board of education.

[N.J.S.A. 18A:58-37.4(a).]

The implementing regulation makes it clear that funds are being used, if at all, to provide nonpublic students with textbooks also used by public students:

A district board of education shall distribute to all students on an equitable basis existing book stocks and newly purchased textbooks⁴ purchased pursuant to N.J.S.A. 18A:58-37.1 et seq. A district board of education shall not discriminate against students in either public or non-public schools.

⁴ Another fundamental objection to the petition, not raised by any party, might be that State funds have no nexus to the offending Japanese textbook. Query whether monies are given to NJSS from Oakland or just actual textbooks purchased by Oakland for use by all students? That fact is not alleged in the petition, but I do not consider it to be a reasonable inference from the petition in light of the regulations cited above.

[N.J.A.C. 6A:23A-20.2.]

With respect to the provision of taxpayer funds for nursing services, the law provides:

Each board of education of a district in which a nonpublic school is located shall:

a. provide nursing services for pupils who are enrolled full-time in the nonpublic school. The services shall include:

- (1) assistance with medical examinations, including dental screening;
- (2) conducting screening of hearing examinations;
- (3) the maintenance of student health records, and notification of local or county health officials of any student who has not been properly immunized; and
- (4) conducting examinations of pupils between the ages of 10 and 18 for the condition known as scoliosis.

b. adopt written policies and procedures extending the emergency care provided to public school pupils to those pupils who are enrolled full-time in the nonpublic school who are injured or become ill at school or during participation on a school team or squad.

[N.J.S.A. 18A:40-25.]

This is the basic starting point for nonpublic school nursing services, with some additional details or services set forth in the subsequent provisions. In fact, a nonpublic school can decline the services but for purposes of these motions, I must accept the allegations as pled. See also N.J.A.C. 6A:16-2.5.

All parties acknowledge that the NJJS is a nonpublic or private school located in Bergen County. New Jersey defines a "nonpublic" school as follows:

"Nonpublic school" means an elementary or secondary school within the State, other than a public school, offering education for grades kindergarten through 12, or any combination of them, wherein any child may legally fulfill compulsory school attendance requirements and which complies with the requirements of Title VI of the "Civil Rights Act of 1964," P.L. 88-352, (42 U.S.C. § 2000d et seq.).⁵

[N.J.S.A. 18A:40-24.]

In New Jersey, and in distinction from charter schools, there is no requirement that a nonpublic school must be certified. Cf. In re Red Bank Charter Sch., 367 N.J. Super. 462 (App. Div. 2004) (describing in general the charter school renewal process and role of the Commissioner, and specifically detailing the substance and process of challenging a charter school's disparate impact on non-minority enrollment in district).

The role of private education in this State has long been acknowledged, as set forth within the following court decision, albeit in a child support context:

Specifically as to the issue of private education, this public policy did not start or end with the amendments to N.J.S.A. 2A:34-23 and the adoption of the child support guidelines. In a series of enactments spanning more than two decades, the Legislature has endorsed a system of primary and secondary education that favorably acknowledges the large numbers of its citizens by reason of family tradition, background or religious belief who have chosen to enroll their children in non-public schools. To this day, to the extent constitutionally permissible, the Legislature continues to demonstrate an ongoing, parallel support for private schools. N.J.S.A. 18A:58-37.1 et seq. (loan of textbooks to non-public school students, L. 1974, c. 79), further supplemented by Amendment to N.J.S.A. 18A:58-37.5 (L. 1990, c. 52, p. 76); N.J.S.A. 18A:46-1 et seq. (compensatory education services for non-public school students, L. 1977,

⁵ The federal cross-reference provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[42 U.S.C.A. § 2000d.]

Petitioner does not allege that NJJS is excluding non-Japanese or other ethnic groups from participating in the opportunities provided at its private school, or that any federal funds are at stake.

c. 192), further supplemented by Amendment to N.J.S.A. 18A:46-2, L. 1990, c. 52, p. 62; N.J.S.A. 18A:46-19.1 et seq. (remedial services for handicapped children in nonpublic schools, L. 1977, c. 193); N.J.S.A. 18A:39-1 et seq. (transportation aid, non-public school pupils, P.L. 1981, c. 57) further supplemented by L. 1990, c. 52, p. 2 & 3⁸; N.J.S.A. 18A:40-23 (nursing services for non-public school pupils, L. 1991, c. 226); N.J.S.A. 18A:40-26 (providing additional medical service and equipment, material and services for immunization for non-public school students, L. 1991, c. 226, p. 4).

An excellent example of the Legislature's strong support for non-public schools can be found in N.J.S.A. 18A:58-37.1 et seq., loan of textbooks. In 1971, the Legislature enacted the Nonpublic Elementary and Secondary Education Act (L. 1971, c. 336, N.J.S.A. 18A:58-59, et seq.) which provided parents of non-public school students reimbursement for the cost of secular textbooks, instructional materials and supplies. The law was challenged and then declared unconstitutional by the United States District Court, District of New Jersey, on April 5, 1973 (see Public Funds for Public Schools of N.J. v. Marburger, 358 F. Supp. 29 (1973), aff'd, 417 U.S. 961 (1974)). After the District Court decision, new legislation was introduced and by August 5, 1974, N.J.S.A. 18A:58-37.1, loan of textbooks, a successor statute, was signed into law, a reaffirmation to all that the Legislature's policy towards private schools remained unchanged then as it remains unchanged now.⁹

⁸ Prior to 1981, by statute, case law, transportation of non-public school students along established public school bus routes long held constitutionally permissible. See Board of Ed. of Cent. Reg'l High Sch. Dist. of Ocean County v. State Bd. of Educ., 27 N.J. 76 (1958).

⁹ The Quality Education Act of 1990 (N.J.S.A. 18A:7D-1 et seq.) finally repealed the Non-Public Elementary & Secondary Education Act (N.J.S.A. 18A:58-59 et seq.). While this statute, as noted, has been succeeded by N.J.S.A. 18A:58-37.1, loan of textbooks, its legislative findings provide insight into current state public policy underlying support for non-public schools (see N.J.S.A. 18A:58-60 expressing legislative sentiment that parents who in the "exercise of their constitutional rights . . . choose non-public education (for their children) make a major contribution to the public welfare . . ." Ibid.; that if such private schools did not exist, intolerable public tax and education burdens would result).

[Hoefers v. Jones, 288 N.J. Super. 590, 617-18 (Ch. Div. 1994).]

Respondents' motions raise as a threshold issue the question of whether this petitioner has standing to assert the allegations contained in his complaint. Standing is

generated by someone who has a sufficient stake, real adverseness with respect to the subject matter of the dispute, and a substantial likelihood of some genuine harm in the event of an unfavorable decision. N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n, 82 N.J. 57, 67 (1980); see also Ridgewood Educ. Ass'n v. Ridgewood Bd. of Educ., 284 N.J. Super. 427 (App. Div. 1995). An important function of standing rules and other justiciability norms is to protect against the issuance of advisory decisions. Id. at 431.

In Ridgewood, individual teachers who worked and also resided in Ridgewood and the local teachers' association challenged a policy of their local Board of Education with respect to limiting the employment of supplemental teachers. The Appellate Division reversed the Administrative Law Judge, the Commissioner, and the then-State Board of Education who had dismissed the litigation on standing grounds because no one was then being affected by the new policy.

The Commissioner's view of Higgins's and Hovan's standing was likewise too stinting. See Haines v. Burlington County Bridge Comm'n, 1 N.J. Super. 163, 171–72, 63 A.2d 284 (App. Div. 1949), aff'd sub. nom., Driscoll v. Burlington Bridge Co., 8 N.J. 433, 86 A.2d 201, cert. denied, 344 U.S. 838, 73 S. Ct. 34, 97 L. Ed. 652 (1952). To the extent their status as residents and taxpayers of the school district was not itself an adequate basis for according standing—a proposition of questionable validity, see Kozesnik v. Montgomery Twp., 24 N.J. 154, 177–78, 131 A.2d 1 (1957)—Higgins and Hovan, by reason of their professional status and involvement, must be seen as having satisfied any additional requirement that may exist for a “slight private interest, added to and harmonizing with the general public interest,” Hudson Bergen County Retail Liquor Stores Ass'n v. Board of Comm'rs, City of Hoboken, 135 N.J.L. 502, 510, 52 A.2d 668 (E. & A. 1947), in order for their standing to be recognized. Elizabeth Federal Sav. & Loan Ass'n v. Howell, 24 N.J. 488, 499–500, 132 A.2d 779 (1957). We see no reason why this State's historic liberal approaches to the issue of standing in general, see Crescent Pk. [Tenants Ass'n v. Realty Equity Corp. of N.Y.], [58 N.J. 98] 101, 275 A.2d 433 [(1971)], should not apply to taxpayer suits challenging the quasi-legislative actions of local boards of education. Silverman v. Board of Ed., Tp. of Millburn, 134 N.J. Super. 253, 257–58, 339 A.2d 233 (Law Div.), aff'd o.b. 131 N.J. Super. 435, 346 A.2d 611 (App. Div. 1975).

[Id. at 432–33.]

All of the cases referenced by Ridgewood (as well as those cited by petitioner) were instituted by local taxpayers challenging local public school action or local zoning action. See also Osborne v. Bd. of Educ. of the Twp. of Lakewood, EDU 6438-02, Commissioner Final Decision (Aug. 26, 2003), <http://lawlibrary.rutgers.edu/oal/search.html> (“[W]hile petitioner in this matter is neither a student nor the parent of a student in the school district, petitioner has presented convincing arguments that, as a resident and a taxpayer, he is directly affected by the annual expenditure of 2 million dollars for courtesy busing of students in the Lakewood School District.”).⁶

However, petitioner here is not a taxpaying resident of the Oakland School District but only of Bergen County and the State. Nor is he challenging the actions of Oakland except as a conduit for State funds. Petitioner pays no taxes to Oakland but only to his own municipality, River Vale Township, and the State. His standing, therefore, must stand or fall as a general State taxpayer challenging on statutory grounds the content of a textbook used by a private and not a public school. It bears repeating that he has no children in either the public or private schools involved in the controversy. Thus, his private interest is much slighter than even that at stake in Ridgewood. Unless the general public interest is substantial, those will not harmonize into a sufficient stake to withstand the motions to dismiss.

Here, it cannot be said that the general public interest is substantial. Petitioner is not vindicating a federal or state constitutional right; rather, he is challenging the entitlement of NJJS to receive some textbooks or nursing funds pursuant to statutory grants, the receipt of neither of which appears to be implicated in the offending

⁶ While federal cases on standing have applied a somewhat less liberal standard than New Jersey courts, it is helpful to remember that the injury must be “fairly” traceable to the challenged action, and relief from the injury must be “likely” to follow from a favorable decision. See Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556, 569 (1984); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 41, 96 S. Ct. 1917, 1924, 1926, 48 L. Ed. 2d 450, 460, 462 (1976). Similar to the litigants in Allen, where black public school parents challenged the IRS grant of tax-exempt status to segregationist private schools, one gets the sense that petitioner here is really challenging any imprimatur of government approval of NJJS that might be derivative of it receiving some textbooks or nursing funds.

paragraph. Further, there is no allegation of harm or injury—past, present or potential—befallen upon petitioner.

In California Parents for the Equalization of Educational Materials v. Noonan, 600 F. Supp. 2d 1088, 1095 (E.D. Cal. 2009), the California Parents for the Equalization of Educational Materials (CAPEEM) alleged that the California State Board of Education had discriminated against CAPEEM's members during the 2005–2006 history-social science textbook adoption process and that the adopted sixth-grade textbooks represented Hinduism in a discriminatory and denigrating manner. The court found that the parent association had standing but ruled against certain of their constitutional claims on summary judgment. The California federal district court summarized the distinctions that have developed between challenges to school procedural practices as compared to school curriculum decisions in the more substantial arena of First Amendment rights.

Significantly, the challenged passages of the textbooks are only a small portion of otherwise clearly nonreligious texts--the books at issue are history-social sciences textbooks--which are part of a clearly, nonreligious history-social sciences program. In that respect, this case is closely analogous to Brown v. Woodland Jt. Unified Sch. Dist., 27 F.3d 1373 (9th Cir. 1994), wherein the Ninth Circuit recognized that when a challenged textbook is only a small part of an otherwise clearly nonreligious program, it is "unlikely that [an] objective observer would perceive the inclusion of the [objected-to] selections . . . as an endorsement or disapproval of religion." 27 F.3d at 1381 ("The fact that the Challenged Selections constitute only a minute part of the Impressions curriculum further ensures that an objective observer in the position of an elementary school student would not view them as religious rituals endorsing witchcraft.")

[Calif. Parents for the Equalization of Educ. Materials v. Noonan, 600 F. Supp. 2d 1088, 1119 (E.D. Cal. 2009).]

The United States Supreme Court has also recognized that that courts should not be in the position of analyzing the minutia of textbook edits and curriculum decisions, as opposed to non-curriculum activities, of public schools on Establishment Clause or

other constitutional grounds. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 300, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (Brennan, J., concurring). The curriculum decisions of private schools would obviously warrant even less scrutiny by the courts. Thus, the issue of the reliance by a nonpublic school of this paragraph in a Japanese textbook, that may or may not be currently in use, and that may or may not have any nexus to the textbook loan program, is not imbued with significant public interest.

The logical consequence of granting petitioner standing to pursue this administrative avenue to appeal the content on one sentence or paragraph in the civics textbook used by a private school and from there to argue that the NJJS should be deprived of recognition as a legitimate private school would be to open the true Pandora's box of litigation where any general State taxpayer could assert the right to question every line of text in every textbook in any school in New Jersey whether public, private, or charter. I must **CONCLUDE** that petitioner does not have anything other than a very tenuous or hypothetical personal interest in this paragraph from the NJJS textbook on civics. He does in fact present the case of an "interloper" who is seeking to have the State administrative process scour the minds of these private school children for possible bias against Koreans. Nor could it reasonably be said that upholding the provision of nursing fund support by the State to the benefit of New Jersey children who happen to attend NJJS will have any impact on petitioner's interest in not being offended by the civics textbook discussion on the Liancourt Rocks. Therefore, I **CONCLUDE** that petitioner does not have standing to challenge the provision of textbooks and nursing funds to the NJJS.

I must also concur with the respondents that even if petitioner had standing as a non-parental, non-resident general taxpayer, there would still be no action upon which relief may be granted. Significantly, nonpublic schools are not approved or certified by the Department, are not bound by the State's Core Curriculum Content Standards, N.J.A.C. 6A:8-1.1 et seq., or the Equality and Equity in Education regulations. N.J.A.C. 6A:7-1.1 et seq.⁷

⁷ Similarly, the State can "encourage" nonpublic schools to comply with the new Anti-Bullying Act but it cannot mandate such:

It must be recognized that local boards of education have been charged by the Legislature with the orderly conduct only of public schools. K.O.H. ex rel R.H. v. Edison Twp. Bd. of Educ., 95 N.J.A.R.2d (EDU) 275, 276, adopted, 95 N.J.A.R.2d (EDU) 278, aff'd, 96 N.J.A.R.2d (EDU) 445. The Department has promulgated quality of education standards that must be implemented by boards of education, such as Oakland. The reach of the Core Curriculum Standards is appropriately circumscribed thusly:

(a) The Core Curriculum Content Standards apply to all students enrolled in public elementary, secondary, and adult high school education programs within the State of New Jersey.

(b) Throughout this chapter, unless otherwise noted, "district boards of education" shall be interpreted to include all providers of publicly funded elementary, secondary, and adult high school education programs, including county vocational schools, educational services commissions, jointure commissions, charter schools, regional day schools, adult high schools, county special services school districts, the Marie H. Katzenbach School for the Deaf, the Department of Human Services, the Department of Corrections, the Juvenile Justice Commission, public college-operated programs, and approved private schools for the disabled.

(c) District boards of education shall align their curriculum and instructional methodologies to assist all students in achieving the Core Curriculum Content Standards and to prepare all students for employment or postsecondary study upon their graduation.

(d) Progress toward meeting the Core Curriculum Content Standards shall be measured by the Statewide assessment system at grade levels three through eight and

a. Nonpublic schools are encouraged to comply with the provisions of the "Anti-Bullying Bill of Rights Act," P.L. 2002, c. 83 (C.18A:37-13 et seq.), as amended and supplemented by P.L. 2010, c. 122 (C.18A:37-13.1 et al.).

b. In the case of a faith-based nonpublic school, no provision of the "Anti-Bullying Bill of Rights Act," P.L. 2002, c. 83 (C.18A:37-13 et seq.), as amended and supplemented by P.L. 2010, c. 122 (C.18A:37-13.1 et al.), shall be interpreted to prohibit or abridge the legitimate statement, expression or free exercise of the beliefs or tenets of that faith by the religious organization operating the school or by the school's faculty, staff, or student body.

[N.J.S.A. 18A:37-31.]

11–12, or if ungraded at equivalent ages, and at any other grades deemed appropriate by the Commissioner.

[N.J.A.C. 6A:8-1.2.]

The scope of the genocide or diversity regulations are similarly circumscribed to public or charter schools and thus, are inapplicable to the NJJS:

These rules [on Equality and Equity in Education] specify standards that apply to district boards of education providing general education services to students in grades preschool through 12, special education services to students ages three through 21, or adult education programs, and to charter schools.

[N.J.A.C. 6A:7-1.2.]

Petitioner cannot state a claim against the NJJS for its alleged failure to promote diversity and equality amongst various ethnic groups through its civics curriculum because these regulations are not binding on nonpublic schools. As set forth by respondents, parents have a right to choose for their children an education at home or in a religious or other private school at which different concepts are taught than could be taught in the public schools.⁸ Accordingly, I **CONCLUDE** that petitioner fails as a matter of law to state a claim upon which relief can be granted.

In assessing the propriety of the relief specifically sought against Oakland, I make one further observation that Oakland is a mere conduit of mandated State funds and exercises no discretion or authority over those funds that are directed for the limited purposes of aiding in the provision of textbooks and nursing services to students in private schools. Cf. Strubaus v. Whitman, 339 N.J. Super. 38, 50 (App. Div. 2001). To the extent that textbooks are physically loaned to the nonpublic schools, it is obvious that those would not fall within the petitioner's complaint because public schools do not have civics textbooks written in Japanese. N.J.S.A. 18A:58-37.4. Thus, there is no

⁸ "The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue." Farrington v. Tokushige, 273 U.S. 284, 298, 47 S. Ct. 406, 71 L. Ed. 646 (1927).

relief that can be required of Oakland and there has been no decision made by that Board which can be said to have been arbitrary, capricious or unreasonable.

There is simply no law and hence, can be no right to demand that the Department scrutinize the curriculum and textbooks of a nonpublic school for language, albeit a word, paragraph, page or chapter, that might offend some member of our greater public community for to do so would infringe on the rights of the NJJS, its parents and students.⁹

ORDER

It is **ORDERED** that the motions of the Board of Education of the Borough of Oakland, the New Jersey Japanese School and the New Jersey Department of Education for Orders Dismissing the Petition of Jay J. Choi are **GRANTED**.

It is **FURTHER ORDERED** that the Petition of Jay J. Choi seeking a mandate that the NJJS cease certain teachings and that Oakland and the Department cease their provisions of funds to NJJS for textbooks and school nursing services with taxpayer monies is and the same is hereby **DISMISSED**.

It is **FURTHER ORDERED** that the Petition of Jay J. Choi seeking a mandate that the NJJS be declared not to be a nonpublic school with instruction equivalent to

⁹ An interesting analysis of the right of even public school officials to select a curriculum that an ethnic or political group might find offensive without federal court scrutiny can be found at Griswold v. Driscoll, 625 F. Supp.2d 49 (D. Mass. 2009). Further, the United States Supreme Court has long remarked on the importance of academic freedom:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

[Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957).]

that provided in the public schools for children of similar grades and attainments is and the same is hereby **DISMISSED**.

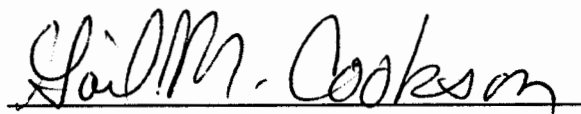
I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 6, 2012

DATE



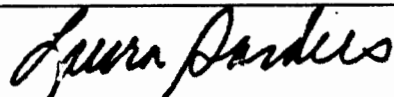
GAIL M. COOKSON, ALJ

Date Received at Agency:

Date Mailed to Parties:

JAN - 9, 2012

id



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OAL DKT. NO. EDU 1531-11
AGENCY DKT. NO. 16-1/11

IN THE MATTER OF THE TENURE : COMMISSIONER OF EDUCATION
HEARING OF CATHLEEN VAN VORST,
UPPER TOWNSHIP SCHOOL DISTRICT, : DECISION
CAPE MAY COUNTY.
_____ :

The record of this matter, the proposed "Settlement Agreement" (Settlement), and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed and found in compliance with *N.J.A.C.* 6A:3-5.6.

Upon such review, the Commissioner concludes that the Settlement is consonant with the standards for settlement of tenure cases set forth in *In re Cardonick*, 1990 *S.L.D.* 842 (1990). The Commissioner therefore approves the Settlement terms, wherein respondent resigns from employment with the district and applies for retirement, and petitioner pays respondent \$50,543.40 for the 2011-2012 school year and withdraws the tenure charges.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the Agreement.¹

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/17/12
Date of Mailing: 2/21/12

¹ A copy of this decision shall be forwarded to the New Jersey Board of Examiners for action as it deems appropriate.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1531-11

AGENCY DKT. NO. 16-1/11

**IN THE MATTER OF THE TENURE
OF CATHLEEN VAN VORST, UPPER
TOWNSHIP BOARD OF EDUCATION.**

William A. Donio, Esq., for petitioner, Upper Township Board of Education
(Cooper Levenson, attorneys)

Ned P. Rogovoy, Esq., for respondent, Cathleen VanVorst

Record Closed: December 23, 2011

Decided: December 29, 2011

BEFORE **W. TODD MILLER, ALJ**:

This matter was transmitted to the Office of Administrative Law on February 14, 2011, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures, and as placed on the record on December 14, 2011.
2. The settlement is in compliance with the standards set forth in In Re Cardonick, 1990 S.L.D. 842 (1990):
3. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

December 29, 2011

DATE



W. TODD MILLER, ALJ

Date Received at Agency:

1/3/12

Date Mailed to Parties:

1/3/12

/sd

William S. Donio, Esquire
Cooper Levenson April Niedelman
& Wagenheim, P.A.
1125 Atlantic Avenue – 3rd Floor
Atlantic City, NJ 08401
(609) 344-3161
Attorneys for Upper Township Board of Education

IN THE MATTER OF THE TENURE OF
CATHLEEN VAN VORST

COMMISSIONER OF EDUCATION OF
THE STATE OF NEW JERSEY

UPPER TOWNSHIP BOARD OF
EDUCATION

OAL DOCKET: EDU 01531-2011S
AGENCY REF: 16- 1/11

2011 DEC 23 P 1:01

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (hereinafter referred to as the “Settlement Agreement”) is made effective as of the ____ day of _____, 2011 by and between the Petitioner Board of Education of Upper Township, Cape May County, New Jersey (hereinafter referred to as the “Board”) and the Respondent Cathleen VanVorst (hereinafter referred to as the “Respondent”) (collectively the “parties”).

WHEREAS, the Board is a body corporate and politic of the State of New Jersey, charged with the statutory responsibilities for the management and administration of Upper Township School District in Cape May County, New Jersey; and

WHEREAS, the Respondent is presently employed by the Board as a tenured teacher at the Board’s Elementary School; and

WHEREAS, the Board filed certain charges against Respondent alleging unbecoming conduct, including but not limited to, violating Board Policy No. 3281 (Inappropriate Staff Conduct), Board Policy No. 2622 (Pupil Assessments), Board Policy No. 3150 (Discipline), Board Policy No. 3211 (Code of Ethics), and sought to remove Respondent from her tenured position, said charges more specifically described in the Tenure Charges filed by the Board and dated January 3, 2011 (the "Tenure Charges") attached hereto as *Exhibit A*; and

WHEREAS, the Respondent, by formal Answer (the "Answer") attached hereto as *Exhibit B*, contested the Tenure Charges and offered explanations for her actions and behavior; and

WHEREAS, the Commissioner of Education for the State of New Jersey (the "Commissioner") referred said charges to the Office of Administrative Law for a plenary hearing before the Honorable William Todd Miller, A.L.J.; and

WHEREAS, the parties appeared before the Honorable William Todd Miller, A.L.J. on September 20, 2011 for such hearing and on December 14, 2011 (Respondent by telephone) for a settlement conference; and

WHEREAS, the parties wish to settle all controversies among and between them, including the charges contained in the Tenure Charges, the defenses and counterclaims, if any, contained in the Answer and any and all related or unrelated claims, known or unknown, which could have been asserted by the Board or Respondent through this Settlement Agreement ("Settlement Agreement"); and

WHEREAS, the Respondent was questioned in open court, on the record on September 20, 2011 and questioned in open court on the record by telephone on December 14, 2011, regarding these representations and acknowledged her understanding that the Settlement

Agreement would be put in writing corresponding to the representations made in open court and that this Agreement does conform to those representations.

WHEREAS, the parties acknowledge that the merits of the controversy are in dispute and that neither the Board nor Respondent admits any liability to either, but both have reasons to desire a resolution of the matter; and

WHEREAS, the Board and Respondent specifically recognize and acknowledge that any settlement is contingent upon approval by the Commissioner as required by and consistent with *New Jersey Administrative Code* § 6A:3-5.6 and *In the Matter of the Tenure Hearing of Frank Cardonick*, State Board of Education decision of April 6, 1983 (1990 School Law Decisions, S.L.D. 842, 846); and

NOW THEREFORE, in consideration of the agreements, promises, covenants and conditions contained herein, the adequacy and sufficiency of which are expressly acknowledged by the parties hereto and the recitations set forth above which are incorporated by reference herein, the parties agree as follows:

1. DISMISSAL OF ACTION.

(a) The Board will pay Respondent her salary until the last regular pay for the 2011 calendar year. Contemporaneous with the signing of this Settlement Agreement, Respondent will deposit with Petitioner's attorney an irrevocable letter of retirement effective two weeks after the Commissioner of Education approves the Settlement Agreement retiring from any and all positions, tenured or untenured, held or claimed by Respondent with the Board attached hereto as *Exhibit C*. Respondent shall turn in all security cards, ID cards keys, laptop and/or other items that are Board property and shall not come on school premises except at such time as the general public is invited or permitted or with prior approval of the Superintendent, or as

otherwise provided in this Agreement. Respondent shall not be entitled to any "retroactivity" or other payment if the Board and any collective bargaining agent who purports to act on Respondent's behalf shall settle any collective bargaining agreement setting forth a new rate of pay for Respondent.

(b) Two weeks after this Settlement Agreement is approved by the Commissioner of Education, the Board will pay Respondent in accordance with the following:

Salary 2011-2012	\$84,239.00
Less Salary Received for 2011-2012 School Year until the end of calendar year 2011	(\$33,695.60)
Total:	\$50,543.40

(c) Respondent acknowledges and represents that she shall not apply or seek any position with the Board or School District including but not limited to any paid, unpaid, appointed, or other position. However, Respondent may attend or volunteer to assist in any future School District functions as a family member of a student or as a member of the public subject to the District's rules regarding same.

(d) Upon Respondent's retirement she shall retire from any and all employment with the Board and shall be entitled to any benefit or privilege for persons retiring from service presently contained in the Board's collective bargaining agreement with the association representing Respondent in effect at the time of the execution of this Settlement Agreement.

(e) Said payment received as provided in Paragraph 1(a), (b) and (d) shall constitute full and absolute payment by the Board to Respondent for all salary, benefits, emoluments, or other claims, rights or privileges Respondent has, may have, claims or may claim, including but not limited to salary for any period, accumulated sick leave, vacation or other paid leave,

benefits, fringe benefits, pension contributions, in-kind or other contributions, opt-out or other payments.

(f) Upon the approval of the Commissioner of Education of this Settlement Agreement, the Board will withdraw and dismiss the Tenure Charges.

2. RELEASE. Respondent, personally and for her legal or personal representatives, assignee, estate and/or heirs, waives, releases and gives up any and all other claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that she may have against the Board and any and all of its officers, directors, agents, representatives and employees (present and former) and their respective successors and assigns, heirs, executors and legal or personal representatives, based upon any act, event or omission occurring before the execution of this Settlement Agreement including, but not limited to, any events related to, arising from or in connection with Respondent's employment with the Board or the Tenure Charges. Respondent specifically waives, releases and gives up any and all claims arising from or relating to her employment and/or association with the Board based upon any act, event or omission occurring before the execution of this Settlement Agreement including, but not limited to, any claim that was asserted or could have been asserted under any federal or state statutes, regulations, or common law or Board policies or regulations.

3. NO CLAIMS PERMITTED/COVENANT NOT TO SUE. Respondent waives her right to file any charge or complaint on her own behalf, to participate as a complainant, a plaintiff or a charging party in any charge or complaint, or to collect damages as a result of any charge or complaint which may be made by any other person or organization on her behalf, with respect to anything which has happened up to the execution of this Settlement Agreement, before any federal, state or local court or administrative agency against the Board except as such waiver is

prohibited by law. Respondent hereby waives and releases any right to file a complaint for any actions related to any tort claim notices that she has previously filed against the Board and any employee.

4. ATTORNEY'S FEES. Each party agrees that each party will bear its own costs and attorney's fees which have been incurred in connection with the within matter and in conjunction with the negotiation and preparation of this Settlement Agreement.

5. NO ADMISSION OF LIABILITY. It is expressly understood that neither the execution of this Settlement Agreement, nor any other action taken by the Respondent in conjunction with the Board's claims or this settlement, constitute admission by the Respondent of any violation of any law, duty or obligation. It is also understood that the acceptance of this settlement does not constitute any representation by the Board as to the merits of its claims or the lack thereof.

6. ENTIRE AGREEMENT. This Settlement Agreement contains the sole and entire agreement between the parties hereto. Each party represents and acknowledges that prior to executing this Settlement Agreement, they consulted with or had an opportunity to consult with counsel, has had ample time to do so and that no party relied upon any representation or statement not set forth in this Settlement Agreement made by any other party hereto, or their counsel or representatives, with regard to the subject matter of this Settlement Agreement. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Settlement Agreement.

7. BOARD APPROVAL. It is expressly understood that this Settlement Agreement and the settlement pursuant to the terms listed in this Settlement Agreement is contingent upon Board approval. A copy of the Board's Resolution approving this Settlement Agreement is attached as *Exhibit D* and incorporated herein by reference.

8. COMMISSIONER'S APPROVAL. It is expressly understood that this Settlement Agreement, and the settlement pursuant to the terms listed in this Settlement Agreement must first be approved by the Commissioner of Education and must meet the following standards as enumerated in N.J.A.C. 6A:3-5.6(a):

(a) Accompaniment by documentation as to the nature of the charges: Petition of Charges are attached hereto and incorporated herein as *Exhibit A* with the Answer attached hereto and incorporated herein as *Exhibit B*.

(b) Explanation of the circumstances justifying settlement or withdrawal: The Board agrees to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges, Agency Docket No. 16-1/11, OAL Docket No. EDU 01532-2011S, with prejudice in light of Respondent's retirement. In executing this Agreement, Respondent understands the ultimate decision with regard to the resolution of the tenure charges lies with the Commissioner of Education and in the event that the New Jersey Commissioner of Education rejects the settlement between the Board and Respondent, then this Settlement Agreement is completely null and void and the tenure charges currently pending will continue to be processed. Respondent understands and has been advised by her counsel of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate. Attached as *Exhibit E* is Respondent's Affidavit showing that she has been counseled in every respect and knows that the State Board of Examiners can act independently. Respondent is aware that the State Board of Examiners has been advised of the facts contained in the tenure charge and that they as a body have the right to take an action against her certification if they so desire.

(c) Consent of both the charged and charging parties is evidenced by this Settlement Agreement.

(d) Indication that the charged party entered into the agreement with a full understanding of his or her rights is evidenced by this Settlement Agreement as well as Respondent's sworn testimony on the record in person before Judge Miller on September 20, 2011 and by telephone before Judge Miller on December 14, 2011.

(e) A showing that the agreement is in the public interest as evidenced by this Settlement Agreement. This Settlement Agreement is also shown to be in the public interest as a result of the parties' separation and satisfaction of any and all claims related to the Tenure Charges. In addition, the public interest is supported by the saving of valuable witness educational time in the form of the avoidance of students missing class time to testify in Court and of teachers and administrators missing time in school during which time their services are required in order to continue providing a thorough and efficient education to the Board's students. The avoidance of subjecting student witnesses to the stresses of testifying in Court is also evidence that this Settlement Agreement is in the public interest. Furthermore, the cost savings to the Board and the public as a result of settling the matter, which is significantly less than the cost associated with prosecuting the Tenure Charges, including appeals, evidence that this Settlement Agreement is in the public interest.

(f) Where the charged party is a teaching staff member, a showing that the teaching staff member has been advised, and was advised, and by recitation of this provision Respondent is advised, of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate. Respondent is aware that the State Board of Examiners has been advised of the facts contained in the tenure

charge and that they as a body have the right to take an action against her certification if they so desire.

9. REFERENCE. In the event the Board is contacted by any future possible employer of Respondent, the Board will not provide any reference positive or negative and will only provide Respondent's dates of employment.

IN WITNESS WHEREOF, the parties have set their hands and seals as of the day and year first written.

By: William S. Donio
William S. Donio, Esq.
Attorney for Petitioner

Date: 12/19/11

By: Ned P. Rogovoy
Ned P. Rogovoy, Esq.
Attorney for Respondent

Date: 12/19/11

By: Michelle Barbieri
Michelle Barbieri
Upper Township Board
of Education President

Date: 12/19/11

By: Cathleen VanVorst
Cathleen VanVorst, Respondent

Date: 12/19/11

**STATEMENT OF CHARGES AND SPECIFICATIONS REGARDING THE
EMPLOYMENT OF CATHERINE VAN VORST, A TENURED FACULTY
MEMBER WITHIN THE EMPLOY OF THE
UPPER TOWNSHIP BOARD OF EDUCATION**

Catherine Van Vorst, a certified tenured teaching staff member employed by the Upper Township Board of Education (the "Board"), engaged in the following unbecoming conduct of a certified teaching staff member, all of which was continuing, flagrant and unjustifiable, as follows:

CHARGE 1: Catherine Van Vorst, a certified tenured teaching staff member, engaged in conduct unbecoming a certified teaching staff member by compromising the test security protocol and validity of the New Jersey Assessment of Skills and Knowledge ("NJASK") of her fourth grade class resulting in an investigation of the Upper Township School District by the New Jersey Department of Education and thirteen (13) of her students exercising the option to retake the NJASK and nine (9) of her students exercising the option to have "void" scores.

SPECIFICATION: The NJASK is a statewide assessment mandated by the New Jersey Department of Education and is created to be a comprehensive, multi-grade assessment program. Along with other indicators of student progress, the results of the NJASK are intended to be used to identify students who need additional instructional support in order to reach the Core Curriculum Content Standards as well as to gauge whether the School District is making Adequate Yearly Progress as required by the No Child Left Behind Act.

SPECIFICATION: Board Policy 2622 Pupil Assessment provides that the Board "will comply with implementing the schedule of the New Jersey State Board of Education Statewide assessment program."

SPECIFICATION: On or about April 15, 2010 Catherine Van Vorst received "Security Plan & Turnkey Training" from the Board's School Test Coordinators and other responsible administrators regarding the administration of the NJASK, such training included but was not limited to instruction that the NJASK was a "secure" test and that "Security breaches may have financial consequences for the district, professional consequences for staff, and disciplinary consequences for students." Such training also advised all test examiners, administrators and school personnel that they were required to report, among other items, any testing irregularities as soon as possible. Such training also advised that "Examiners, proctors and other school personnel may not discuss or disclose any test items either before, during or after the test administration."

SPECIFICATION: On or about April 15, 2010 Catherine Van Vorst signed a New Jersey ASK Department of Education Statewide Assessments Test Security Agreement which provides among other items: paragraph 6: "I will not review any test items or passages with students before, during or after the assessment"; paragraph 8: "I will not interfere with the independent work of any student taking the assessment and I will not compromise the security of the test by any means...."; paragraph 9: "I will administer the assessment in accordance with the directions for administration set forth in the test examiner manuals; paragraph 10: "I have been trained to administer statewide assessments."

SPECIFICATION: On May 10th, May 11th, May 12th, 2010, Catherine Van Vorst did violate said security agreement and the provisions for a valid and secure test of the NJASK for her fourth grade class, by among other items, pre-teaching items tested on the NJASK, allowing students to model items to be tested on the NJASK, reviewing with

students how to answer open ended questions on the NJASK, and reviewing other specifically tested information of the NJASK, such as placement of decimal points and instructing students on how to fold a piece of paper to answer a fraction. In addition, Catherine Van Vorst did compromise the security of the NJASK for her fourth grade class by tapping students on the head if they made a mistake, telling students to check over their work, reading questions directly to students, giving examples of the test questions before the beginning of the test, telling students to raise their hands if they did not understand a question and giving examples of answers.

SPECIFICATION: Catherine Van Vorst's actions were without just cause or approval of the Board or the Board's administration. Catherine Van Vorst's actions were not caused by ignorance or mistake regarding the security protocols. When interviewed about her actions Catherine Van Vorst admitted in certain instances to compromising the security of the NJASK but refused to acknowledge the seriousness of her actions.

SPECIFICATION: Catherine Van Vorst's actions resulted in an investigation of the school district by the New Jersey Department of Education, the voiding of the NJASK tests, and the requirement that the Board offer her students the opportunity to retake the NJASK or have "void" scores.

SPECIFICATION: In November 2010, the New Jersey Department of Education, Office of Fiscal Accountability and Compliance (OFAC) Investigations Unit issued a report of its investigation of the alleged breach of test administration protocol for the NJASK administered in Catherine Van Vorst's fourth grade class.

SPECIFICATION: The OFAC investigator interviewed Superintendent Vincent Palmieri, Principal Andrea Urbano, Test Coordinator Melissa Giacomo, Teacher Tamela Pittaro, Teacher Catherine Van Vorst (who was represented by legal counsel, a district union representative, and a Uniserv representative) and reviewed district documents, including, statements obtained from the students in Catherine Van Vorst's fourth grade class during the NJASK administration.

SPECIFICATION: The OFAC report concluded that by a preponderance of the evidence developed during the investigation, "Mrs. Catherine Van Vorst breached the test security protocol" for the NJASK administered in her fourth grade class.

CHARGE 2: Catherine Van Vorst, a certified tenured teaching staff member, engaged in conduct unbecoming a certified teaching staff member by violating the Upper Township Board of Education Policy No. 3150, Discipline, by compromising the security of the 2010 NJASK for her fourth grade class.

SPECIFICATION: Board Policy No. 3150 provides in pertinent part "Board of Education directs all teaching staff members to observe statutes of the State of New Jersey, Rules of the State Board of Education, policies of this Board duly promulgated administrative rules and regulations governing staff conduct."

SPECIFICATION: The NJASK is a statewide assessment mandated by the New Jersey Department of Education and is created to be a comprehensive, multi-grade assessment program. Along with other indicators of student progress, the results of the NJASK are intended to be used to identify students who need additional instructional support in order to reach the Core Curriculum Content Standards as well as to gauge whether the School District is making Adequate Yearly Progress as required by the No Child Left Behind Act.

SPECIFICATION: Board Policy 2622 Pupil Assessment provides that the Board "will comply with implementing the schedule of the New Jersey State Board of Education Statewide assessment program."

SPECIFICATION: On or about April 15, 2010 Catherine Van Vorst received "Security Plan & Turnkey Training" from the Board's School Test Coordinators and other responsible administrators regarding the administration of the NJASK, such training included but was not limited to instruction that the NJASK was a "secure" test and that "Security breaches may have financial consequences for the district, professional

consequences for staff, and disciplinary consequences for students." Such training also advised all test examiners, administrators and school personnel that they were required to report, among other items, any testing irregularities as soon as possible. Such training also advised that "Examiners, proctors and other school personnel may not discuss or disclose any test items either before, during or after the test administration."

SPECIFICATION: On or about April 15, 2010 Catherine Van Vorst signed a New Jersey ASK Department of Education Statewide Assessments Test Security Agreement which provides among other items: paragraph 6: "I will not review any test items or passages with students before, during or after the assessment"; paragraph 8: "I will not interfere with the independent work of any student taking the assessment and I will not compromise the security of the test by any means...."; paragraph 9: "I will administer the assessment in accordance with the directions for administration set forth in the test examiner manuals; paragraph 10: "I have been trained to administer statewide assessments."

SPECIFICATION: On May 10th, May 11th, May 12th, 2010, Catherine Van Vorst did violate said security agreement and the provisions for a valid and secure test of the NJASK for her fourth grade class, by among other items, pre-teaching items tested on the NJASK, allowing students to model items to be tested on the NJASK, reviewing with students how to answer open ended questions on the NJASK, reviewing other specifically tested information of the NJASK, such as placement of decimal points and instructing students on how to fold a piece of paper to answer a fraction. In addition, Catherine Van Vorst did compromise the security of the NJASK for her fourth grade class by among other items tapping students on the head if they made a mistake, telling

students to check over their work, reading questions directly to students, giving examples of the test questions before the beginning of the test, telling students to raise their hands if they did not understand a question and giving examples of answers.

SPECIFICATION: Catherine Van Vorst's actions were without just cause or approval of the Board or the Board's administration. Catherine Van Vorst's actions were not caused by ignorance or mistake regarding the security protocols. When interviewed about her actions Catherine Van Vorst admitted in certain instances to compromising the security of the NJASK but refused to acknowledge the seriousness of her actions.

SPECIFICATION: Catherine Van Vorst's actions resulted in an investigation of the school district by the New Jersey Department of Education, the voiding of the NJASK tests for her students, and the requirement that the Board offer her students the opportunity to retake the NJASK or have "void" scores.

SPECIFICATION: In November 2010, the New Jersey Department of Education, Office of Fiscal Accountability and Compliance (OFAC) Investigations Unit issued a report of its investigation of the alleged breach of test administration protocol for the NJASK administered in Catherine Van Vorst's fourth grade class.

SPECIFICATION: The OFAC investigator interviewed Superintendent Vincent Palmieri, Principal Andrea Urbano, Test Coordinator Melissa Giacomo, Teacher Tamela Pittaro, Teacher Catherine Van Vorst (who was represented by legal counsel, a district union representative, and a Uniserv representative) and reviewed district documents, including, statements obtained from the students in Catherine Van Vorst's fourth grade class during the NJASK administration.

SPECIFICATION: The OFAC report concluded that by a preponderance of the evidence developed during the investigation, "Mrs. Catherine Van Vorst breached the test security protocol" for the NJASK administered in her fourth grade class.

SPECIFICATION: Catherine Van Vorst's actions violated the policies, rules and regulations of the New Jersey Department of Education and the Board by compromising the security of the NJASK a statewide assessment used by the New Jersey Department of Education and the Board.

CHARGE 3: Catherine Van Vorst, a certified tenured teaching staff member, engaged in conduct unbecoming a certified teaching staff member by violating Board Policy Number 3211, Code of Ethics.

SPECIFICATION: Board Policy Number 3211 states in pertinent part, "the educator shall exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of trust to careers in education, and to assist in preventing the practice of the profession by unqualified persons."

SPECIFICATION: Board Policy Number 3211 provides also in pertinent part in that educators shall not restrain pupils from the independence of action in their pursuit of learning or compromise the respect and confidence of the educators colleagues, pupils and parents regarding the educators ability to instruct.

SPECIFICATION: The NJASK is a statewide assessment mandated by the New Jersey Department of Education and is created to be a comprehensive, multi-grade assessment program. Along with other indicators of student progress, the results of the NJASK are intended to be used to identify students who need additional instructional support in order to reach the Core Curriculum Content Standards as well as to gauge whether the School District is making Adequate Yearly Progress as required by the No Child Left Behind Act.

SPECIFICATION: On or about April 15, 2010 Catherine Van Vorst received "Security Plan & Turnkey Training" from the Board's School Test Coordinators and other responsible administrators regarding the administration of the NJASK, such training included but was not limited to instruction that the NJASK was a "secure" test and that

"Security breaches may have financial consequences for the district, professional consequences for staff, and disciplinary consequences for students." Such training also advised all test examiners, administrators and school personnel that they were required to report, among other items, any testing irregularities as soon as possible. Such training also advised that "Examiners, proctors and other school personnel may not discuss or disclose any test items either before, during or after the test administration."

SPECIFICATION: On or about April 15, 2010 Catherine Van Vorst signed a New Jersey ASK Department of Education Statewide Assessments Test Security Agreement which provides among other items: paragraph 6: "I will not review any test items or passages with students before, during or after the assessment"; paragraph 8: "I will not interfere with the independent work of any student taking the assessment and I will not compromise the security of the test by any means...."; paragraph 9: "I will administer the assessment in accordance with the directions for administration set forth in the test examiner manuals; paragraph 10: "I have been trained to administer statewide assessments."

SPECIFICATION: On May 10th, May 11th, May 12th, 2010, Catherine Van Vorst did violate said security agreement and the provisions for a valid and secure test of the NJASK for her fourth grade class, by among other items, pre-teaching items tested on the NJASK, allowing students to model items to be tested on the NJASK, reviewing with students how to answer open ended questions on the NJASK, reviewing other specifically tested information of the NJASK, such as placement of decimal points and instructing students on how to fold a piece of paper to answer a fraction. In addition, Catherine Van Vorst did compromise the security of the NJASK for her fourth grade

class by tapping students on the head if they made a mistake, telling students to check over their work, reading questions directly to students, giving examples of the test questions before the beginning of the test, telling students to raise their hands if they did not understand a question and giving examples of answers.

SPECIFICATION: Catherine Van Vorst's actions were without just cause or approval of the Board or the Board's administration. Catherine Van Vorst's actions were not caused by ignorance or mistake regarding the security protocols. When interviewed about her actions Catherine Van Vorst admitted in certain instances to compromising the security of the NJASK but refused to acknowledge the seriousness of her actions.

SPECIFICATION: Catherine Van Vorst's actions resulted in an investigation of the school district by the New Jersey Department of Education, the voiding of the NJASK tests, and the requirement that the Board offer her students the opportunity to retake the NJASK or have "void" scores.

SPECIFICATION: In November 2010, the New Jersey Department of Education, Office of Fiscal Accountability and Compliance (OFAC) Investigations Unit issued a report of its investigation of the alleged breach of test administration protocol for the NJASK administered in Catherine Van Vorst's fourth grade class.

SPECIFICATION: The OFAC investigator interviewed Superintendent Vincent Palmieri, Principal Andrea Urbano, Test Coordinator Melissa Giacomo, Teacher Tamela Pittaro, Teacher Catherine Van Vorst (who was represented by legal counsel, a district union representative, and a Uniserv representative) and reviewed district documents,

including, statements obtained from the students in Catherine Van Vorst's fourth grade class during the NJASK administration.

SPECIFICATION: The OFAC report concluded that by a preponderance of the evidence developed during the investigation, "Mrs. Catherine Van Vorst breached the test security protocol" for the NJASK administered in her fourth grade class.

SPECIFICATION: Catherine Van Vorst's actions in compromising the security of the NJASK also compromised her integrity and professionalism and the integrity and professionalism of the Board.

CHARGE 4: Catherine Van Vorst, a certified tenured teaching staff member, engaged in conduct unbecoming a certified teaching staff member by violating Board Policy Number 3281, Inappropriate Staff Conduct.

SPECIFICATION: On May 10th, 11th and 12th, 2010, Catherine Van Vorst a certified tenured teaching staff member did violate Board Policy No. 3281 by acting in an unprofessional manner by discharging her responsibilities in an unprofessional and inappropriate manner and by not engaging in appropriate conduct with regards to compromising the New Jersey ASK test.

SPECIFICATION: The NJASK is a statewide assessment mandated by the New Jersey Department of Education and is created to be a comprehensive, multi-grade assessment program. Along with other indicators of student progress, the results of the NJASK are intended to be used to identify students who need additional instructional support in order to reach the Core Curriculum Content Standards as well as to gauge whether the School District is making Adequate Yearly Progress as required by the No Child Left Behind Act.

SPECIFICATION: On or about April 15, 2010 Catherine Van Vorst received "Security Plan & Turnkey Training" from the Board's School Test Coordinators and other responsible administrators regarding the administration of the NJASK, such training included but was not limited to instruction that the NJASK was a "secure" test and that "Security breaches may have financial consequences for the district, professional consequences for staff, and disciplinary consequences for students." Such training also advised all test examiners, administrators and school personnel that they were required to report, among other items, any testing irregularities as soon as possible. Such

training also advised that "Examiners, proctors and other school personnel may not discuss or disclose any test items either before, during or after the test administration."

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SPECIFICATION: On May 10th, May 11th, May 12th, 2010, Catherine Van Vorst did violate said security agreement and the provisions for a valid and secure test of the NJASK for her fourth grade class, by among other items, pre-teaching items tested on the NJASK, allowing students to model items to be tested on the NJASK, reviewing with students how to answer open ended questions on the NJASK, reviewing other specifically tested information of the NJASK, such as placement of decimal points and instructing students on how to fold a piece of paper to answer a fraction. In addition, Catherine Van Vorst did compromise the security of the NJASK for her fourth grade class by tapping students on the head if they made a mistake, telling students to check over their work, reading questions directly to students, giving examples of the test questions before the beginning of the test, telling students to raise their hands if they did not understand a question and giving examples of answers.

SPECIFICATION: Catherine Van Vorst's actions were without just cause or approval of the Board or the Board's administration. Catherine Van Vorst's actions were not caused by ignorance or mistake regarding the security protocols. When interviewed about her actions Catherine Van Vorst admitted in certain instances to compromising the security of the NJASK but refused to acknowledge the seriousness of her actions.

SPECIFICATION: Catherine Van Vorst's actions resulted in an investigation of the school district by the New Jersey Department of Education, the voiding of the NJASK tests, and the requirement that the Board offer her students the opportunity to retake the NJASK or have "void" scores.

SPECIFICATION: As a result of Catherine Van Vorst's actions, students' scores were compromised with regards to New Jersey ASK test.

SPECIFICATION: As a result of the scores being compromised, certain students' New Jersey ASK scores were not recorded and the School District was harmed.

SPECIFICATION: In November 2010, the New Jersey Department of Education, Office of Fiscal Accountability and Compliance (OFAC) Investigations Unit issued a report of its investigation of the alleged breach of test administration protocol for the NJASK administered in Catherine Van Vorst's fourth grade class.

SPECIFICATION: The OFAC investigator interviewed Superintendent Vincent Palmieri, Principal Andrea Urbano, Test Coordinator Melissa Giacomo, Teacher Tamela Pittaro, Teacher Catherine Van Vorst (who was represented by legal counsel, a district union representative, and a Uniserv representative) and reviewed district documents,

including, statements obtained from the students in Catherine Van Vorst's fourth grade class during the NJASK administration.

SPECIFICATION: The OFAC report concluded that by a preponderance of the evidence developed during the investigation, "Mrs. Catherine Van Vorst breached the test security protocol" for the NJASK administered in her fourth grade class.

STATE OF NEW JERSEY)

)SS

COUNTY OF CAPE MAY)

VINCENT PALMIERI, of full age, being duly sworn according to law upon his

1. I am the Superintendent of Schools of the Upper Township School District

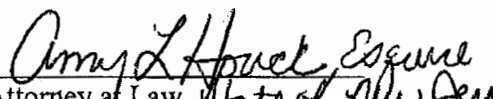
2. The attached documents consist of the charges of unbecoming conduct, as

3. The charges are based upon the District's records and the District's

4. The charges and supportive evidence are true and correct to the best of my


VINCENT PALMIERI

Sworn and Subscribed to before me
this 3 day of January, 2011.


Attorney at Law *State of New Jersey*

Law Offices
NED P. ROGOVOY, ESQUIRE, L.L.C.
782 South Brewster Road, Unit A-6
Vineland, New Jersey 08361
(856) 205-9701
Attorney for Cathleen Van Vorst

In the Matter of Tenure Charges
Against Cathleen Van Vorst,
Upper Township School District

AGENCY DKT. NO.

CATHLEEN VAN VORST'S RESPONSE
TO TENURE CHARGES

CATHLEEN VAN VORST, by and through her attorney, Ned P. Rogovoy,
Esquire, answers the tenure charges by saying:

No investigation was properly done which allows for a conclusion that there was
a breach by a preponderance of the evidence.

Preponderance of the evidence is not just a term of art. It is a term with legal
significance. The 14th Amendment allows an individual due process by being
represented by counsel, confronting the witnesses against her by cross examination
and then having a trier of fact who is either a judge or a jury of peers who has also
personally heard the case, then making a determination as to whether the scales of
justice have been tipped in favor of the proposition of unprofessional conduct.

If there were to be a tenure case, then the due process that is specified above
will have to occur with the school having the burden of proof and duty to prove by a
preponderance of the evidence that teacher Van Vorst's conduct rises to such an
unprofessional level that her tenure in the district after 25 years should be taken.

B

Preponderance of the evidence indicates who has the burden of proof and the school system has the burden of proof in a tenure case.

Something should also be said that whoever this author of the OFAC report is has not interviewed any witnesses himself, no witnesses were cross examined and he very cavalierly determined that there was a "breach of procedure." We as Americans are used to quantifying breaches in certain ways. If the breach happens to be that of an earthquake, then we have a Richter scale. We can all determine that a scratch is a breach to paint, however, the extent of the scratch we attempt to quantify in our minds after looking at the scratch and seeing the breach for ourselves. In this particular case, the breach could be akin to an earthquake on a Richter scale of a .001. There is no way to measure the breach.

To use the terms preponderance of evidence, without due process, without a burden of proof, without Mrs. Van Vorst having a right to cross examine witnesses on her behalf and coming face-to-face with accusers is nothing more than words and art. Mrs. Van Vorst was tried so far by hearsay and reports which admit to assumption.

Mrs. Van Vorst never looked at any of these tests prior to the children and then specifically taught them methods or supplied answers. All of that would be a terribly unprofessional act, but I quote Melissa Giacomo's statement when she said she, "... assumed (emphasis added) were on the test." She mentioned, referring to Mrs. Van Vorst's instructions to the children that, "On question six, you will use the nine times table." Has anyone in this investigation actually examined the math test and determined whether question number six has anything to do with the nine times table,

or again, has anyone believed the statement that Mrs. Van Vorst has explained as to how the nine times trick came to be discussed in her classroom that day. It was not initiated by her and it was not related to any question on the test, but rather a student's recount of a method to get the nine times table correct.

Mrs. Van Vorst has over and over again from day one of the investigation explained when she had a chance, why she took longer than was anticipated. It is not that she gave the test to the children for a longer time period than was allowed. It is because she has a special education child mainstreamed in her class who would not leave and therefore, she could not begin the test until the child had been comfortably taken to his special education teacher. Therefore, the test got started late, but the amount of time allotted for each test protocol was done properly by Mrs. Van Vorst. The time issue is totally unrelated to impropriety.

The Board has seen the way in which the paper was folded so that the students could use it for 16 different answers. This was not something Mrs. Van Vorst originated herself. It was also discussed amongst other teachers in the school and they did likewise, it is not a disclosure of answers to questions.

There was never any hearing whereby the school had the burden of proof and the trier of fact, after due process, found that the Board of Education had sustained its burden of proof by a preponderance of the evidence. Any suggestion that there was a proper protocol used to make a determination of unprofessional conduct violates every principle of due process. To use the word breach without properly defining the depth and width of a breach on some type of measurable scale does nothing but lead to the

conclusion that a presumably mild breach and a severe breach are one in the same when we know that an earthquake of a .001 on the Richter scale will not cause anywhere near the devastation of an earthquake measured at .7.

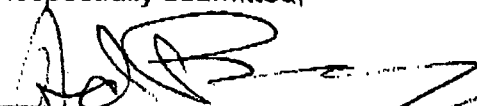
These general terms and this general investigation falls far short of due process and fairness, and to make assumptions which will possibly taint a teacher's professional career is not appropriate nor fair to say the least.

Cathleen Van Vorst, by and through her attorney, Ned P. Rogovoy, Esquire, will if the tenure charges are filed, contest same in the proper forum which mandates due process.

It should be noted, however, that before these charges are certified that a great deal of time, expense and inconvenience will flow to the District, and the District's stability, as well as the consternation caused to Cathleen Van Vorst. Therefore, I ask the Board that prior to certifying these charges, that you look with circumspect at the actions of Cathleen Van Vorst on May 10, 11 and 12, 2010, as well as for the past 25 years.

Dated: January 18, 2010

Respectfully submitted,



NED P. ROGOVOY, ESQUIRE
Attorney for Cathleen Van Vorst

To Upper Township Board of Education:

I, Cathleen Van Vorst, hereby irrevocably retire my employment from the Upper
Township Board of Education effective _____.

Cathleen Van Vorst
Cathleen Van Vorst

Sworn & Subscribed to
Before me this 19th day of
December, 2011.

Paul Rogosky
Attorney of N.J.

C

RESOLUTION

RESOLUTION OF THE UPPER TOWNSHIP BOARD OF EDUCATION AUTHORIZING and RATIFYING THE SETTLEMENT AGREEMENT “IN THE MATTER OF THE TENURE OF CATHLEEN VAN VORST v. UPPER TOWNSHIP BOARD EDUCATION” OAL EDU 01531-2011S

WHEREAS, the Upper Township Board of Education (the “Board”) desires to resolve the pending Petition before the Commissioner of Education which is captioned In The Matter of the Tenure of Cathleen Van Vorst v. Upper Township Board of Education, OAL EDU 015310-2011S; and

WHEREAS, the Board is a body corporate and politic of the State of New Jersey, charged with the statutory responsibilities for the management and administration of the Upper Township School District in Cape May County, New Jersey; and

WHEREAS, the Respondent is presently employed by the Board as a tenured teacher at the Board’s Elementary School; and

WHEREAS, the Board filed certain charges against Respondent alleging unbecoming conduct, including but not limited to, violating Board Policy No. 3281 (Inappropriate Staff Conduct), Board Policy No. 2622 (Pupil Assessments), Board Policy No. 3150 (Discipline), Board Policy No. 3211 (Code of Ethics), and sought to remove Respondent from her tenured position, said charges more specifically described in the Tenure Charges filed by the Board and dated January 3, 2011 (the “Tenure Charges”); and

WHEREAS, the Respondent, by formal Answer (the “Answer”) contested the Tenure Charges and offered explanations for her actions and behavior; and

WHEREAS, the Commissioner of Education for the State of New Jersey (the "Commissioner") referred said charges to the Office of Administrative Law for a plenary hearing before the Honorable William Todd Miller, A.L.J.; and

WHEREAS, the parties appeared before the Honorable William Todd Miller, A.L.J. on September 20, 2011 for such hearing and on December 14, 2011 (Respondent by telephone) for a settlement conference; and

WHEREAS, the parties wish to settle all controversies among and between them, including the charges contained in the Tenure Charges, the defenses and counterclaims, if any, contained in the Answer and any and all related or unrelated claims, known or unknown, which could have been asserted by the Board or Respondent through a written Settlement Agreement ("Settlement Agreement"); and

WHEREAS, the Respondent was questioned in open court, on the record on September 20, 2011 and questioned in open court on the record by telephone on December 14, 2011, regarding these representations and acknowledged her understanding that the Settlement Agreement would be put in writing corresponding to the representations made in open court and that this Agreement does conform to those representations.

WHEREAS, the parties acknowledge that the merits of the controversy are in dispute and that neither the Board nor Respondent admits any liability to either, but both have reasons to desire a resolution of the matter; and

WHEREAS, the Board and Respondent specifically recognize and acknowledge that any settlement is contingent upon approval by the Commissioner as required by and consistent with *New Jersey Administrative Code § 6A:3-5.6* and *In the Matter of the Tenure Hearing of Frank*

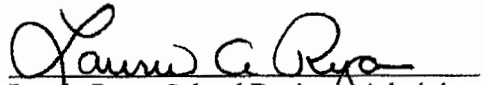
Cardonick, State Board of Education decision of April 6, 1983 (1990 School Law Decisions, S.L.D. 842, 846); and

NOW THEREFORE, BE IT RESOLVED that the Board does hereby accept and ratify the terms of the written settlement for "In the Matter of The Tenure of Cathleen Van Vorst v. Upper Township Board of Education" as discussed before The Honorable W. Todd Miller, A.L.J. on September 20, 2011 and December 14, 2011 and expressed in the Settlement Agreement which written terms are specifically approved; and

BE IT FURTHER RESOLVED the Board does hereby accept the Retirement of Cathleen Van Vorst pursuant to the Settlement Agreement; and

BE IT FURTHER RESOLVED the Board authorizes the President of the Board, the Superintendent, the Business Administrator and the Solicitor to take whatever actions are necessary to effectuate the Settlement Agreement.

This is to certify the above is a true copy of a motion adopted by the Board of Education of Upper Township, in the County of Cape May, New Jersey, at the Meeting on December 19, 2011.



Laurie Ryan, School Business Administrator/Board Secretary

NED P. ROGOVOY, ESQUIRE, L.L.C.
782 South Brewster Road, Unit A6
Vineland, NJ 08361
(856) 205-9701
Attorney for Cathleen Van Vorst

IN THE MATTER OF THE TENURE	:	BEFORE THE COMMISSIONER OF
HEARING OF CATHLEEN VAN VORST	:	EDUCATION OF THE STATE OF
	:	NEW JERSEY
	:	
UPPER TOWNSHIP BOARD	:	AGENCY DKT NO. 16-1/11
OF EDUCATION	:	OAL DOCKET NO.: EDU 0531-2011S
	:	
	:	AFFIDAVIT OF CATHLEEN VAN
	:	VORST

STATE OF NEW JERSEY)
 :SS:
COUNTY OF CUMBERLAND)

CATHLEEN VAN VORST, of full age, being duly sworn according to law upon his oath deposes and says:

1. I have reviewed the Settlement Agreement and all of its terms and conditions contained therein and understand its ramification, including the fact that the Board of Examiners will independently review the facts surrounding the tenure charges and have the right to bring an Order to Show Cause to suspend or revoke my license.

2. Additionally, I was advised that I could have proceeded to trial, cross-examined the Board's witnesses, presented evidence and testified on my own behalf and presented witnesses to testify in my defense. I fully understand that, after considering the Boards' accusations and my defense, the Judge would have made a determination regarding whether or not the Board of Education has, by a preponderance of the evidence, proved that there was sufficient unprofessional conduct which could have allowed the Judge to take away my tenure.

3. I have entered into the Settlement Agreement freely and voluntarily and on one has forced or coerced me to retire from my position. I have done so at my own free will, knowing the perils and in some case benefits, that I will or could derive.

Cathleen Van Vorst
CATHLEEN VAN VORST

Subscribed and sworn to
before me this 19th day of
December, 2011

John R. [Signature]
Attorney for NJ

DELAWARE VALLEY SCHOOL
FOR EXCEPTIONAL CHILDREN,

PETITIONER,

V.

NEW JERSEY DEPARTMENT OF
EDUCATION, DIVISION OF
FINANCE,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The petitioner (DVSEC) appeals the Department's determination that petitioner – a private school for children with disabilities (PSD) which has been approved to educate students sent to it by public school districts – may not include in its tuition charges for the 2007-08 school year the undisputed amount of \$10,360, which it incurred to provide student lunches. Respondent contends that the disallowance is justified pursuant to *N.J.A.C. 6A:23A-18 et seq.* The parties have filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue of material fact, and the matter is ripe for summary decision; pursuant to *N.J.A.C. 6A:23-4.2(a)* (now codified as *N.J.A.C. 6A:23A-18 (a)*), a sending district may only be charged for allowable costs; non-allowable costs are defined by code and include the costs of meals for students, unless the PSD meets the criteria set forth in *N.J.A.C. 6A:23-4.2(a)20*; such criteria include receipt of two separate school board resolutions from a majority of the school districts that contracted to send students to the PSD in that fiscal year, the first resolution declaring that those districts do not require the PSD to apply for and receive funding from the State's Child Nutrition Program, and the second declaring that those district boards do not require the PSD to charge students for reduced and/or paid meals; the number of sending districts petitioner had for purposes of the regulation was seven; four, therefore, constituted a majority; and petitioner had only two valid resolutions for the 2007-2008 school year. The ALJ concluded that DVSEC did not meet its burden of proving that the respondent acted in an arbitrary and capricious manner when it disallowed \$10,360 in food service costs incurred during the 2007-2008 school year, granted respondent's motion for summary decision, and dismissed the petition.

Upon a thorough and independent review of the record, the Commissioner found that, under the circumstances of this case, the number of sending districts under contract with the petitioner at the time designated by the regulations was five; three constituted a majority and only one district submitted the required resolutions. Consequently, the Commissioner concluded that the petitioner failed to show that respondent's disallowance of the food services fee as a component of tuition costs was arbitrary, capricious or unreasonable. The Initial Decision of the OAL was adopted as modified, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 9326-10
 AGENCY DKT. NO. 144-7/10

DELAWARE VALLEY SCHOOL
 FOR EXCEPTIONAL CHILDREN,

PETITIONER,

V.

NEW JERSEY DEPARTMENT OF
 EDUCATION, DIVISION OF
 FINANCE,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

Before the Commissioner is an appeal from respondent's determination that petitioner – a private school for children with disabilities (PSD) which has been approved to educate students sent to it by public school districts – may not include in its tuition charges for the 2007-08 school year the undisputed amount of \$10,360 which it incurred to provide student lunches. Upon review of the record, Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions and respondent's replies thereto, the Commissioner concludes that the petitioner has failed to show that respondent's disallowance of the food service fees as a component of tuition costs was arbitrary, capricious or unreasonable.

Governing the controversy is *N.J.A.C.* 6A:23-4.5(a) (now codified as *N.J.A.C.* 6A:23A-18.5(a)) which identifies "[c]osts that are not allowable in the calculation of the certified actual cost per student." This Department of Education (Department) regulation provides, in pertinent part, that a PSD may not fold the costs of student lunches into tuition fees

unless certain conditions have been met. *N.J.A.C.* 6A:23-4.5(a)(20). Two of those conditions are at issue in the instant case.

The first condition, articulated in *N.J.A.C.* 6A:23-4.5(a)(20)(ii), requires that for lunch costs to be included in the tuition calculations a PSD must have received, on an annual basis prior to the start of the fiscal year, school board resolutions from a majority of the school districts that have contracted to send students to the PSD in that fiscal year, which resolutions declare that those district boards of education do not require the PSD to apply for and receive funding from the State's Child Nutrition Program (CNP). The second condition, set forth in *N.J.A.C.* 6A:23-4.5(a)(20)(iii), similarly requires that for lunch costs to be included in tuition calculations a PSD must have received, on an annual basis prior to the start of the fiscal year, school board resolutions from a majority of the school districts that have contracted to send students to the PSD in that fiscal year, which resolutions declare that those district boards of education do not require the PSD to charge students for a reduced and/or paid meal.

As a threshold matter, the parties have offered differing theories about the number of school board resolutions that petitioner needed in 2007 for it to satisfy the above stated conditions for including lunch costs in the tuition fees. Petitioner's number is three – constituting a majority of the five school districts that had – before the beginning of the 2008 fiscal year – contracted to send students to petitioner. Respondent contends that the number should be five, which constitutes a majority of the eight schools that actually sent students to petitioner during the 2007-08 school year.

While respondent's position is not without appeal, the date identified in *N.J.A.C.* 6A:23-4.5(a)(20) as the time at which school districts must weigh in about whether they will allow food service costs to be included in tuition fees is clear. As regards the present matter,

that date was June 30, 2007. Thus, for petitioner to have been allowed to include food service costs in its tuition fees, it would have had to have received the required board resolutions from three of the five districts that had entered into contracts with it by June 30, 2007.

The five districts in question were Bordentown, Trenton, South Brunswick, Rancocas Valley and South Orange-Maplewood. It is undisputed that Bordentown timely provided petitioner with the resolutions required both by *N.J.A.C.* 6A:23-4.5(a)(20)(ii) and (iii). It also appears undisputed that Trenton did not timely submit the required resolutions, and South Brunswick submitted no resolutions at all. Thus, the question of whether petitioner's food service cost for the 2007-08 school year was an allowable component of its tuition fees turns on whether the required resolutions were timely submitted by the Rancocas Valley and South Orange-Maplewood school districts.

The Commissioner concurs with the Administrative Law Judge (ALJ) that the South Orange-Maplewood board of education timely submitted only one of the two resolutions required by *N.J.A.C.* 6A:23-4.5(a)(20). It did not submit a resolution excusing petitioner from the requirement – set forth in *N.J.A.C.* 6A:23-4.5(a)(20)(ii) – to apply to the CNP for funding, and can therefore not be counted as a school board which exempted petitioner from the prohibitions of *N.J.A.C.* 6A:23-4.5(a)(20). Nor can the Commissioner impute to the South Orange Maplewood board of education an intent that is not – contrary to petitioner's suggestion – evident in the correspondence from the South Orange-Maplewood Board.

Thus, petitioner did not have the required resolutions from a majority of the five sending school districts with which it had contracted by June 30, 2007. It was consequently not arbitrary, capricious or unreasonable for respondent to disallow lunch costs as an element of the per-child tuition rate which petitioner was entitled to charge.

In light of the foregoing, the instant controversy may be resolved without reference to the parties' competing theories about whether the Rancocas Valley's submission¹ could be deemed to have satisfied the conditions set forth in *N.J.A.C. 6A:23-4.5(a)(20)*. However, the Commissioner makes the following observations.

Petitioner urged the Commissioner not to elevate form over substance, and to determine that the Rancocas Valley submission substantially complied with the waivers referenced in *N.J.A.C. 6A:23-4.5(a)(20)*. While it is often appropriate to ensure that the substantive legislative intent of a statute or regulation is not frustrated by technicalities, the task at hand is less to interpret *N.J.A.C. 6A:23-4.5(a)(20)*, and more to assess Rancocas Valley's submissions.

Ultimately, it is only the cover letter by Board Secretary Robert L. Sapp that mentions an intent to allow petitioner to include lunch costs in its tuition calculations without charging lunch fees. Respondent reminds us that the representations of individual board members or administrators are insufficient to bind a board to a particular course of action and that a board can only be bound by official board action. *See, e.g. Robert Busler v. Board of Education of the Township of East Orange, Essex County*, Commissioner Decision No. 281-01 (August 30, 2001), *aff'd* State Board of Education Decision No. 38-01 (February 6, 2002); *Dorrington v. Board of Education of the Township of North Bergen, Hudson County*, 1982 *S.L.D.* 247, *aff'd*, 1982 *S.L.D.* 256. The foregoing canon is especially sensible when financial accountability is at issue. Thus, the Commissioner cannot regard as arbitrary, capricious or

¹ That submission included a board resolution which only absolved petitioner from applying for CNP funding but did not waive the requirement of charging fees for meals. A cover letter from the Rancocas Valley Board Secretary, however, stated that the Rancocas Valley Board waived both requirements.

unreasonable respondent's reluctance to rely on Sapp's cover letter in lieu of the formal resolution of the Rancocas Valley Board of Education.

In summary, petitioner failed to show that respondent's disallowance of food service costs as a component of petitioner's 2007-08 school year tuition calculations was an arbitrary, capricious or unreasonable act. Accordingly, the Initial Decision is modified as set forth herein above, and the petition is dismissed.

IT IS SO ORDERED.²



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/17/12

Date of Mailing: 2/21/12

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 9326-10

AGENCY DKT. NO. 144-7/10

**DELAWARE VALLEY SCHOOL FOR
EXCEPTIONAL CHILDREN,**

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF EDUCATION,
DIVISION OF FINANCE,**

Respondent.

David B. Rubin, Esq., for petitioner

Jennifer L. Campbell, Deputy Attorney General, for respondent (Paula T. Dow,
Attorney General of New Jersey, attorney)

Record Closed: September 27, 2011

Decided: November 18, 2011

BEFORE LISA JAMES-BEAVERS, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 12, 2010, petitioner Delaware Valley School for Exceptional Children (DVSEC) filed a petition with the Commissioner of Education alleging that the decision

of the respondent Department of Education, Division of Finance (respondent) to disallow \$10,360 in food service costs incurred during the 2007-2008 school year was arbitrary, capricious and unreasonable. On July 23, 2010, respondent filed an answer to the petition denying the allegations and relying on its May 17, 2010 letter setting forth the justification for the disallowance. The Commissioner transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. It was filed with the OAL on August 27, 2010.

Respondent and petitioner filed cross motions for summary decision, setting forth that there were no material facts in dispute and each was entitled to judgment as a matter of law. I heard oral argument on September 27, 2011.

FINDINGS OF FACT

The following material facts have been stipulated and therefore I **FIND** them as **FACT**:

1. The Delaware Valley School for Exceptional Children, Inc. ("DVSEC") is an approved private school for the disabled ("PSD").
2. As an approved PSD, the DVSEC is subject to the provisions of N.J.A.C. 6A:23A-18, et seq.
3. As an approved PSD, the DVSEC must determine its final tuition rate in accordance with N.J.A.C. 6A:23A-18.2.
4. Pursuant to N.J.A.C. 6A:23A-18.2, the final tuition rate charged by an approved PSD must be less than or equal to the certified actual cost per student.
5. N.J.A.C. 6A:23A-18.5(a)(20)(ii) prohibits an approved PSD from including specified costs in the calculation of the certified actual cost per student.
6. As an approved PSD, the DVSEC was prohibited from including the cost of meals for students in the calculation of its certified actual cost per student for the 2007-2008 school year, unless prior to the start of the

fiscal year it received school board resolutions from five (5) of the school districts that it served in that fiscal year, resolving that the district board of education did not require the DVSEC to charge students for a reduced and/or paid meal.

7. As an approved PSD, the DVSEC was prohibited from including the cost of meals for students in the calculation of its certified actual cost per student for the 2007-2008 school year, unless prior to the start of the fiscal year it received school board resolutions from five (5) of the school districts that it served in that fiscal year, resolving that the district board of education did not require the DVSEC to apply for and receive funding from the Child Nutrition Program.¹
8. Prior to the start of the fiscal year, DVSEC received a school board resolution from Bordentown school district resolving that it did not require the DVSEC to apply for and receive funding from the Child Nutrition Program for the 2007-2008 school year.
9. Prior to the start of the fiscal year, DVSEC received a school board resolution from Bordentown school district resolving that it did not require the DVSEC to charge students for a reduced and/or paid meal for the 2007-2008 school year.
10. Prior to the start of the fiscal year, DVSEC did not receive a school board resolution from Trenton school district resolving that it did not require the DVSEC to apply for and receive funding from the Child Nutrition Program for the 2007-2008 school year.
11. Prior to the start of the fiscal year, DVSEC did not receive a school board resolution from Trenton school district resolving that it did not require the DVSEC to charge students for a reduced and/or paid meal for the 2007-2008 school year.
12. The Trenton Board of Education did not pass a resolution that it did not require the DVSEC to apply for and receive funding from the Child

¹ Although the DVSEC stipulated to the facts in number six and seven, it argued in its motion that the law required only three resolutions from school districts from which it contracted prior to the start of the 2007-2008 fiscal year. Ultimately, it is a legal, not factual issue, whether three or five resolutions were required.

Nutrition Program or to charge students for a reduced and/or paid meal for the 2007-2008 school year until March 2010.

13. During the 2007-2008 school year, the DVSEC incurred food services costs in the amount of \$10,360.00.
14. Respecting the 2007-2008 school year, DVSEC did not, prior to the start of the fiscal year, receive school board resolutions from five (5) of the school districts that it served in that fiscal year, resolving that the district board of education did not require the DVSEC to apply for and receive funding from the Child Nutrition Program.

The following facts, set forth in the parties' briefs are undisputed, although not stipulated. Accordingly, I **FIND** them as **FACT**:

1. DVSEC opted not to charge students for meals due to its concerns about behaviorally challenged students carrying money to school.
2. On June 1, 2007, Dr. James Calderone drafted a letter to the five school districts that were planning to send students to DVSEC for school in 2007-2008 – Trenton, Bordentown, South Brunswick, Rancocas Valley and South Orange-Maplewood, explaining that the regulations had changed regarding student meals.
3. Dr. Calderone's letter requested a resolution absolving DVSEC from charging students for reduced or paid meals as referenced in N.J.A.C. 6A:23-4.5(a)2(ii) and (iii), explained the rationale for making the request and attached a copy of the new regulation. (Calderone Certification, Exhibit A).
4. Before sending the letter, he personally telephoned his assigned contact people in each of the five districts to let them know that the letter was coming and then faxed it to them.
5. Prior to the start of DVSEC's fiscal year on July 1, 2007, DVSEC received back resolutions from Bordentown, Rancocas Valley and South Orange-Maplewood.

6. Bordentown's resolution, adopted June 19, 2007, set forth that the DVSEC "will meet the nutritional requirement of the Children Nutrition Program as administered by the New Jersey Department of Agriculture, but will not be required to apply for funding or to charge for reduced and/or paid meals. Bordentown sent it under cover letter addressing only that DVSEC did not have to charge students for reduced and/or paid meals.
7. Rancocas Valley's resolution, adopted June 26, 2007, approved that the school "not require that private schools for the handicapped apply for and receive funding from the CNP." It was forwarded under a cover letter stating that the school "does not require the private schools to apply for and receive funding from the Child Nutrition Program. The cover letter further stated that the school "does not require the [DVSEC] to charge students for reduced and/or paid meals."
8. South Orange-Maplewood's resolution, adopted June 18, 2007, approved that the Board does not require private schools "to charge our district students attending these schools for a reduced and/or paid meal." It was forwarded under a transmittal letter advising that the board "approved a resolution absolving your school from charging students for reduced and/or paid meals."
9. South Brunswick opted not to reply.
10. Trenton's contact person told Dr. Calderone that it had approved the resolution, but did not provide one until April 28, 2008, which referenced the 2008-2009 school year rather than the 2007-2008 school year at issue. On March 8, 2010, the Trenton board approved a resolution absolving DVSEC from charging students for meals or applying for reimbursement from the Child Nutrition Program for the 2007-2008 school year.
11. As of July 1, 2007, DVSEC had resolutions from three of the five school districts that had contracted to enroll students. These were Bordentown, Rancocas Valley and South Orange-Maplewood.

12. In September 2007, three new school districts contracted to enroll students at DVSEC. They were Northern Burlington, South Hunterdon and Hamilton Township. Dr. Calderone called each district and faxed a letter explaining the need for a resolution.
13. Only Northern Burlington provided a resolution dated November 19, 2007, absolving DVSEC from charging students for reduced and or paid meals as stipulated under the Child Nutrition Program.
14. When the Office of Fiscal Policy and Planning (OFPP) wrote to DVSEC's auditor and asked for proof that DVSEC had secured the required number of resolutions, DVSEC's auditor responded and forwarded resolutions from Bordentown, Northern Burlington, Rancocas, South Orange-Maplewood and Trenton on March 9, 2010. He said, "As DVSEC served students from nine (9) districts during the 2007-2008 school year please note that five districts constitute a majority."
15. Mr. Verner from the OFPP set forth that only two of the nine resolutions, those of Bordentown and Trenton, had both resolutions and disallowed \$10,360 in tuition charges for students' meals. (Respondent's brief, Exhibit J).
16. DVSEC's auditor requested that Mr. Verner consider the underlying intent of the resolutions, but Mr. Verner denied the request saying that the required language had to be in the resolutions.
17. On May 10, 2010, Dr. Calderone appealed the OFPP determination to the Assistant Commissioner for Finance, who denied it. DVSEC then filed the present appeal.

ANALYSIS

I. Is Summary Decision Appropriate?

The parties have filed cross-motions for summary decision pursuant to N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 of the New Jersey Court Rules. See also Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). Under N.J.A.C.

1:1-12.5(b), the motion for summary decision may be granted “if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” The opposing party must submit responding affidavits showing that there is indeed a genuine issue of material fact, which can only be determined in an evidentiary proceeding, and that the moving party is not entitled to summary decision as a matter of law. Failure to do so entitles the moving party to summary judgment. Brill, supra, 142 N.J. 520. The New Jersey Supreme Court’s standard for summary judgment is thus designed to “liberalize the standards so as to permit summary judgment in a larger number of cases” due to the perception that we live in “a time of great increase in litigation and one in which many meritless cases are filed.” Brill, supra, 142 N.J. at 539.

The parties agree that there are no material facts in dispute and the issue remaining is one of the application of the law to the facts of the present case. Therefore, I **CONCLUDE** this matter is ripe for summary decision.

DVSEC, as an approved PSD, has public school districts that send students to its school. Pursuant to N.J.A.C. 6A:23-4.2(a), a sending district may only be charged for allowable costs. Non-allowable costs are defined by code and include the cost of meals for students, unless the PSD meets the criteria set forth at N.J.A.C. 6A:23-4.5(a)20, which provides, in pertinent part:

20. The cost of meals:

- i. For students when the meals do not meet the nutritional requirements of the Child Nutrition Program as administered by the New Jersey Department of Agriculture;
- ii. Effective July 1, 2007, for students when a non-profit approved private school for students with disabilities has not applied for and received funding from the Child Nutrition Program as administered by the New Jersey Department of Agriculture except when the private school has received on an annual basis prior to the start of the fiscal year, school board resolutions from a majority of the school districts that have contracted to send students to the private school in that fiscal year, which resolves the district board of

education does not require the private school to apply for and receive funding from the Child Nutrition Program (CNP);

- iii. Effective July 1, 2007, for students when the approved private school for students with disabilities has not charged students for paid and reduced meals in accordance with the income eligibility criteria established by the Child Nutrition Program as administered by the New Jersey Department of Agriculture except when the private school has received, on an annual basis prior to the start of the fiscal year school board resolutions from a majority of the school districts that have contracted to send students to the private school in that fiscal year, which resolves the district board of education does not require the private school to charge students for a reduced and/or paid meal;

II. How Many Resolutions Was DVSEC Required to Obtain?

DVSEC stipulated that it was prohibited from including the cost of meals for students in the calculation of its certified actual cost per student for the 2007-2008 school year, unless it received resolutions from five of the nine school districts that it served in that fiscal year resolving that the district board of education did not require the DVSEC to charge students for a reduced and/or paid meal or to apply for and receive funding from the CNP. (Respondent's brief, Exhibit C, 8 and 9). In addition, DVSEC's auditor wrote to Mr. Verner that, "As DVSEC served students from nine (9) districts during the 2007-2008 school year please note that five districts constitute a majority." (Respondent's brief, Exhibit B). Nevertheless, DVSEC now argues that the language of the regulation setting forth that the number of resolutions is based on the number of districts with whom the PSD has contracted at the start of the fiscal year. That number would be five, rather than nine, and the majority would be three. Further, in the moving papers of both parties, there are only eight sending school districts named, not nine, although admittedly, the majority would still be five. DVSEC further argues, however, that Hamilton should not be counted since the one student it was sending to DVSEC moved to Bordentown in October 2007. Noting this change would bring the number of sending districts to seven and the majority to four.

The plain language of the regulation says that the number of resolutions the PSD must obtain is that of a "majority of the school districts that have contracted to send

students to the private school in that fiscal year” prior to the start of the fiscal year. Because DVSEC had contracted with only five districts prior to the start of the fiscal year on July 1, 2007, in order to get the number eight, respondent needs to draw an inference that the number of districts that constitute the pool must be the whole of those that contracted with the PSD during the entire 2007-2008 fiscal year, despite the plain language of the regulation. DVSEC’s auditor was accepting of this inference as noted in his letters of March 9, 2010 and April 8, 2010. (Respondent’s brief, Exhibits B and K). Attachments to DVSEC’s brief indicate that the Department extended the deadline to obtain resolutions in recognition of the fact that all contracts had not been signed between the sending and receiving districts as of July 1, 2007.

Thus, I **CONCLUDE** that, in the present case, the auditor’s letters, the stipulation and the logical inference to be drawn from the regulation is that the “majority” should be based on the number of districts that contracted with the PSD during the fiscal year 2007-2008. Regarding DVSEC’s argument that such a number would fluctuate so much as to be equivalent to threading a moving needle, determining the number was not difficult in the present case. The auditor and the OFPP were in agreement that all of the sending districts for the fiscal year should be counted. DVSEC had five sending districts contract with it by the start of the 2007-2008 fiscal year in July 2007, the majority of which was three. By the end of September 2007, three new school districts had chosen to enroll students at DVSEC, bringing the total to eight, the majority of which was five. In October 2007, the one student from Hamilton transferred to Bordentown bringing the number of sending districts to seven. The auditor was unaware or did not make the OFPP aware that the one student from Hamilton moved to Bordentown bringing the number of sending districts to seven for the fiscal year 2007-2008, the majority of which would be four. Rather than challenge the number of sending districts in its opposition to DVSEC’s cross-motion, respondent takes the position that DVSEC does not have enough appropriate resolutions to defeat its motion for summary decision using even five sending districts as the measure. I **CONCLUDE** that the number of sending districts the DVSEC had for purposes of the regulation at issue was seven, the majority of which constitutes four.

III. Was the Respondent's Determination that DVSEC Did Not Provide the Required Number of Resolutions Arbitrary, Capricious and Unreasonable?

Both DVSEC and respondent succinctly set forth their arguments in their cross-motions for summary decision. DVSEC argues that it is clear that the districts intended to give DVSEC both of the requested exemptions and to hold otherwise would violate the Commissioner's admonition not to exalt form over substance. See Kentwood Academy v. Lucille Davy, EDU 7165-08, adopted, Commissioner July 27, 2009. DVSEC supplements this argument with recent cases in which the Commissioner upheld a decision stating that substantial compliance with regulatory requirements was sufficient. Brookfield Schools v. N.J. State Dept. of Education, Division of Finance, EDU 11447-10, adopted July 28, 2011; Celebrate the Children v. N.J. State Dept. of Educ., Division of Finance, EDU 7771-10, adopted August 29, 2011. Last, DVSEC argues that it should not be held responsible for the clerical errors of its sending districts. Respondent argues, however, that it is longstanding principle that the representations of an individual board member or administrator are insufficient to bind a board to a particular course of action. See Cheryl Dorrington v. North Bergen Board of Education, 1982 S.L.D. 247. Respondent goes on to argue that it would be irresponsible for the Department of Education to accept a letter authored by a single board member or administrator as the equivalent of a board action. Respondent notes that the board resolutions are the only documentation of official board action.

DVSEC filed the petition and filed for summary decision on the grounds that, as a matter of law, respondent's decision to disallow \$10,360 in food service costs for failure to provide the required number of resolutions was arbitrary, capricious and unreasonable. As stipulated and **FOUND as FACT**, one resolution, that of Bordentown, clearly complies in a timely manner with the requirements for a resolution giving DVSEC the exemptions. Thus, at issue is whether respondent was arbitrary, capricious and unreasonable in not accepting three others resolutions as compliant.

The Rancocas Valley resolution failed to exempt DVSEC from charging students for reduced and/or paid meals, but in its cover letter to the resolution signed by the

Board Secretary said that Rancocas Valley does not require the private schools to apply for and receive funding from the Child Nutrition Program and does not require the DVSEC to charge students for reduced and/or paid meals. In the case of the Rancocas Valley resolution, the Board clearly intended to adopt a resolution absolving DVSEC of both the need to seek reimbursement from CNP and the choice to charge students for free or reduced meals. Thus, rejecting it would be to place form above substance for no good reason. See Kentwood Academy v. Lucille Davy, supra. It would not have been irresponsible for the respondent to consider the cover letter in that instance as it did not conflict with the board resolution, only clarified it. It would be the more logical interpretation since the Board opted to approve a resolution in the first place. As DVSEC's auditor argued, to find otherwise would mean that it took the time to adopt a resolution and set the requirements in the cover letter to not provide the required exemptions when it could have as easily done so by doing nothing. Therefore, I **FIND** that the resolution of Rancocas Valley substantially complied with the regulation and should have counted toward its necessary majority of sending school districts.

The South Orange-Maplewood resolution failed to exempt DVSEC from seeking reimbursement from the CNP and in its cover letter only said it was exempting DVSEC from charging students for reduced and/or paid meals. South Orange-Maplewood is a more difficult board to discern intent other than what was written. Both the resolution and the cover letter absolve DVSEC only of charging students for reduced or paid meals. Respondent's argument does not apply here as the cover letter does not say anything different than the resolution. DVSEC's argument that the district substantially complied and denying it would be putting form over substance also does not apply because the resolution is very clear. It says nothing regarding exempting DVSEC from seeking reimbursement from CNP. Whether it did so intentionally or unintentionally cannot be gleaned from the documents it sent. Thus, I **FIND** that the resolution of South Orange-Maplewood did not comply with the regulation requiring an exemption for both charging students and not seeking CNP and did not count toward achieving the majority of sending districts.

The Northern Burlington resolution specifically absolved DVSEC from charging students for reduced and/or paid meals and notes in the preceding paragraph that DVSEC is not currently participating nor desires to participate in funding from the CNP. However, it does not absolve DVSEC from seeking reimbursement. Northern Burlington's resolution stopped short of saying that it absolved DVSEC from doing so. The cover letter did not clarify why it referenced the CNP funding and acknowledged DVSEC's desire not to seek it, but did not say that the board approved DVSEC not to seek it. Referencing Dr. Calderone's letter to the district, it appears that he asked only for the one resolution regarding meals and failed to ask for the one absolving DVSEC from seeking CNP funding. (Calderone Certification, Exhibit A). DVSEC argues that the resolution should be accepted because there is no indication of disagreement with or withholding of approval of DVSEC's not seeking CNP funding. Further, DVSEC argues that the cover letter, setting forth, "Enclosed is . . . the resolution for the Out of District Non-Allowable Costs that the Northern Burlington Regional School District approved at the November 19, 2007 Board of Education meeting," indicates its desire to provide DVSEC with the required resolutions. Respondent does not have to go to such lengths to determine a Board's intent when both the resolution and the cover letter set forth only one resolution for meals. Based on the wording of the resolution and the cover letter, I **FIND** that Northern Burlington's resolution did not comply with the regulation requiring an exemption for both charging students and not seeking CNP and did not count toward achieving the majority of sending districts.

The Trenton resolution exempts DVSEC from seeking reimbursement from CNP and charging students for reduced and/or paid meals, but is not dated until March 8, 2010. Trenton's resolution had the correct wording setting forth that it absolved DVSEC from charging students for meals and from seeking reimbursement from the CNP. Respondent argues that the resolution was too late to be considered in the count of sending districts that adopted resolutions for the 2007-2008 year. DVSEC argues that Trenton said that it had adopted the resolution in a timely manner, but it neglected to file a resolution for 2007-2008 before March 8, 2010. DVSEC argues that it should not be held responsible for the delay. DVSEC further argues that the District intended to adopt the resolutions, even if it did so clumsily and belatedly. Given the fact that the

resolution was not adopted until 2010, I **FIND** that Trenton's resolution did not comply with the regulation requiring an exemption for both the charging of students for meals and not seeking CNP funding for the year 2007-2008 and did not count toward the achieving resolutions from the majority of sending districts.

Based on the foregoing, I **FIND** that the DVSEC had two valid resolutions that complied with the regulation requiring resolutions for the 2007-2008 school year that absolved DVSEC from charging students for meals and from seeking reimbursement from CNP -- Bordentown and Rancocas Valley. I further **FIND** that Dr. Calderone's letters requesting the resolution asked only for a resolution absolving DVSEC from charging for meals, which contributed substantially to the faulty resolutions. I therefore **CONCLUDE** that DVSEC did not meet its burden of proving that the respondent acted arbitrarily and capriciously in disallowing \$10,360 in food service costs that DVSEC incurred during the 2007-2008 school year. I further **CONCLUDE** that respondent has demonstrated that there are no material facts challenged and that it is entitled to summary decision as a matter of law pursuant to N.J.A.C. 1:1-12.5.

ORDER

Based on the foregoing findings of fact and legal authority, I hereby **GRANT** respondent's cross-motion for summary decision and **DENY** petitioners' motion for summary decision and **ORDER** the petitioner's Verified Petition be and hereby is **DISMISSED**.

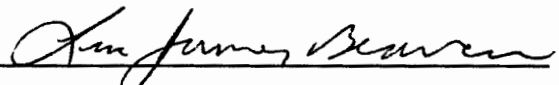
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 18, 2011
DATE


LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

11/18/11

Date Mailed to Parties:

11/21/11

cmo

#58-12R

OAL DKT. NO. EDU 3461-11
 (EDU 1475-08 on remand)
 AGENCY DKT. NO. 354-11/07

RENEE POLLACK,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
SOUTH ORANGE-MAPLEWOOD	:	
SCHOOL DISTRICT, ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter, the proposed "Settlement Agreement" (Settlement), and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon such review, the Commissioner approves the Settlement terms, wherein it was agreed, *inter alia*, that petitioner would be reinstated to the position of "Principal on Special Assignment" on December 1, 2011, at an annual salary of \$152,595, and would resign from employment in respondent's district as of December 31, 2012 and apply for retirement. Respondent is to pay petitioner \$573,281 gross pay for the period of January 1, 2008 through November 30, 2011 – less the applicable state and federal payroll deductions and less mitigation in the amount of \$24,080 which was received by petitioner in the form of unemployment benefits. Respondent has also agreed to reimburse petitioner for dental and healthcare premium deductions that were taken from her New York pension benefits – in the amount of \$37,957.32 –

and for legal expenses in the amount of \$5,275. It was agreed that each of the foregoing sums would be paid in two equal installments: on or before December 31, 2011 and December 31, 2012.

In approving the settlement terms the Commissioner makes the following observation. Sections 4 and 6 of the Agreement reference actions that may have already taken place, and have therefore preceded consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have either successfully implemented the settlement terms, or have agreed upon mutually satisfactory alternate dates for the effectuation of same. Assuming the foregoing, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.¹


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/17/12

Date of Mailing: 2/21/12

¹ A copy of this decision shall be forwarded to the Department of Labor.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3461-11
(ON REMAND OAL DKT. NO. EDU
1475-08)
AGENCY DKT. NO. 354-11/07

RENEE POLLACK,

Petitioner,

v.

**BOARD OF EDUCATION OF THE SOUTH
ORANGE-MAPLEWOOD SCHOOL DISTRICT,
ESSEX COUNTY,**
Respondent.

David Nash, Esq., for petitioner

John E. Collins, Esq., for respondent (Parker McCay, attorneys)

Record Closed: December 22, 2011

Decided: January 3, 2012

BEFORE **JOSEPH LAVERY, ALJ** t/a:

This matter was remanded from the Appellate Division for a determination as to whether petitioner should be reinstated to her position as Principal on Special Assignment or some other position consistent with her seniority and tenure rights and the amount of back pay and other compensation to which petitioner is entitled.

The Acting Director and Chief Administrative Law Judge on April 27, 2011 ordered that this case be heard before the undersigned. After a prehearing conference with counsel, hearing dates were scheduled for September 12 and 13, 2011. On September 12, 2011, the parties appeared before me and the hearing was converted to an in-person settlement conference. At the joint request of counsel, the hearing for September 13, 2011, was adjourned for good cause and rescheduled for November 1, and 7, 2011. At the hearing on November 1, 2011, the parties reached a tentative settlement agreement pending Board of Education approval. On November 21, 2011, the Board approved the settlement, and a copy of the executed settlement agreement and Board Resolution is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

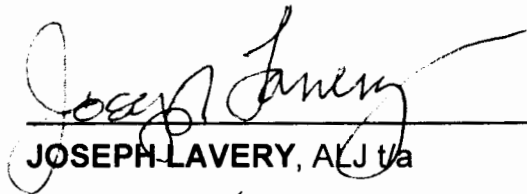
I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

January 3, 2012

DATE



JOSEPH LAVERY, ALJ t/a

Date Received at Agency:

1/3/12

Date Mailed to Parties:

1/3/12

mph

SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, NJ
PUBLIC BOARD MEETING
November 21, 2011

FOR ACTION

RESOLUTION 2822

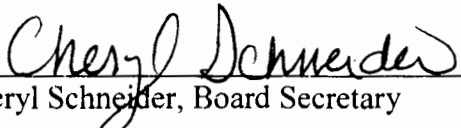
SUBJECT: APPROVE SETTLEMENT AGREEMENT

BE IT RESOLVED THAT the Board of Education approves a settlement agreement with Employee #3487 and authorizes the Board President to execute the settlement agreement.

MOTION made by Dr. Payne-Parrish, seconded by Mrs. Wren-Hardin, to approve Resolution 2822.

ROLL CALL: Motion 2822 passed; 8 yes, 0 no.

I, Cheryl Schneider, Secretary of the South Orange-Maplewood Board of Education, hereby certify that the attached resolution was adopted at a duly convened meeting of the Board of Education on November 21, 2011 by the roll call vote set forth above and remains in full force and effect.



Cheryl Schneider, Board Secretary

In the matter of Renee Pollack v. South Orange – Maplewood Board of Education,
OAL Docket No. EDU 3461-11:

irrevocably resign and retire RP
Pursuant to the terms of the attached agreement, I hereby ~~resign~~ from my position with
the South Orange – Maplewood School District effective December 31, 2012.

Dated: *Nov. 1, 2011* *Renee Pollack*
Renee Pollack

Witness: *11/1/11* *David [Signature]*

SETTLEMENT AGREEMENT

In the matter of Renee Pollack v. South Orange – Maplewood Board of Education,
OAL Docket No. EDU 3461-11:

Renee Pollack ("Pollack") and the South Orange – Maplewood Board of Education
("Board") agree as follows:

1. The Board agrees to compensate Pollack, subject to mandatory state and federal payroll deductions and contributions and New Jersey pension deductions and contributions, the gross amount of \$573,281 [representing gross salary payments for the period of January 1, 2008 through November 30, 2011 pursuant to the applicable agreements between the Board and the Association of Coordinators and Administrators ("ASCA") less *mitigation by job* unemployment benefits in the amount of \$24,080 received by Pollack in 2008 (43 weeks at \$560 per week)}. The Board will take the steps required by the NJ Division of Pensions to ensure that Pollack receives proper pension credit for the period from January 1, 2008 through November 30, 2011.
2. The Board also agrees to reimburse Pollack for dental and for her healthcare contributions deducted from her monthly payments from the Teachers' Retirement System of the City of New York from April 2008 through January 2012 in the amount of \$37,957.32.
3. The Board also agrees to reimburse Pollack in the amount of \$5,275, representing legal fees paid and /or owed to Robert Greenwood, Esq. as ordered by the N.J. Commissioner of Education in his decision dated February 11, 2010.
4. Pollack will be reinstated *or as mutually agreed upon RP JJK* to her position as Principal on Special Assignment (job description attached) on December 1, 2011, at an annual salary of \$152,595 pursuant to the Board's agreement with ASCA. Pollack has accumulated 28 vacation days and 110 sick days through June 30, 2012 that are available upon her reinstatement.
5. In consideration of the above, Pollack agrees to ~~resign~~ *irrevocably resign and retire RP JJK* from her position effective December 31, 2012, and she attaches hereto an original signed letter of ~~resignation~~ *resignation and retirement RP JJK* effective on that date.

RP 6. The payments referenced in paragraphs 1 and 2 shall be made in accordance with the following schedule:

- a. One-half of each amount will be paid by the Board on or before December 31, 2011,

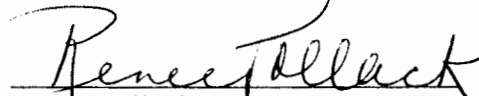
- b. The remaining one-half of each amount will be paid by the Board on or before December 31, 2012.
7. To the extent permissible by law the terms of this agreement shall remain confidential.
8. The parties hereby release one another from any and all claims that either may have or believe each may have against the other occurring prior to and through the date of this agreement.
9. This agreement is subject to and contingent upon approval by the South Orange - Maplewood Board of Education at a regularly scheduled meeting.

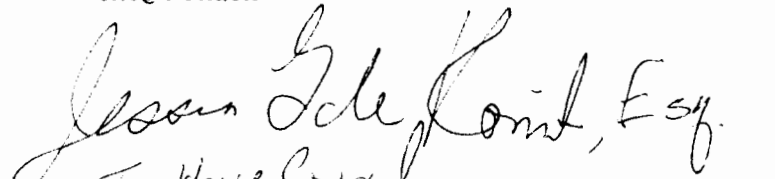
Date: 11/1/11

Date: Nov. 1, 2011

Dated: Nov. 1, 2011


Witness


Renee Pollack


Jessica Lee Kunt, Esq.
In-House Counsel
S. Orange - Maplewood School Dist.

**SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, NJ
525 Academy Street Maplewood, NJ 07040**

JOB DESCRIPTION

POSITION: Principal on Special Assignment

JOB GOALS:

- To assist the Superintendent in completion of special projects which enhance the operation of the school district.
- To provide support to the Superintendent in implementing the District's Strategic Plan.

REPORTS TO: Superintendent of Schools

MINIMUM QUALIFICATIONS:

- New Jersey Principal/Administrative Certification
- Minimum of Five Years Principal Experience
- Able to perform essential functions ~~with or without reasonable accommodation~~
- Overall knowledge of the functioning of a school district central administration
- Required criminal history background check and proof of U.S. citizenship or legal resident alien status

JOB RESPONSIBILITY AND AUTHORITY:

- Perform staff functions which directly support the Superintendent in advancing the instructional and operational functions of the school district.

PRIMARY RESPONSIBILITIES:

1. Seek out and develop grant proposals to enhance the instructional and operational functions of the school district.
2. Supervise the central registration activities and investigate and recommend improvements to the process.
3. Supervise the implementation of revised home instruction regulations and ensure legal requirements are met and the instructional needs of students are fulfilled.
4. Perform all other duties assigned by the Superintendent.

TERMS OF EMPLOYMENT:

12 months. Salary and benefits as per ASCA agreement and comparable to the principal assignment previously performed in the school district.

Exhibit 8

While this job description cannot cover all of the duties and responsibilities of the position, it lists most of the important areas and is intended to convey a general understanding of the assignment. However, evaluation of performance will be based on the duties and responsibilities listed in the job description.

BOE Approval:

O.B. on behalf of minor child, A.B., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
CITY OF ORANGE, ESSEX COUNTY, :
RESPONDENT. :
_____ :

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her daughter in May 2011. A hearing at the Office of Administrative Law (OAL) was scheduled for December 29, 2011, but petitioner failed to appear despite having received appropriate notice and provided no explanation for her nonappearance. Having received no explanation from petitioner for her failure to appear, the OAL returned the file to the Commissioner.

There being no explanation filed, the Commissioner dismissed the petition with prejudice, noting that the file included notations indicating that petitioner's child has been re-enrolled in respondent's district.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
--

February 21, 2012

OAL DKT. NO. EDU 7918-11
 AGENCY DKT. NO. 119-5/11

O.B. on behalf of minor child, A.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record for this matter, the Office of Administrative Law's (OAL) notice memorializing petitioner's failure to appear at the hearing on December 29, 2011, and a copy of the notification sent to the parties by the OAL on October 19, 2011 – informing them of the date of the hearing – have been reviewed. It is noted that the OAL hearing notice was sent to the address petitioner entered on her petition.

The Administrative Law Judge (ALJ) held the matter for one day after the scheduled hearing date to give petitioner the opportunity to offer an explanation for her nonappearance – pursuant to *N.J.A.C. 1:1-14.4(a)*. Having received no explanation from petitioner, the ALJ returned the file to the Commissioner.

It appears from notations in the file that petitioner's child has been re-enrolled in respondent's district, and in the absence of any filing from petitioner concerning her non-appearance at the OAL hearing, this matter is no longer deemed to be a contested case before the Commissioner and is accordingly hereby dismissed with prejudice.

IT IS SO ORDERED.*


 ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/21/12
 Date of Mailing: 2/22/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)

OAL DKT. NO. EDU 03959-11
 AGENCY DKT. NO. 370-12/05

MAUREEN E. SMITH,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF ENGLEWOOD, BERGEN	:	
COUNTY,	:	
RESPONDENT.	:	
_____	:	

The record of this matter, the proposed Settlement Agreement and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon such review, the Commissioner approves the provisions of the Agreement, with the following observation. Under Term 3, Term 4, and Term 11 of the parties' Agreement, reference is made to actions that may have already taken place, thus preceding consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have either successfully implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same. Assuming the foregoing, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


 ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/21/12

Date of Mailing: 2/22/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03959-11

AGENCY DKT. NO. 370-12/05

MAUREEN E. SMITH,

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY OF
ENGLEWOOD, BERGEN COUNTY,**

Respondent.

Alfred F. Maurice, Esq., for petitioner

Mark S. Tabakin, Esq., for respondent

Record Closed: December 15, 2011

Decided: December 28, 2011

BEFORE **CARIDAD F. RIGO, ALJ:**

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on April 5, 2011, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

Hearings were scheduled for November 9, 2011. Prior to the hearing the parties settled the matter. A Settlement Agreement was prepared and executed indicating the terms of the agreement, which are incorporated herein by reference.

Having reviewed the contents of the attached Stipulation of Settlement and Board Resolution, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

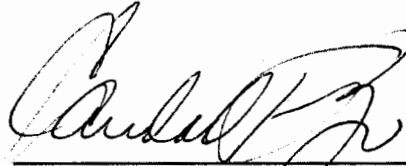
I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

December 28, 2011

DATE



CARIDAD F. RIGO, ALJ

Date Received at Agency:

1-3-12

Mailed to Parties:



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

JAN - 3 2012

DATE

Ir

attachment

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made and entered into between the Board of Education of the City of Englewood (the "Board") and MAUREEN SMITH (SMITH or Petitioner), collectively, "the Parties".

WHEREAS, Petitioner filed a Petition of Appeal with the Commissioner of Education under OAL Docket No. EDUOR 03571-2006N and Agency Ref. No. 370-12/05 claiming improper withholding of employment and adjustment increments for the 2004-2005 and subsequent school years.

WHEREAS, The Board has filed an Answer to the petition denying Petitioner's claims that resulted in the matters being referred to the O.A.L. for disposition as a contested case where it was listed for trial.

WHEREAS, the Board and Petitioner, now mutually agree to settle the matters and allegations in dispute; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable consideration, the parties hereby agree as follows:

1. The "Board", as used herein, shall at all times mean the Board of Education of the City of Englewood, its affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, and successors, whether in their individual or

official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.

2. "Petitioner", as used herein, shall mean **MAUREEN SMITH** and her successors-in-interest, heirs, administrators and assignees.
3. In consideration of the mutual promises set forth herein and for other valuable consideration, within thirty (30) business days of the Board's receipt of an executed copy of this Settlement Agreement, the Board shall pay to the Petitioner a sum less appropriate tax with-holding and pension contributions applicable to the period representing one half (1/2) of the combined annual and adjustment withholdings from September 2004 through June 30, 2009.
4. The Board shall also pay to the Petitioner a sum less appropriate tax with-holding and pension contributions applicable to the period representing from September 1, 2009 through June 30, 2010.
5. The parties acknowledge and agree that said payments are in full and complete settlement of Petitioner's claims to salary and pension credits for the periods in question.
6. In addition to the payment described in paragraphs 4, above, the Board shall notify the Division of Pensions of said payment and certify Petitioner's final salary to the Division of Pensions for calendar year 2009-2010 as the final adjusted salary set forth in the agreement.
7. To the extent reasonably possible, the Board shall certify Petitioner's salary for 2008-2009 to reflect the payment set forth in Paragraph 3.
8. In the event the final salary for any year is unsettled at the time of this agreement because a successor collective bargaining agreement has not been reached with the Englewood

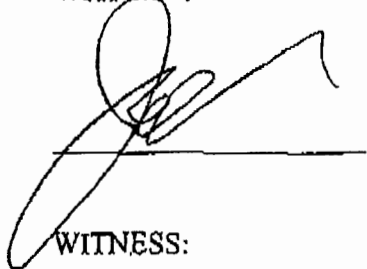
Teachers Association, petitioner's final salary shall include any annual or adjustment increment based upon the settled contract even if the settlement takes place following the execution of this agreement.

9. This Settlement Agreement is contingent on and subject to approval and ratification by the Board.
10. This Settlement Agreement contains the full agreement of the Board and the SMITH as respects the resolution of the issues raised in the above-referenced Petition of Appeal before the Commissioner of Education.
11. Petitioner will withdraw the Petition of Appeal under the above docket numbers, with prejudice, upon the receipt of a fully executed settlement agreement and Resolution executed by the Board and payment as described in this agreement. **Petitioner shall also submit an irrevocable letter of resignation of her teaching staff position with the District effective June 30, 2010 for the purpose of retirement. Petitioner shall receive any benefits pursuant to her retirement as contained in the collective bargaining agreement between the Board and Englewood Teachers Association.**
12. This Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.
13. The parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions that are necessary or appropriate to effect the terms of this settlement agreement.
14. This Settlement Agreement may be executed in counterparts, each of which shall be deemed to be an original copy, but all of which together shall be deemed one and the same instrument.

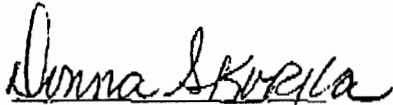
15. This Settlement Agreement contains the entire Agreement between the Petitioner and the Board with regard to the matters set forth in it. It shall be binding upon and inure to the benefit of their officials, officers, directors, representatives, employees, associates, partners, agents, servants and successors in interest and enforceable in any court of competent jurisdiction.
16. This Settlement Agreement shall become effective immediately following approval by the Board and the execution by the parties.

Dated: July , 2011

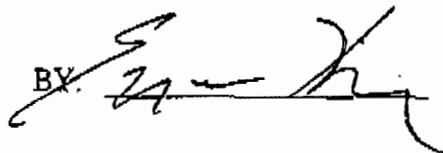
WITNESS:



WITNESS:



BOARD OF EDUCATION OF
THE CITY OF ENGLEWOOD

BY: 


MAUREEN SMITH

Dated: July 29 2011.

X. NEW/OLD BUSINESS

Resolution:

11-P-61 APPROVE SETTLEMENT AGREEMENTS FOR CAROLYN OUTLAW AND MAUREEN SMITH

RESOLVED, upon the recommendation of the Superintendent that the settlement agreements for Carolyn Outlaw and Maureen Smith hereby are approved and the Board President and Business Administrator are authorized to execute the agreements.

Vote: SB, ED, GGIII, GG, JL, ML, HP/II, SS: Yes
MM: Absent

K.B., on behalf of minor children, T.B., T.B., and I.B.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLANDS, MONMOUTH COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her children, T.B., T.B., and I.B., are not eligible for a free public education in the Highlands school district. Petitioner contended, *inter alia*, that she is a resident of Rumson, but intended to live temporarily in Highlands – in a property owned by her and her husband – while her Rumson residence was being renovated. She further contended that she was at all times honest with the Highlands School District, and was never alerted to the fact that she might end up owing tuition; since respondent failed to so notify petitioner, she argues that the Board should be stopped from seeking tuition reimbursement for the 2009-2010 school year. The Board sought tuition reimbursement in the amount of \$20,211, which represents the cost of educating petitioner's triplets for a full year.

The ALJ found, *inter alia*, that: petitioner's permanent home is in Rumson, not Highlands, and even if she did intend to live in Highlands for a brief time, her intent was always to return to Rumson; petitioner wrote that she lived in Highlands on her children's enrollment forms because she wanted her triplets to attend Pre-K in Highlands school district and was aware that she needed to live in Highlands in order for her children to receive a free education there; petitioner was not domiciled in Highlands during the 2009-2010 school year and therefore her children were not entitled to a free public education in Highlands schools pursuant to *N.J.S.A.* 18A:38-1. Accordingly, the ALJ concluded that petitioner owes respondent Board tuition for the entire 2009-2010 school year in the amount of \$20,211, and dismissed the petition.

Upon a full and independent review, the Commissioner concurred with the findings and conclusion of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this case, and the petitioner was ordered to pay tuition in the amount of \$20,211 for the period of her children's ineligible attendance.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

February 21, 2012

OAL DKT. NO. EDU 4109-10
AGENCY DKT. NO. 66-4/10

K.B., on behalf of minor children, T.B., T.B.,
and I.B.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH
OF HIGHLANDS, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon full review and consideration, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that petitioner – as an admitted domiciliary of Rumson during the 2009-10 school year – was not entitled to receive a free public education for her children, T.B., T.B. and I.B. from the Board of Education of the Borough of Highlands during the period September 2009 through June 2010.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and petitioner is hereby directed to pay tuition to the Board in the amount of \$20,211 (\$6,737 per child) for this period of the children's ineligible attendance in its schools.

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/21/12

Date of Mailing: 2/22/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4109-10

AGENCY DKT. NO. 66-4/10

K.B. ON BEHALF OF

T.B., T.B. AND I.B.,

Petitioner,

v.

BOROUGH OF HIGHLANDS

BOARD OF EDUCATION,

Respondent.

Henry F. Wolff, III, Esq., for petitioner

Christopher B. Parton, Esq., for respondent (Kenney, Gross, Kovats and
Parton, attorneys)

Record Closed: October 7, 2011

Decided: January 5, 2012

BEFORE LISA JAMES-BEAVERS, ALJ:

STATEMENT OF THE CASE

Petitioner K.B. appeals the ruling of the Highlands Borough Board of Education (Board) that her children, T.B., I.B. and I.B., who are triplets, were not entitled to receive

a free public education provided by the Board, as it did not believe that petitioner was domiciled within the Highlands Borough School District (District).

PROCEDURAL HISTORY

The Board issued a Notice of Final Ineligibility to petitioner on March 3, 2010. In addition to claiming that petitioner's children were ineligible to attend the schools of the District, this Notice also alerted her that if no appeal was filed from the Board's decision, the Board might assess her tuition for each day T.B., T.B. and I.B. attended the District's school while not entitled to do so for free. On April 8, 2010, petitioner filed a petition of appeal with the Department of Education's Office of Controversies and Disputes. On April 16, 2010, the Board filed an Answer to petitioner's appeal. The Department transmitted the contested case to the Office of Administrative Law, where it was filed on April 22, 2010.

The case was scheduled for hearing on October 18, 2010; however, on October 16, 2010, respondent's attorney notified the court that respondent's primary witness had to have emergency surgery and would not be available to testify for a while. He therefore requested an adjournment with the permission of his adversary. I granted the request. The hearing was rescheduled for December 17, 2010, but the witness remained on medical leave of absence through June 30, 2011. The parties attempted to settle, but were not successful. The case was rescheduled for October 7, 2011. Respondent's witness never recovered well enough to testify. On October 7, 2011, I heard the case and closed the record.

FINDINGS OF FACT

The following facts are admitted and undisputed; therefore, I **FIND** them as **FACT**. On or about August 24, 2009, petitioner enrolled three children, T.B., T.B. and I.B., in the pre-kindergarten program at Highlands Elementary School in the Borough of Highlands School District. At the time petitioner enrolled her children, petitioner advised the Board that she was a resident of the Borough of Rumson and an owner of property

in Highlands. Throughout the entire 2009-2010 school year, petitioner and her children were domiciled in their full-time residence in the Borough of Rumson, New Jersey. At no time during the 2009-2010 school year did petitioner and her children live in the property that petitioner owned in Highlands. Petitioner enrolled her children in the Pre-K program at Highlands Elementary School for the 2009-2010 school year knowing that neither she nor her children were domiciled in the Borough of Highlands, but that in fact, they were domiciled in the Borough of Rumson. Petitioner's intention as of August 2009, was for herself and her children to temporarily relocate to the Highlands address at some point during the 2009-2010 school year while their home in Rumson was being renovated.

Sometime before January 12, 2010, petitioner was provided with new Highlands Elementary School Emergency Procedures cards to fill out for T.B., T.B. and I.B. On January 12, 2010, petitioner submitted to the Board signed Emergency Procedures Cards on behalf of T.B., T.B. and I.B., listing each student's "current address," as well as "Mother's address" and "Father's address" as "[] Shore Dr. Highlands." At no time during the period from July 2009 to December 2009 did petitioner ever petition or request of either the Board or the Superintendent permission to enroll T.B., T.B. and I.B. in the Highlands School District, despite their domicile in Rumson. During the 2009-2010 school year, petitioner had at least one discussion with District officials regarding the eligibility of her children for free enrollment, the possibility of their removal from the District and the charging of tuition.

The New Jersey Department of Education establishes the amount it costs each student to attend school in each school district in the state. For the period from September 2009 to June 2010, the amount it cost the Board to educate each pre-kindergarten student was \$6,737 per year. The Board seeks \$20,211 for the cost of the education of the three triplets for the full year.

In addition to the above **FINDINGS of FACT**, petitioner testified that the property that she and her husband owned in Highlands was income property that her husband owned before they were married. It is a two-family house that had one tenant living

upstairs in 2009. A friend of theirs sometimes stayed downstairs during the summer paying informally with no lease. She and her husband decided to renovate their home in Rumson in January 2009. The ground had shifted and the floors had buckled. The floors needed sanding and refinishing. They were going to move to the Highlands property due to the dust and mess as their son is asthmatic. The tenant asked for a month's notice.

Petitioner further testified that when she began looking for childcare for her triplets, she was not satisfied. The children went to Sandy Hook Childcare Center from 2008 to August 2009. She began looking for a new center in April 2009, but it was hard to find three openings together. She was told to call Highlands. Petitioner does not know the name of the person with whom she spoke, but she told the person that she does not live there, but plans on living there for six weeks. The person did not tell her whether she could enroll her children. Petitioner called back and was able to obtain the necessary paperwork to enroll her children. She gathered her proof of ownership in Highlands and the children's birth certificates along with the application and drove them to Highlands Elementary School. She met with Lillian Colby and discussed her situation. She used the Highlands address on the application because she was asked if she would get mail there. She placed the Highlands address on the Emergency Procedures Card because she asked Lillian Colby which address she should write and someone behind Ms. Colby told her Highlands. Ms. Colby asked for documents showing ownership in Highlands, which she produced, but the documents also showed that they were sent to petitioner at an address in Rumson. (P-4, P-5 and P-6). There was no question in her mind that she honestly advised them of her residence in Rumson. She advised Ms. Colby that she was going to be moving into Highlands, but Ms. Colby did not ask to see a contract, estimate or anything showing that work was going to be done on her Rumson house. She was introduced to the superintendent, Ms. Galassetti, but she does not recall any conversation with her. The staff said that she could enroll her children and enrolled them. No one told her that there would be tuition.

In November 2009, the school nurse sent home a letter regarding the influenza vaccine. She left the letter for her husband at the Highlands address, but he did not pick it up, so it was returned to the Highlands Elementary School. She went to the main office to pick it up. She did not hear any more from the District until the middle of January 2010 when the school mailed home records asking her to update her contact information. She talked to Ms. Colby who thought there was confusion with the property address. Ms. Colby had petitioner fill out new Emergency Cards. At that time, petitioner and her husband were still having work done. At the end of January 2010, the work stopped. On February 8, 2010, petitioner received a letter from Highlands Elementary School that said that her children were not eligible for a free education in the District. (P-8). She had received a letter from Ms. Lynch prior to the February 8, 2010, letter saying that she had until March 1, 2010, to move into her house. (P-9). After receiving the letter dated February 8, 2010, she called the board secretary, the superintendent and the Monmouth County Schools Superintendent. No one called her back, including Ms. Galassetti. Someone told her to call a lawyer, which she did. She appealed before the Board and the Board found her ineligible to send her children to the District. Petitioner did not pull them out of school after receiving the March 3, 2010, letter from the Board. She was very upset, but tried to find a place for them. No one had space for three children in March.

On cross-examination, petitioner testified that Rumson has a lottery system for its Pre-K program and she was told that she would never get three children in the program. Petitioner was always clear that the children would not be living in Highlands. If they went to Highlands for Pre-K, she always intended for them to return to Rumson. She denied telling one at the District that she was in the process of moving into Highlands. She may have said she had started to pack. She had no money to move. When she signed an admission that she and her children were never domiciled in Highlands, she had never even heard the word "domicile." However, she answered the requests for admissions with Mr. Wolff and understood that she admitted only to being domiciled in Rumson. She left the letter from the nurse in the mailbox because she always left all the mail for her husband to take home. He never went back and got it. In January 2010, she filled out and updated her childrens' emergency cards. She again

put Highlands for her address, although she was living in Rumson. No one told her that she was legally entitled to enroll her children in Highlands, but no one said that she was not. She admits that the February letter from Ms. Lynch asks for additional proof, but does not say that it was fine for her children to be attending the District schools. Petitioner knew the February 8 letter from Galasseti was serious, but she did not realize until February 8, 2010 that she may be on the hook for tuition. She had no idea that a public school could charge tuition. Petitioner believes that she had no choice when she was told that she had to disenroll her children and pay tuition from September to February or keep them in and pay tuition.

Lillian Colby testified that she is the Highlands Elementary School secretary and attendance officer and she was so employed for almost three years between 2008 and 2011. Her responsibility is to register students for school. She has no authority to give legal permission to enroll, so if she were asked, she would have to speak to the superintendent. Ms. Colby recalled petitioner coming in sometime in May 2009 with her three children to register them for the Pre-K program. Petitioner said that she was living in Rumson and she was planning to move to Highlands while her house was being worked on. Colby understood that petitioner would be living in Highlands. She never told petitioner that it was okay to enroll her children although they did not live in Highlands. When Ms. Galasseti came in, Ms. Colby introduced her to petitioner and told her that petitioner was registering her children for September and that they were going to be moving into Highlands. Ms. Galasseti only said, "Hello."

Ms. Colby further testified that she received petitioner's initial enrollment information, which listed a Highlands address. She told petitioner to write the address at which she will be living. In January 2010, she received a letter back that the District had sent to petitioner. When she called and asked petitioner why the letter was returned, petitioner said that the letter was left in the mailbox for her husband so he could see it and she thought the postman took the letter by mistake. Petitioner did not say at that time that she is not living in Highlands. Ms. Colby told petitioner that she needed to verify her residence. She gave her new emergency forms. Petitioner came in a day or so later. That was the first time Ms. Colby knew that petitioner was not living

in Highlands. Petitioner told Ms. Colby that she had made it perfectly clear that she was not living in Highlands. Ms. Colby said that the forms were to reflect her current address and petitioner had written Highlands. Petitioner became very upset. Petitioner talked to Ms. Galasseti and said that she was a taxpayer in Highlands and deserved to have her children go there.

Ms. Colby further testified on cross-examination that she knew that ownership was not grounds for enrolling children in Highlands. She thought that petitioner showed the Highlands address as where she intended to live. She recognized documents that petitioner gave her that indicated that petitioner lived in Rumson. (P-4, P-5). The documents did not raise any red flags with regard to residency or eligibility. Ms. Colby denied telling petitioner to put the Shore Drive Highlands address on her emergency cards. She believed that is where petitioner intended to live. She did not ask for petitioner's license or voter registration card because she figured that those changes were in progress. She knew it was necessary for petitioner to move in and reside in Highlands, but did not do anything to check up to see if the petitioner moved in prior to January 2011. Looking back at it now, Ms. Colby thinks that she should have followed-up. The second time that petitioner came into the office, Ms. Colby did not ask if she had moved in. However, petitioner said that it was not her fault that the construction was delayed. That was the first time Ms. Colby learned that petitioner had not moved into the Highlands house. She never avoided petitioner's telephone calls.

CONCLUSIONS OF LAW

The issue is whether petitioner was entitled to receive a free public education for her triplets in Highlands during the 2009-2010 school year. Regarding residency appeals, N.J.S.A. 18A:38-1 provides:

Public schools shall be free to the following persons over five and under 20 years of age:

- a. Any person who is domiciled within the school district

"In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving." In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991) (quoting Kurilla v. Roth, 132 N.J.L. 213, 215 (Sup. Ct. 1944)). Thus, domicile is what is regarded as an individual's true and permanent home. In re Jaffe, 74 N.J. 86, 90-91 (1977).

Further, N.J.A.C. 6A:22-3.1 provides:

(a) A student over five and under 20 years of age pursuant to N.J.S.A. 18A:38-1, or such younger or older student as is otherwise entitled by law to free public education, is eligible to attend school in a school district if the student is domiciled within the district.

1. A student is domiciled in the school district when he or she is the child of a parent or guardian whose permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.

Petitioner admitted and I have **FOUND** as **FACT** that her permanent home was in Rumson, not Highlands. Even if she initially intended to live in Highlands for a brief time, it was always her intent to return to Rumson.

Petitioner presented two arguments. First, she argued that N.J.A.C. 6A:22-4.1(a)5 required notice of potential assessment for tuition, advising that she could be charged if her children were found ineligible for a free public education in Highlands. The Board did not provide such notice. However, pursuant to N.J.A.C. 6A:22-1.1(b), the notice of potential tuition assessment applies only to students over the age of five and those otherwise entitled to a free public education by law. Petitioner's children were age four until February 11, 2010, and were not otherwise entitled to a free public education by law. By that date, they had received the letter of February 8, 2010, that petitioner's children were not entitled to a free public education. Therefore, I

CONCLUDE that the notice provision is inapplicable to the facts of this case. Petitioner seemed to have abandoned this argument in closing summations.

Second, petitioner argues through counsel that she was at all times honest with the Highlands School District, yet no one there ever told her that she could end up owing \$20,000 in tuition. In addition, petitioner argues that all of the bills that she submitted showed that petitioner owned property in Highlands, but also showed that the bills were being sent to her residence in Rumson. To hit her with tuition in February when there was nowhere else that she could enroll her children was grossly unfair. Petitioner argues through counsel that promissory estoppel should apply since she relied on the representation of Board staff and she changed her position to her detriment. She argues that, although estoppel is usually not available against public entities, there are limited exceptions. Anske v. Bd. of Educ. of the Borough of Palisades Park, 139 N.J. Super. 342, 348 (App. Div. 1976). Estoppel is the doctrine, grounded in equity and justice, that one shall not be permitted to repudiate an act done or position assumed where that course would work injustice to another who, having the right to do so, has detrimentally relied thereon. Id. (citing N.J. Suburban Water Co. v. Harrison, 122 N.J.L. 189 (E. & A. 1939); West Jersey Title, etc., Co. v. Industrial Trust Co., 27 N.J. 144 (1958).) The equitable principles of estoppel will be applied against public bodies where the interests of justice, morality and common fairness dictate that course. Id. (citing Gruber v. Raritan Tp., 39 N.J. 1, 13 (1962); Skulski v. Nolan, 68 N.J. 179, 198 (1975)). Petitioner argues that there were red flags that the Board should have seen to prompt further inquiry. Ms. Colby is the Board's representative in charge of enrollment, so she should have alerted petitioner to the potential problem. Because she failed to do so, petitioner argues, the Board should be estopped from seeking tuition for the year.

To say that Ms. Colby should have been alerted to the possibility that petitioner did not live in the District is not the same as saying that she told petitioner that it was fine that she did not live in the District. Ms. Colby testified credibly that she did not have the authority to say that petitioner could legally enroll her children in the District and therefore, she never told that to petitioner. I so **FIND**. I also found Ms. Colby to be

credible in stating that she did not tell petitioner to write that she lived in Highlands on the emergency forms. I **FIND** that petitioner wrote that she lived in Highlands on her forms because she wanted her triplets to attend Pre-K in the District. Estoppel fails in the present case because petitioner was aware that she needed to live in Highlands in order for her children to receive a free education there. She just did not know that the Board could charge her tuition in the event that it was discovered that she did not live in Highlands. I **FIND** that petitioner did not detrimentally rely upon representations made by the Board or its staff in enrolling her children in Highlands. Therefore, I **CONCLUDE** that estoppel does not apply to bar the Board from seeking back tuition for the 2009-2010 school year.

Assuming that there was intent on the part of petitioner to reside in the Borough of Highlands at the end of the 2008- 2009 school year, it did not materialize into the petitioner's family ever actually living in Highlands, much less establishing a domicile there. If the parents have not established domicile, the children are not entitled to a free public education in the district schools. K.L. and K.L. on behalf of minor children, M.L. and C.L. v. Bd. of Educ. of the Borough of Kinnelon, EDU 1191-08, Final Decision (July 23, 2008) <http://lawlibrary.rutgers.edu/oal/search.html>. Petitioner never established a domicile in Highlands. Therefore, I **CONCLUDE** that petitioner and her children T.B., T.B. and I.B. were domiciled in Borough of Rumson during the 2009-2010 school year. Further, I **CONCLUDE** that petitioner was not entitled to receive a free public education from the Borough of Highlands School District during the period from September 2009 to June 2010. As a result of the foregoing, I **CONCLUDE** that petitioner owes the Borough of Highlands Board of Education tuition for T.B., T.B. and I.B. for the entire school year from the start of the school year in September 2009 through the end of the school year in June 2010.

ORDER

Based upon the foregoing, it is **ORDERED** that petitioner's appeal is hereby **DISMISSED**. It is further **ORDERED** that the Board's claim for tuition costs associated with the triplets' attendance in Pre-K in the Borough of Highlands School District from

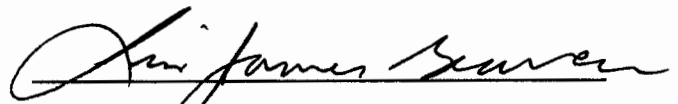
September 2009 through the end of the 2010 school year in the amount of \$6,737 each for a total of \$20,211 for the three is hereby **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 5, 2012
DATE


LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

1/5/12

Date Mailed to Parties:

1/5/12

cmo

APPENDIX
WITNESSES

For Petitioner:

K.B.

For Respondent:

Lillian Colby

EXHIBITS

For Petitioner:

- P-1 Genesis Report for I.B.
- P-2 Genesis Report for Th.B.
- P- 3 Genesis report for Tr.B.
- P-4 Wells Fargo Statement, dated April 8, 2009
- P-5 2008 Final/2009 Preliminary Tax Bill
- P-6 Sewer Department Bill
- P-7 Memo, dated November 30, 2009, re: seasonal influenza vaccine,
together with copy of returned envelope
- P-8 Notice of Initial Determination of Ineligibility, dated February 8, 2010
- P-9 Letter to Petitioner from Highlands Elementary School, re: Request for
Documentation

For Respondent:

- R-1 Answers to Requests for Admissions

OAL DKT. NO EDU 10771-11
AGENCY DKT. NO. 238-8/11

IN THE MATTER OF THE TENURE :
HEARING OF PATRICK BROOKS, :
SCHOOL DISTRICT OF THE CITY OF : COMMISSIONER OF EDUCATION
WILDWOOD, CAPE MAY COUNTY. :
DECISION

The record of this matter, the parties' Settlement Agreement and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C. 1:1-19.1*.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/21/12
Date of Mailing: 2/22/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10771-11

AGENCY DKT. NO. 238-8/11

**IN THE MATTER OF THE TENURE
OF PATRICK BROOKS, CITY OF
WILDWOOD BOARD OF EDUCATION.**

Andrew J. Cafiero, Esq., for petitioner, City of Wildwood Board of Education
(Cafiero and Balliette, attorneys)

Ned P. Rogovoy, Esq., for respondent, Patrick Brooks

Record Closed: December 30, 2011

Decided: January 3, 2012

BEFORE W. TODD MILLER, ALJ:

This matter was transmitted to the Office of Administrative Law on September 12, 2011, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement is in compliance with the standards set forth in In Re Cardonick, 1990 S.L.D. 842 (1990):
3. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

January 3, 2012

DATE



W. TODD MILLER, ALJ

Date Received at Agency:

1/9/12

Date Mailed to Parties:

1/9/12

/sd

Andrew J. Cafiero, Esquire
CAFIERO & BALLIETTE
3303 New Jersey Avenue
P. O. Box 789
Wildwood, New Jersey 08260
(609) 522-0511

IN THE MATTER OF THE TENURE : COMMISSIONER OF EDUCATION OF
HEARING OF PATRICK BROOKS : THE STATE OF NEW JERSEY
:
CITY OF WILDWOOD BOARD OF : OAL DOCKET NO. EDU10771-2011S
EDUCATION : AGENCY REF. NO. 238-8/11
:
: SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (hereinafter referred to as the "Settlement Agreement") is made effective as of the _____ day of _____, 2011 by and between the Petitioner, City of Wildwood School District Board of Education, Cape May County, New Jersey (hereinafter referred to the "Board") and the respondent, Patrick Brooks (hereinafter referred to as the "Respondent") (collectively the "parties").

WHEREAS, the Board is a body corporate and politic of the State of New Jersey, charged with the statutory responsibilities for the management and administration of the Wildwood School District in Cape May County, New Jersey; and

WHEREAS, the Respondent is presently employed by the Board as a tenured teacher/guidance counselor; and

WHEREAS, the Board filed certain tenure charges against Respondent alleging inefficiency, including but not limited to Respondent's continued inability and/or unwillingness to efficiently and effectively perform his duties more specifically by (a) failing to communicate with teachers and parents; (b) failing to perform his job responsibilities as required and outlined by the District; (c) failing to respond to e-mails and voice mails; (d) failing to meet with students in need of guidance counselor services as required; (e) failure to keep accurate and consistent counseling logs; (f) failing to turn in appointment logs; and (g) falsifying and fabricating information on the appointment logs and/or counseling logs, more specifically described in the tenure charges filed by the Board on March 29, 2011 (the "Tenure Charges") attached hereto as **Exhibit A**; and

WHEREAS, the Respondent, by formal response contested the Tenure Charges and offered explanations for his actions and behavior, attached hereto as **Exhibit B**; and

WHEREAS, the Commissioner of Education for the State of New Jersey (the "Commissioner") referred said charges to the Office of Administrative Law for a plenary hearing before the Honorable W. Todd Miller, A.L.J.; and

WHEREAS, a telephonic pre-hearing conference was held on October 6, 2011; and

WHEREAS, a pre-hearing Order was prepared and filed on October 6, 2011; and

WHEREAS, prior to the first hearing date scheduled for November 18, 2011, parties discussed terms and conditions of a Settlement Agreement which they believe resolve the dispute; and

WHEREAS, the parties wish to settle all controversies among and between including the charges contained in the Tenure Charges, the defenses and counterclaims,

contained in the Response and any and all related or unrelated claims, known or unknown, which could have been asserted by the Board or Respondent; and

WHEREAS, the Respondent acknowledges that on Monday, November 14, 2011 Respondent signed a letter of resignation and acknowledged his understanding that the Settlement Agreement would be put in writing corresponding to the representations discussed between the parties and their attorneys; and

WHEREAS, this agreement conforms to the discussions between the parties and their attorneys; and

WHEREAS, the parties acknowledge that the merits of the controversy are in dispute and that neither the Board nor Respondent admits any liability to either, but have reasons to desire that the matter be resolved; and

WHEREAS, the Board and Respondent specifically recognize and acknowledge that any settlement is contingent upon approval by the Commissioner as required by and consistent with the New Jersey Administrative Code Section 6A:3-5.6 and *In the Matter of the Tenure Hearing of Frank Cardonick*, State Board of Education decision of April 6, 1983 (1990 School Law Decisions, S.L.C. 842, 846); and

NOW THEREFORE, in consideration of the agreements, promises, covenants and conditions contained herein, the adequacy and sufficiency of which are expressly acknowledged by the parties hereto, the parties agree as follows:

1. **DISMISSAL OF ACTION.**

- (a) The Board will reinstate Respondent's increment withholding for the 2011-2012 school year and return Respondent to the Board's payroll effective August 31, 2011 at Respondent's 2011-2012 salary rate of \$81,206.00. Respondent shall

remain on the Board's payroll until January 31, 2012 at which point the irrevocable letter of resignation executed by Respondent on November 14, 2011 shall take effect.

- (b) On the date the Settlement Agreement is approved by the Commissioner of Education, the Board will pay Respondent in accordance with the following:

Salary 2011-2012 prorated from 8/31/11 through 1/31/12
(\$8,120.60 per month x 5 months = \$40,603.00)

The Board has and will continue to pay Respondent's health benefits from 8/31/11 through 1/31/12 for a total health benefit credit totaling \$3,277.77

The Board shall issue a check payable to the order of Respondent or his assignee in an amount of \$40,603.00 which check shall be placed with the Board's attorney to be held in a non-interest bearing escrow account.

- (c) Said salary and health benefit credit received as provided in paragraphs 1(a) and (b) shall constitute full and absolute payment by the Board to Respondent for all salary, benefits, emoluments or other claims, rights or privileges Respondent has, may have, claims or may claim, including but not limited to salary for any period, accumulated sick leave, vacation or other paid leave, benefits, fringe benefits, pension contributions, in-kind or other contributions, opt-out or other payments. Within one (1) week of the execution of this settlement agreement by the parties, Respondent shall direct the Board how such payment provided for in 1(b) shall be allocated. The Board within two (2) weeks (ten (10) business days) of the Commissioner of Education's approval of this Settlement Agreement shall issue a check payable to the order of Respondent or his assignee in the manner directed by Respondent.

(d) Upon the approval of the Commissioner of Education of this Settlement Agreement, the Board will withdraw and dismiss the Tenure Charges, forward Respondent the check provided for in paragraph 1(b) of this Settlement Agreement and Respondent's letter of resignation will become operative.

2. **RELEASE.**

Respondent, personally and for his assignee, estate and/or heirs, waives, releases and gives up any and all other claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that he may have against the Board and any and all of its officers, directors, agents, representatives and employees (present and forever) and their respective successors and assigns, heirs, executors and legal or personal representatives, based upon any act, event or omission occurring before the execution of this Settlement Agreement including, but not limited to, any events related to, arising from or in connection with Respondent's employment with the Board or the Tenure Charges. Respondent specifically waives, releases and gives up any and all claims arising from or relating to his employment and/or association with the Board Based upon any act, event or omission occurring before the execution of this Settlement Agreement including, but not limited to, any claim that was asserted or could have been asserted under any Federal or State statutes, regulations or common law or Board Policies or regulations.

LAW OFFICES

Caputo and Ballietto

303 NEW JERSEY AVENUE

P. O. Box 789

WILDWOOD, N. J. 08260

3. **NO CLAIMS PERMITTED/COVENANT NOT TO SUE.**

Respondent waives his right to file any charge or complaint on his own behalf, to participate as a complainant, a plaintiff or a charging party in any charge or complaint, or to collect damages as a result of any charge or complaint which may be made by any other person or organization on his behalf, with respect to anything which has happened up to the execution of this Settlement Agreement, before any Federal, State or local court of administrative agency against the Board except as such waiver is prohibited by law.

4. **ATTORNEY'S FEES.**

Each party agrees that each party will bear its own costs and attorney's fees which have been incurred in connection with the within matter and in conjunction with the negotiation and preparation of this Settlement Agreement.

5. **NO ADMISSION OF LIABILITY.**

It is expressly understood that neither the execution of this Settlement Agreement, nor any other action taken by the Respondent in conjunction with the Board's claims or this settlement, constitute admission by the Respondent or any violation of any law, duty or obligation. It is also understood that the acceptance of this settlement does not constitute any representation by the Board as to the merits of its claims or the lack thereof.

6. **ENTIRE AGREEMENT.**

This Settlement Agreement contains the sole and entire agreement between the parties hereto. Each party represents and acknowledges that prior to executing this

LAW OFFICES

Spero and Ballietto

03 NEW JERSEY AVENUE

P. O. BOX 789

WILDLWOOD, N. J. 08260

Settlement Agreement, they consulted with or had an opportunity to consult with counsel, have had ample time to do so and that no party relied upon any representation or statement not set forth in this Settlement Agreement made by any other party hereto, or their counsel or representatives, with regard to the subject matter of this Settlement Agreement. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Settlement Agreement.

7. **BOARD RESOLUTION.**

Attached hereto as **Exhibit C** is a true copy of a Resolution of the Board, adopted in compliance with the laws of the State of New Jersey, including the Open Public Meetings Act, duly satisfying this Settlement Agreement and authorizing the Board's signatory to sign this Settlement Agreement on its behalf.

8. **COMMISSIONER'S APPROVAL.**

It is expressly understood that this Settlement Agreement, and the settlement pursuant to the terms listed in this Settlement Agreement must first be approved by the Commissioner of Education and must meet the following standards as enumerated in N.J.A.C. 6A:3-5.6(a):

- (a) Accompaniment by documentation as to the nature of the charges: Petition of Charges are attached hereto and incorporated herein as Exhibit A with the Response attached hereto and incorporated herein as Exhibit B.
- (b) Explanation of the circumstances justifying the settlement or withdrawal: The Board agrees to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges, OAL Docket No. EDU10771-

2011S, Agency Reference No. 238-8/11 with prejudice in light of Mr. Brooks' resignation and the lump sum consideration paid by the Board. In executing this agreement, Mr. Brooks understands the ultimate decision with regard to the resolution of the Tenure Charges lies with the Commissioner of Education and in the event that the New Jersey Commissioner of Education rejects the settlement between the Board and Mr. Brooks, then this agreement is completely null and void and the Tenure Charges currently pending will continue to be processed. Mr. Brooks understands and has been advised by his counsel of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate. Attached as **Exhibit D** is Mr. Brooks' affidavit showing that he has been counseled in every respect and knows that the Board of Examiners can act independently.

- (c) Consent of both the charged and charging parties is evidence by this Settlement Agreement.
- (d) Indication the charged party entered into the agreement with a full understanding of his rights is evidenced by this Settlement Agreement.
- (e) A showing that the agreement is in the public interest as evidenced by this Settlement Agreement. This Settlement Agreement is also shown to be in the public interest as a result of the parties' separation and satisfaction of any and all claims related to the Tenure Charges. In addition, the public interest is supported by the saving of valuable witness education time in the form of the avoidance of students missing class time to testify in court and of teachers and

administrators missing time in school during which time their services are required in order to continue providing a thorough and efficient education to the Board's students. The avoidance of subjecting student witnesses to the stress of testifying in court is also evidence that this Settlement Agreement is in the public interest. Furthermore, the cost savings to the Board and the public as a result of settling the matter, which is significantly less than the cost associated with litigating the Tenure Charges, including appeals, evidence that this Settlement Agreement is in the public interest.

- (f) Where the charged party is a teaching staff member, a showing that the teaching staff member has been advised by counsel and, by recitation of this provision Respondent is advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

9. **NON-DISCLOSURE.**

Except as may be otherwise required of the Board pursuant to the Open Public Records Act and/or Open Public Meetings Act, such obligations may be modified by Federal or State statutory or administrative provisions as to the privacy of personnel records, no party will broadcast or publicize financial or other elements of this settlement to any third party. The parties are free to respond to inquiries made of them by indicating that the matter has been amicably resolved or satisfactorily settled, and recognize that the Board may disclose the substantive details of this settlement pursuant to a lawful request by providing a lawful request with a copy of this Settlement Agreement.

LAW OFFICES

Cero and Ballietto

3 NEW JERSEY AVENUE

P. O. BOX 789

EDWOOD, N J 08260

10. **REFERENCE.**

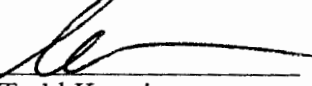
In the event the Board is contacted with regard to Respondent's employment, the Board will not provoke any reference positive or negative and will only provide Respondent's dates of employment.

IN WITNESS WHEREOF the parties have set their hands and seals as of the day and year first written.

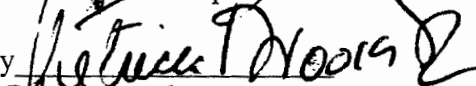
By: 
Andrew J. Caffero, Esq.
Attorney for Petitioner

Date 12/21/11

By: 
Ned Rogovoy, Esq.
Attorney for Respondent

By: 
Todd Kenninger
Wildwood School District
Board of Education President

Date 12/21/11

By: 
Patrick Brooks
Respondent

LAW OFFICES

Cero and Ballietto

3 NEW JERSEY AVENUE

P. O. Box 789

LDWOOD, N. J. 08260

WILDWOOD BOARD OF EDUCATION

Office of the Business Administrator

4300 Pacific Avenue

Wildwood, New Jersey 08260

609-522-0786 609-523-1014 (fax)

29
March 28, 2011

Mr. Patrick Brooks, Jr.
321 W. Garfield Avenue
Wildwood, New Jersey 08260

Dear Mr. Brooks:

Please be advised that as the Board Secretary for the Wildwood Board of Education I am in receipt of a certified charge of inefficiency regarding the performance of your duties and job performance. This charge has been filed by Mr. Christopher Armstrong, Principal of the Wildwood High School.

Mr. Armstrong has provided me with a written statement of evidence in support of that charge.

By this letter I am taking the following actions:

1. I am notifying you, and your representative of the charge of inefficiency and my receipt of the written statement of evidence;
2. I am including, with this letter, a copy of the written statement of evidence;
3. I am informing you that unless such inefficiencies are corrected within a ninety (90) day period, or any longer period provided by the Board, the Board of Education intends to certify charges of inefficiency to the Commissioner of Education pursuant to N.J.S.A. 18A:6-11;
4. I am directing that you be provided a modification to your Professional Improvement Plan, as mandated by N.J.A.C. 6A:32-4.4, to assure that the plan modification addresses the specific charges of inefficiency and comports with the timelines established for correction;
5. I have directed that a copy of this modification to your Professional Improvement Plan be provided to you, and your representative, today, March 28, 2011.

Upon completion of the ninety (90) day period for improvement or longer period as may be provided by the District Board of Education, the administrator responsible for bringing such charges to the attention of the Board must notify the Board, in writing, what charges, if any, have not been corrected.

I urge you, Mr. Brooks, to carefully review the modified Professional Improvement Plan. If, at any time, there are any tasks you are uncertain how to perform, or need any assistance in

performing them you should seek immediate assistance from you supervisor or other administrator.

Should you have any questions regarding this matter please do not hesitate to contact me directly.

Sincerely,

A handwritten signature in black ink, appearing to read "Gregory S. Rohman", followed by a horizontal line.

Gregory S. Rohman
Business Administrator/ Board Secretary

cc: D. Anderson, Superintendent
C. McDonald, WEA President
A. Cafiero, Solicitor
W. Hybbeneth, Consultant
File

In The Matter of the
PATRICK BROOKS

:
:
: WRITTEN CHARGE OF
: INEFFICIENCY
:

STATE OF NEW JERSEY)
 :SS:
COUNTY OF CAPE MAY)

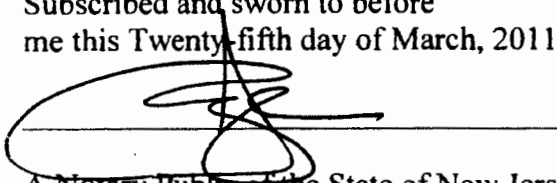
I, Christopher Armstrong, Principal of the Wildwood High School, by way of a written charge against Patrick Brooks, employee of the Wildwood Public School District, says:

Patrick Brooks, employee for the Wildwood School District is charged with inefficiency due to his continued inability and/or unwillingness to efficiently and effectively perform his duties, more specifically by (a) failing to communicate with teachers and parents; (b) failing to perform his job responsibilities as required and outlined by the District; (c) failing to respond to e-mails and voice mails; (d) failing to meet with students in need of guidance counselor services as required; (e) failing to keep accurate and consistent counseling logs; (f) failing to turn in appointment logs; and (g) falsifying and fabricating information on the appointment logs and/or counseling logs.

I, Christopher Armstrong, upon my sworn oath hereby acknowledge that the
aforementioned written charge of inefficiency is true and accurate to the best of my knowledge.
I am aware that if any of the foregoing statements made by me are willfully false, I am subject
to punishment.

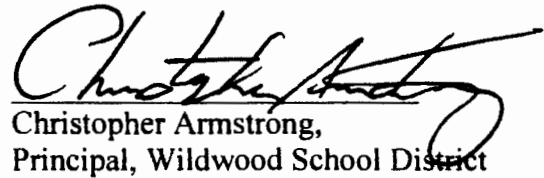
Dated:

Subscribed and sworn to before
me this Twenty-fifth day of March, 2011.



A Notary Public of the State of New Jersey

JESSICA ANAYA
Notary Public of New Jersey
My Commission Expires 12/15/2015
ID No. 2184669



Christopher Armstrong,
Principal, Wildwood School District

In The Matter of the
PATRICK BROOKS

I
:
:
: SWORN STATEMENT OF EVIDENCE
: UNDER OATH
:

STATE OF NEW JERSEY)
:SS:
COUNTY OF CAPE MAY)

I, Christopher Armstrong, in support of the written charge for inefficiency filed against Patrick Brooks, employee of the Wildwood School District, upon my sworn oath do hereby depose and say:

1. I am a Principal for the Wildwood Public School District and I am hereby authorized to make representations on its behalf.
2. I have thoroughly investigated the matter of Patrick Brooks, an employee of the Wildwood School District, and I am qualified to execute this affidavit relating to Mr. Brooks and the facts as set forth in this sworn statement.
3. In a memo to Mr. Brooks from then Director of Guidance Russell Heaton from December 1, 2005 Mr. Brooks was admonished for failure to maintain accurate logs of his meetings with special needs students as required by their IEPs. It was noted his logs did not reflect any of the mandated sessions required for some IEP students and showed too few sessions for others. For example some students who should have

- received one session a week (approximately 8 sessions by the time of the memo) were shown in Mr. Brooks' logs as having received only two or three sessions. In several of those cases the counseling sessions indicate they were held on weekends.
4. In an annual performance report of Mr. Brooks for 2005-2006 dated May 5, 2006 it was noted that Mr. Brooks repeatedly failed to meet the mandates of special education student's IEPs with regard to the number and length of counseling sessions for special education students. It is also noted that Mr. Brooks failed to accurately document his IEP counseling sessions.
 5. In that performance report it is noted that in his logs Mr. Brooks recorded holding counseling sessions with students on days when the students were absent from school and on weekends, despite having been given written and verbal direction as to the necessity to maintain accurate records of these sessions.
 6. In that performance report it is noted that despite repeated requests Mr. Brooks failed to produce his IEP conference logs for the month of March 2006.
 7. In that performance report it is noted that Mr. Brooks was a member of the New Jersey Youth Correctional Facility Board of Directors and would attend meetings for that agency on a monthly basis. It was noted that Mr. Brooks had been granted, at his request, a full day of professional duty leave for the meetings. The memo states that the administration learned that attendance at the meetings did not require a full day of leave and informed Mr. Brooks that he would no longer be granted a full day of leave to attend those meetings.
 8. In a memo dated November 22, 2006 then Director of Guidance Russell Heaton admonished Mr. Brooks for failure to carry out an administrative directive which

caused “a continuation of (a) dispute and interfered with (an) administrator’s attempt to mediate” between parties in an ongoing dispute.

9. In that same memo Mr. Heaton admonished Mr. Brooks for his failure to follow directives to notify his co-workers as to his whereabouts when not in his office and his failure to spend adequate time in his office “performing essential duties”.
10. In that same memo Mr. Heaton admonished Mr. Brooks for ignoring teacher requests for parent conferences, and for failing to attend parent conferences when requested.
11. In that same memo Mr. Heaton admonished Mr. Brooks for failure to complete in a timely manner the forms used to refer students for child study team evaluations.
12. In that same memo Mr. Heaton admonished Mr. Brooks for failure to enter schedule changes into the student data base. Mr. Heaton noted that both he and Mrs. Clevenger had given Mr. Brooks instruction on how to make those changes. Additionally, computer training workshops had been offered to Mr. Brooks which he chose not to attend.
13. In that same memo Mr. Heaton admonished Mr. Brooks for not scheduling students in a timely manner which “...interrupts their educational progress...”
14. In that same memo Mr. Heaton admonished Mr. Brooks for not seeing students who received poor progress reports, for failure to log any such discussions with students.
15. At the May 10, 2006 Wildwood Board of Education meeting the Board of Education voted to withhold Mr. Brooks’ 2006-2007 salary increment.
16. In August 2010, following a restructuring of the guidance department, Mr. Brooks was given a new office. Ms. Clevenger organized the office for Mr. Brooks and set up the files in order for them to be compliant with district requirements. One filing cabinet

was organized to hold files pertaining to his job, with a drawer for each of the four grade levels Mr. Brooks was assigned (grades 6 through 9). A labeled file folder was established for each of the students assigned to Mr. Brooks. Labeled bins were established with necessary forms and additional bins were labeled for completed forms. A cork board was hung behind the desk with school calendars and schedules. A stand-up "flip file" with lists of students was attached to his desk. Binders of student schedules and information were organized by grade level and alphabetized by student name. On the first day of school Ms. Clevenger gave a complete in-service on how to use the organization and maintain it.

17. On October 13, 2010, Principal Gladys Lauriello forwarded a letter to Patrick Brooks regarding two students who were having problems with mathematics. A teacher had requested that the students' schedules be changed by Mr. Brooks. Mr. Brooks failed to respond in a timely manner and change the students' schedules to their detriment. The letter further informed him that he must communicate more effectively with teachers and students in the future.
18. On October 22, 2010, Mary Beth Clevenger, Assistant Principal, forwarded to Mr. Brooks a comprehensive outline of Mr. Brooks' responsibilities which specified his guidance counselor duties for grades 6 through 9. This outline also included a freshman procedure list/guide.
19. On October 22, 2010 and October 26, 2010, Mary Beth Clevenger, Assistant Principal, forwarded a memo to Mr. Brooks indicating that he was not using appointment forms as required as outlined in the memo of October 22, 2010, and that he was not

scheduling enough appointments to meet with students during the course of the school day.

20. In addition, Ms. Clevenger provided Mr. Brooks with a list of freshmen in need of academic counseling due to their progress reports (each freshman had a D or an F on his or her report card). Ms. Clevenger instructed Mr. Brooks to send out appointment notices for these freshmen.
21. Also, Ms. Clevenger mandated that Mr. Brooks devise a weekly reporting system for freshmen with two or more failing grades.
22. In her October 26, 2010 memo, Ms. Clevenger also referenced an e-mail dated 10/19/2010 from Jean McCarthy, the Child Study Team Supervisor, to Mr. Brooks in which Ms. McCarthy stated that Mr. Brooks erroneously placed two new students in special education courses when they were not special education students. He did not respond to the e-mail, nor did he change the student's schedules. Because Mr. Brooks had not changed the schedules as directed, Mrs. Clevenger changed students' schedules to reflect their regular education enrollment. Despite the emails and memo, Mr. Brooks did not discuss this problem with Mrs. Clevenger or Ms. McCarthy.
23. On November 22, 2010, Mary Beth Clevenger again wrote to Mr. Brooks wherein she again implored him to utilize the appointment forms and schedule meetings with students who had Ds and/or Fs on their report cards. She directed that he fill out appointment notices for students in need of academic counseling and give the notices to the students' home room teachers.
24. Patrick Brooks refused and/or neglected to comply with Ms. Clevenger's instructions. From 9/2/2010-10/22/2010 there was no evidence or indication of compliance with

Ms. Clevenger's directives despite repeated conversations, specific directions, and training in all areas of concern.

25. In her November 22, 2010 letter to Mr. Brooks, Ms. Clevenger also told him to complete an academic conference report for each student he met with and to place the report in each student's file thereafter. She wanted to know what took place at the conferences as well as the duration of same. This form was developed by the former Director of Guidance, Mr. Russell Heaton, and has been used by all other counselors since the 2005-2006 school year. There is no evidence that Mr. Brooks ever used the forms.
26. On December 1, 2010, a concerned parent, Marielis Gonzalez, forwarded a letter to the District complaining that Mr. Brooks did not return her numerous telephone calls.
27. In the same letter, Ms. Gonzalez stated that her daughter was a classified student and that Mr. Brooks continually failed to counsel her daughter as required.
28. In addition, Ms. Gonzalez stated that she wanted to discuss with Mr. Brooks an issue her daughter had with another student in hopes of defusing a potential conflict. She believed Mr. Brooks' failure to respond resulted in her daughter being assaulted.

Mrs. Clevenger returned Ms. Gonzalez's call on 11/19/2010 and was told that there had been no return calls from Mr. Brooks. Ms. Gonzalez stated that on 11/15/2010 students started calling Marielis (her daughter) names. After talking with Marielis on 11/19/2010 Mrs. Clevenger intervened and put a stop to the disagreement
29. On December 7, 2010, the guidance counselor from Upper Township Middle School called to discuss a new student, advising Mary Beth Clevenger that she had left several messages for Mr. Brooks but he had never returned her calls. The student had been

- one of the students on Mr. Brooks' roster of students and was transferring to Upper Township. Because Mr. Brooks had never returned the telephone calls or supplied the needed information Ms. Clevenger had to supply the Upper Township counselor with the necessary statistical information for the purpose of placing the new student appropriately (these were duties that should have been performed by Mr. Brooks).
30. On or about December 8, 2010, Mr. Brooks was admonished for again violating school procedure outlining approval for schedule changes by placing a non-special education student into a special education class and for misrepresenting that an administrator (more specifically Mary Beth Clevenger) approved the change when she had, in fact, not done so. This represented a material misrepresentation of fact on the part of Mr. Brooks.
31. Mr. Brooks used the school's schedule change form to take a student out of a College Prep History class and placed him in a general level history class. Mr. Brooks did not get this change approved. He did not discuss the change in class and level with either of the teachers involved.
32. When Mr. Brooks made this change he incorrectly coded the student on the form as if the student were a special education student.
33. Mr. Brooks did not initiate a change of schedule in the student data base, so the student's official schedule and transcript still reflected the student as enrolled in the College Prep class.
34. Mr. Brooks did not communicate the schedule change to any of the teachers involved. He filled out the paper and asked the student to communicate the change to the teachers.

35. On December 9, 2010, then Principal Gladys Lauriello met with Mr. Brooks for the purpose of discussing his duties and responsibilities as mandated and thoroughly explained through various meetings, conversations and communications between the administration and Mr. Brooks dating back to October, 2010.
36. During this meeting, Ms. Lauriello discussed with Mr. Brooks the fact that he still was not providing daily logs, was not meeting with the requisite number of students as required in a timely manner, was not completing the requested counseling reports, and was not responding to e-mails or telephone messages (there were approximately 270 unopened messages, many from teachers regarding student concerns and other messages from school administrators regarding Mr. Brooks' duties and responsibilities).
37. Dr. Lauriello had previously verified this failure to read and respond to emails by opening Mr. Brooks' email account and viewing his unopened emails. This action was witnessed by Christopher Armstrong, Assistant Principal and Mrs. Clevenger, Assistant Principal
38. During the December 9, 2010 meeting with Principal Lauriello, Mr. Brooks produced a handful of student files, most of which contained no student information whatsoever.
39. The few files that contained information, merely included notes regarding dates of meetings (there was nothing in them pertaining to the purpose of the meetings or the duration of the meetings as required). The duration of the meetings is crucial for IEP and Academic At Risk student purposes. The importance of this information had been previously made clear to Mr. Brooks.

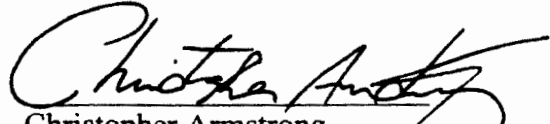
40. Dr. Lauriello stated to Mr. Brooks that he was still not following the documentation procedure prepared and provided by Ms. Clevenger on October 22, 2010.
41. Perhaps most importantly, there were discrepancies and inconsistencies contained in the appointment/conference logs.
42. During this meeting Mr. Brooks stated, and showed his logs as verification, that he had held conferences with students in his office on specific dates and times. Mr. Brooks could not possibly have met with the students at those times as he was, in fact, in other parts of the building attending Middle School Team meetings during the times he claimed to be meeting with students, constituting a misrepresentation of material fact.
43. Also, Mr. Brooks claimed to have met with students who were absent on the days he claimed to have met with them, constituting a misrepresentation of material fact.
44. In addition, Mr. Brooks claimed to have met with students who were no longer Wildwood students at the time he claimed to have met with them, constituting a misrepresentation of material fact.
45. On or about December 10, 2010, Mr. Brooks did not follow or otherwise carry out a progress report plan implemented by Cape May County Crisis Intervention intended to rehabilitate a student that was in trouble.
46. On or about December 21, 2010, Mr. Brooks blatantly ignored a secretary's request that he counsel a student that was physically and emotionally upset after he, the student, broke up with his girlfriend.
47. On January 18, 2011, it was noted in school records that despite a memo dated October 22, 2010 directing him to ensure his records were legible, Mr. Brooks was still preparing illegible log sheets that made it impossible for the Child Study Team to

determine whether IEP's mandates were met. This also made it impossible for the Child Study Team to monitor the student interaction with Mr. Brooks in academic counseling to see that the administrative mandates were met. On January 19, 2011 a second memo was issued to Mr. Brooks directing him, again, to maintain his logs and records in a legible manner.

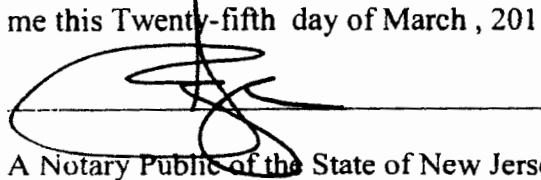
48. Between January 12, 2011 and January 21, 2011, Mr. Brooks failed to respond to a teacher's request that he meet with two students that were failing Spanish.
49. At the Board of Education meeting on January 19, 2011 the Wildwood Board of Education voted to withhold Mr. Brooks' salary adjustment increment for the 2011-2012 school year due to "blatant deficiencies" which were noted in his job performance. On January 20, 2011 Mr. Dennis J. Anderson, Superintendent of Schools, notified Mr. Brooks of this action in writing.
50. In light of the pattern of Mr. Brooks' conduct over many years, which remains unchanged despite him being provided with guidance, support and warnings from the school administrators, and remains unchanged despite having received formal disciplinary action by the Board of Education on two occasions in the form salary increment withholdings – one in 2006 and one in 2011 – I prepare and execute this sworn, written statement of evidence in support of the written charge that Mr. Brooks has performed and continues to perform his duties in an inefficient manner.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated:


Christopher Armstrong,
Principal, Wildwood School District

Subscribed and sworn to before
me this Twenty-fifth day of March, 2011.


A Notary Public of the State of New Jersey

JESSICA ANAYA
Notary Public of New Jersey
My Commission Expires 12/15/2015
ID No. 2184669

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

General Conditions:

These general conditions are to be applied to all goals and objectives of this Action Plan even if not explicitly stated in the individual goal's guidelines.

1. It is the goal of this action plan to assist the Counselor in improving his performance and remediating those areas which the administration has identified as areas of concern in the execution of his duties and responsibilities.
2. This action plan will remain in place for a minimum of ninety (90) days in order to ensure that every opportunity has been provided to the Counselor in his efforts to improve and eliminate the areas of concern, while also offering support, encouragement and assistance to the Counselor in his efforts to reach that goal.
3. If at any time the Counselor is unclear, unsure, or in any way not certain of the expectations, directions, or how to accomplish a task he is directed to seek immediate assistance from his supervisor. If his supervisor is unable to assist in the matter the Counselor is directed to seek additional help from another administrator. Administrative, technical, secretarial, and other assistance are available to assist him in complying with the expectations in this Action Plan.
4. The Counselor is to respond to all email, telephone messages, letters, and requests during the same day in which they are received.
5. The Counselor will respond to all other correspondence, within one work day of receipt, unless otherwise stated.
6. The Counselor is to log or note all activities in the daily planner as they occur.
7. The Counselor is to log all interactions with students, parents, staff, and agencies using the appropriate form(s) and placed in the student's folder within one day of the event/ meeting.
8. For the first 30 days of the action plan all items are to be checked daily by the Supervisor. If there is adequate improvement and compliance monitoring will thereafter be done on a weekly basis, as long as improvement and compliance continue.

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
Goal #1: Increase daily student academic counseling for all at-risk students per progress report and end of marking periods.	Academic Development Stand. A-C	• Use suggestions from weekly supervisor and department meetings • Utilize all forms provided • Maintain time on task guidelines during all sessions • Utilize School database for reviewing student schedules, academic progress, contact information, etc. • Utilize daily planner for maintaining a list of all appointments in order to maximize the daily activities. • Utilize provided office space for meetings and conferences rather than meeting with students and staff in the hallways • Log all incoming telephone calls in the daily planner indicating the time, person spoken with, and topic. • Log all outgoing and returned calls in the daily planner indicating the time, person spoken with, and topic. • All telephone messages are to	On-going until June, 2011 For the first 30 days of the action plan all items are to be checked daily by the Supervisor. If there is adequate improvement and compliance monitoring will thereafter be done on a weekly basis, as long as improvement and compliance continue. Logs are to be submitted to Supervisor for review on the last work day of each week. Daily Planner is to be reviewed by	• Daily Interview Control Sheet (Log) • Conference Summary Forms • Student Files • Counselor's daily appointment planner • Report Card & Progress Report At-Risk lists • Academic Contracts • Report Card Conference Form • Student Visit Passes • Guidance Dept. Visitor Log • Email and telephone usage will be monitored

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
		be logged, and responded to, during the work day during which they are received. • All email is to be opened and, when appropriate, responded to during the work day in which it is received. • At conferences with students follow-up action items are to be developed and noted in the student file and daily planner. • Specific notes regarding time of meeting, topic, and follow-up action items (if necessary) are to be placed in the student's file either during or immediately following the conference with the student.	Supervisor at least weekly. Post-meeting action plans are to be reviewed monthly by Supervisor.	
Goal #2: Increase communication with parents and families by providing information to students and their families regarding student progress, major assignments, etc.	Academic Development Stand. A-C Personal/Social Development Stand. A-B	• Use suggestions from weekly supervisor and department meetings • Utilize all forms provided • Maintain time on task guidelines during all sessions • Utilize daily planner for appointments in order to maximize the daily activities. • Utilize School database for reviewing student schedules,	On-going until June, 2011 For the first 30 days of the action plan all items are to be checked daily by the Supervisor. If there is adequate improvement and compliance	• Daily Interview Control Sheet (Log) • Conference Summary Forms • Student Files • Counselor's daily appointment planner • Report Card & Progress Report At-Risk lists • Phone log

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
		academic progress, contact information, etc. • Utilize all communication tools, telephone, email, letters (specific and form), parent interviews and appointments • Utilize provided office space for meetings and conferences with parents and families. • Log all incoming telephone calls in the daily planner indicating the time, person spoken with, and topic. • Log all outgoing and returned calls in the daily planner indicating the time, person spoken with, and topic. • All telephone messages are to be logged, and responded to, during the work day during which they are received. • All email is to be opened and, when appropriate, responded to during the work day in which it is received. • At conferences with parents and families follow-up action items are to be developed and noted in the student file and daily	monitoring will thereafter be done on a weekly basis, as long as improvement and compliance continue. Logs are to be submitted to Supervisor for review on the last work day of each week. Daily Planner is to be reviewed by Supervisor at least weekly. Post-meeting action plans are to be reviewed monthly by Supervisor.	• Email account • Correspondence file • Academic Contracts • Guidance Dept. Visitor Log • Email and telephone usage will be monitored

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
Goal #3: Maintain CST student counseling per the CST's IEP requirement.	Academic Development Stand. A-C Personal/Social Development Stand. A-C Career Development Stand. A-C	planner. • Use suggestions from weekly supervisor and department meetings as to groupings. • Utilize all forms provided • Maintain time on task guidelines during all sessions • Utilize daily planner for appointments in order to maximize the daily activities. • Utilize School database for reviewing student schedules, academic progress, contact information, etc. • Utilize all communication tools, telephone, email, letters (specific and form), parent interviews and appointments • Meet with CST Caseworker bi-weekly. • During meeting with CST Caseworker develop action items for CST (meeting schedules, counseling sessions, key dates, etc.). Log these to the daily planner. • Utilize provided office space for meetings and conferences rather than meeting with	On-going until June, 2011 For the first 30 days of the action plan all items are to be checked daily by the Supervisor. If there is adequate improvement and compliance monitoring will thereafter be done on a weekly basis, as long as improvement and compliance continue. Logs are to be submitted to Supervisor for review on the last work day of each week. Daily Planner is to be reviewed by	• Daily Interview Control Sheet (Log) • Conference Summary Forms • Student Files • Counselor's daily appointment planner • Report Card & Progress Report At-Risk lists • Academic Contracts • Report Card Conference Form • Student Visit Passes • Guidance Dept. Visitor Log • Email and telephone usage will be monitored

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
		students and staff in the hallways • Log all incoming telephone calls in the daily planner indicating the time, person spoken with, and topic. • Log all outgoing and returned calls in the daily planner indicating the time, person spoken with, and topic. • All telephone messages are to be logged, and responded to, during the work day during which they are received. • All email is to be opened and, when appropriate, responded to during the work day in which it is received. • At conferences with students follow-up action items are to be developed and noted in the student file and daily planner.	Supervisor at least weekly. Post-meeting action plans are to be reviewed monthly by Supervisor.	
Goal #4: Increase student involvement in Peer Mediation services when appropriately indicated.	Personal/Social Development Stand. A-C	• Use program in place via MS secretary • Choose HS mediator based on students involved in conflict. • Review with mediator expectations and procedures for mediation process.	On-going until June, 2011 For the first 30 days of the action plan all items are to be checked daily by	• Conference Summary Forms • Student Files • Guidance Dept. Visitor Log • Peer Mediation forms

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
		• Ensure that mediation session is held not more than one week after incident. • Within one week of mediation session hold follow-up session with students involved and mediator. • In cases where there is uncertainty on the part of the counselor if they should notify the parents of involved students, the counselor is to consult with his supervisor immediately. • Use suggestions from weekly supervisor and department meetings as to groupings. • Utilize all forms provided • Maintain time on task guidelines during all sessions • Utilize provided conference room space • Perform appropriate follow-up with Mediators within one school day of mediation meeting. This meeting and a brief summary are to be noted in Daily Log and any other appropriate logs.	the Supervisor. If there is adequate improvement and compliance monitoring will thereafter be done on a weekly basis, as long as improvement and compliance continue. Logs are to be submitted to Supervisor for review on the last work day of each week. Daily Planner is to be reviewed by Supervisor at least weekly. Post-meeting action plans are to be reviewed monthly by Supervisor.	• Email and telephone usage will be monitored

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
		Notes are to be placed in the appropriate student files the same day as events and mediation sessions are held.		
Goal #5: Attend and participate in all requested and contractual meetings (IEP, I & RS, Guidance Dept., Supervisor, Team, etc...).	Professional Development Standard 1-3 5 10 12	- Use suggestions from weekly supervisor and department meetings as to groupings. - Utilize all forms provided - Maintain time on task guidelines during all sessions - Utilize daily planner for appointments in order to maximize the daily activities. - Utilize School database - Utilize all communication tools, telephone, email. - Utilize a meeting Log Sheet to be placed in appropriate student files the same day as meeting was held.	On-going until June, 2011 For the first 30 days of the action plan all items are to be checked daily by the Supervisor. If there is adequate improvement and compliance monitoring will thereafter be done on a weekly basis, as long as improvement and compliance continue. Supervisor to review sign-in sheets, logs, etc. to ensure attendance.	- Conference Summary Forms - Student Files - Daily Interview Control Sheet (Log) - Counselor's daily appointment planner - Verbal reports during Supervisor's meeting - Meeting Log Sheet - Email and telephone usage will be monitored
Goal #6: Effectively communicate with	Professional Development	Use suggestions from weekly supervisor and department	On-going until June, 2011	- Email account - Voicemail account

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
staff and administration.	Standard 1-3 5 10 12	meetings as to groupings. • Maintain time on task guidelines during all sessions • Utilize daily planner for appointments in order to maximize the daily activities. • Utilize all communication tools, telephone, email to initiate and respond to staff and administration • Respond in timely fashion to staff and administrative needs. • Log all incoming telephone calls in the daily planner indicating the time, person spoken with, and topic. • Log all outgoing and returned calls in the daily planner indicating the time, person spoken with, and topic. • All telephone messages are to be logged, and responded to, during the work day during which they are received. • All email is to be opened and, when appropriate, responded to during the work day in which it is received. • All requests for information are	For the first 30 days of the action plan all items are to be checked daily by the Supervisor. If there is adequate improvement and compliance monitoring will thereafter be done on a weekly basis, as long as improvement and compliance continue. Logs are to be submitted to Supervisor for review on the last work day of each week. Daily Planner is to be reviewed by Supervisor at least weekly.	• Phone log • Daily Interview Control Sheet (Log) • Meeting Log Sheet • Counselor's daily appointment planner • Email and telephone usage will be monitored

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
		to be responded to during the work day in which it is received. If additional time is needed to resolve the matter a response is to be sent indicating that.	Post-meeting action plans are to be reviewed monthly by Supervisor.	
Goal #7: Implement and oversee all Freshman Guidance areas as outlined in the Guidance Counselor responsibilities list provided.	Academic Development Stand. A-C Personal/Social Development Stand. A-C Career Development Stand. A-C	• Use suggestions from weekly supervisor and department meetings as to groupings. • Maintain time on task guidelines during all sessions • Utilize daily planner for appointments in order to maximize the daily activities. • Utilize all communication tools, telephone, email to initiate and respond to staff and administration. • Utilize Ambassador Program file to successfully plan and implement program. • All planning for Ambassador Program is to be reviewed with supervisor at least one month prior to visit. • All sending districts are to be contacted at least one month in advance of visit to ensure schedule compatibility.	On-going until June, 2011 For the first 30 days of the action plan all items are to be checked daily by the Supervisor. If there is adequate improvement and compliance monitoring will thereafter be done on a weekly basis, as long as improvement and compliance continue. Logs are to be submitted to Supervisor for review on the last	• Daily Interview Control Sheet (Log) • Conference Summary Forms • Student Files • Counselor's daily appointment planner • Report Card & Progress Report At-Risk lists • Academic Contracts • Report Card Conference Form • Student Visit Passes • Guidance Dept. Visitor Log • Email account • Voicemail account • Phone log • Peer Mediation forms • Email and telephone

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
		- All sending districts are to be contacted one week prior to the event via email and/or telephone to review names of participants, arrangements, etc. - Student questionnaires are to be collected at the end of the visitation day, and then reviewed. A summary of the remarks and findings of the questionnaire is to be submitted and discussed with the supervisor within one week of the event. - Utilize secretarial staff for scheduling students for HS placements by supplying secretarial staff with a list of scheduled students each day. Secretarial staff will enter the schedule into the data base, if appropriate. The counselor will review the entered schedule for accuracy on the same day as it is entered. - In the event a student earns less than a "C" in a class the counselor will contact the teacher within one day of the	work day of each week. Daily Planner is to be reviewed by Supervisor at least weekly. Post-meeting action plans are to be reviewed monthly by Supervisor.	usage will be monitored

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
		grade report. - Progress reports will be reviewed prior to being distributed. Students with less than a "C" in a class will be contacted and scheduled for an appointment. - Counselor will attempt to contact via telephone every parent/ guardian whose child is out three (3) or more days. Contact attempts are to be logged in the daily planner and student contact log. - Utilizing the manner described above, additional follow-up contacts are required for students who miss an additional three (3) days.		
Goal #8: Facilitate and maintain student schedules and student records with regard to transfer in and transfer out.	Academic Development Stand. A-C	- Use suggestions from weekly supervisor and department meetings as to groupings. - Maintain time on task guidelines during all sessions - Utilize daily planner for appointments in order to maximize the daily activities. - Utilize all communication tools, telephone, email.	On-going until June, 2011 For the first 30 days of the action plan all items are to be checked daily by the Supervisor. If there is adequate improvement and	- Daily Interview Control Sheet (Log) - Conference Summary Forms - Student Files - Counselor's daily appointment planner - Report Card Conference Form - Student Visit Passes

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
		• Within one school week (five school days) of enrollment the counselor will utilize secretarial staff as needed for securing student grade, test scores, attendance and discipline records from previous schools. • In the event that materials do not arrive within one week the counselor will contact the school and re-request records. • All contacts are to be noted in daily planner. • Counselor will meet student within two school days of the arrival of the materials in order to review as needed, adjust schedule, etc. • Oversee your new student's cumulative folders to ascertain their completeness, as per standard requirements. If folder is not complete within one week of enrollment, counselor will contact the student, parent, and/or former school district to secure needed materials. • Communicate with schools, guidance counselors, and	compliance monitoring will thereafter be done on a weekly basis, as long as improvement and compliance continue. Logs are to be submitted to Supervisor for review on the last work day of each week. Daily Planner is to be reviewed by Supervisor at least weekly.	• Guidance Dept. Visitor Log • Student database • Approved Schedule Change Form • New Student Entry Forms • Email and telephone usage will be monitored

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
		agencies as needed. Return calls are to be made within one school day of receiving a request for information, etc. • All correspondence, email, telephone calls, or telephone messages are to be responded to within one school day of receipt. • Complete all new student entry forms and have reviewed by administration within one week of student enrollment in the district. Work is to be logged in daily planner and the student folder. • Participate in 8th to 9th grade scheduling training run by Mrs. Clevenger, designed to train the counselor in how to schedule high school students. • Participate in all database and scheduling trainings offered, both administratively and product training. • Complete all Approved Schedule Change forms within one school day. All completed Schedule Change forms are to		

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
		be submitted the same day to the supervisor for review. Once approved all forms are to be given to the guidance secretary for processing and filing. All teachers involved in the change are to be notified the same day as the schedule change is initiated. All activity is to be logged in the Daily Planner.		
Goal #9: Effectively communicate with outside agencies as required.	Personal/Social Development Stand. A-C Career Development Stand. A-C	- Refer students/families to Cape Counseling or others when outside counseling services are needed. Log it to daily planner and child's file. - Refer students/families to DYFS according to the Professional Development recently provided. Utilize any and all materials distributed as resources for determining the appropriateness of this step. Log it to daily planner and child's file - Refer student/families to Family Crisis Intervention Unit as in serviced by CST. - Communicate after obtaining	On-going until June, 2011 For the first 30 days of the action plan all items are to be checked daily by the Supervisor. If there is adequate improvement and compliance monitoring will thereafter be done on a weekly basis, as long as improvement and compliance continue.	- Daily Interview Control Sheet (Log) - Conference Summary Forms - Student Files - Counselor's daily appointment planner - Guidance Dept. Visitor Log - Email account - Voicemail account - Phone log - Email and telephone usage will be monitored

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
		proper releases with all outside agencies with respect to your student load and any circumstances requiring outside intervention. This communication is to be initiated the same day the counselor becomes aware of the incident or condition. Copies of releases are to be stored in the student's cumulative folder immediately upon receiving them.	Logs are to be submitted to Supervisor for review on the last work day of each week. Daily Planner is to be reviewed by Supervisor at least weekly. Supervisor is to periodically review all files to ensure releases are obtained and documentation is properly maintained.	
Goal #10: Effectively maintain logs and records.	Professional Development Standard 1-3 5 10	- Use suggestions from weekly supervisor and department meetings - Utilize all forms provided - Maintain time on task guidelines during all sessions	On-going until June, 2011 For the first 30 days of the action plan all items are to	- Daily Interview Control Sheet (Log) - Conference Summary Forms - Student Files - Counselor's daily

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
	12	- Utilize daily planner for appointments in order to maximize the daily activities. - Utilize provided office space as designed for proper filing of records. Filing of records should be done immediately upon the student's departure from the guidance office. - Utilize all communication tools, telephone, email, letters (specific and form), parent interviews and appointments to maximize student and parent contact.	be checked daily by the Supervisor. If there is adequate improvement and compliance monitoring will thereafter be done on a weekly basis, as long as improvement and compliance continue. Logs are to be submitted to Supervisor for review on the last work day of each week. Daily Planner is to be reviewed by Supervisor at least weekly. Supervisor is to periodically review all files to ensure releases are	appointment planner - Guidance Dept. Visitor Log - Email account - Voicemail account - Phone log - Correspondence file - Academic Contracts - Verbal reports during Supervisor's meeting - Meeting Log Sheet - Email and telephone usage will be monitored

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
			obtained and documentation is properly maintained.	

Signed (Administrator)

Date

Signed (Counselor)

WILDWOOD PUBLIC SCHOOLS
4300 Pacific Avenue
Wildwood, New Jersey 08260

PROOF OF SERVICE FORM

PERSONAL RECEIPT

On 3/29/11, I received a copy of the following document(s) by hand delivery.

1. Letter from Board Secretary re: Charge of Inefficiency, transmittal of "Statement of Evidence", Modification of PIP
2. Charge of Inefficiency
3. Copy of "Statement of Evidence" in support of inefficiency charge
4. Copy of Professional Improvement Plan

I, Patrick Brooks, understand that copies of these documents will be placed in my personnel file.

Receipt of this document does not mean that I agree with the statements contained therein.

I declare that I am over the age of 18 years. I also declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on

March 29 2011 at Wildwood, New Jersey

Patrick Brooks, Jr.
Patrick Brooks, Jr.

Jon W. Stevenson
Representative

Carol A. McDonald
Representative

Gary S. NL
Administration Representative

Jon W. Stevenson
Administration Representative

Christy
Administration Representative

Marybeth Cleverger, ASST P.
Christel Pond

WILDWOOD PUBLIC SCHOOLS
Action Plan for Professional Improvement
Patrick Brooks 2010-11
End of Year – CAP Review

Specific Improvement Goal	Goals Related to National Standards for Counseling Programs	Actions to Accomplish Objective	Projected date for completion	Documentation of Actions
provided: Daily Interview Control Sheet (Log) Conference Summary Forms Student Files Counselor's daily appointment planner Guidance Dept. Visitor Log Email account Voicemail account Phone log Correspondence file Academic Contracts Verbal reports during Supervisor's meeting Meeting Log Sheet		<i>I have read this document on 6/15/11 but don't agree with comments by Mrs. Clewenger</i>		

<i>Mrs. Clewenger</i> Signed (Administrator)	6/15/2011 Date	 Signed (Staff)
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Wildwood Public Schools
4300 Pacific Avenue
Wildwood, NJ 08260
Phone: 609-522-7922
FAX: 609-522-7914
www.wildwooddistrict.org

Christel Pond
Assistant Principal/AD

Christopher Armstrong
Principal

Mary Beth Clevenger
Assistant Principal

To: Wildwood Board of Education

From: Christopher Armstrong, Principal

Re: Mr. Brooks' Action Plan

Date: July 7, 2011

In The Matter of the
PATRICK BROOKS

:
:
: SWORN STATEMENT OF PROGRESS
: UNDER OATH
:

STATE OF NEW JERSEY)
:SS:
COUNTY OF CAPE MAY)

I, Christopher Armstrong, Principal of the Wildwood High School, by way of a written sworn statement of progress made by Patrick Brooks, employee of the Wildwood Public School District, towards remediation of the deficiencies presented to the Wildwood Board of Education says:

Whereas Patrick Brooks, employee for the Wildwood School District has been previously charged with inefficiency due to his continued inability and/or unwillingness to efficiently and effectively perform his duties, and;

Whereas Patrick Brooks was given the mandated ninety (90) day period in which to improve his job performance in several areas as detailed in a Corrective Action Plan for Professional Improvement, and;

Whereas the Improvement Period began for Mr. Brooks on March 29, 2011, the date when Mr. Brooks was presented with the charges against him and the Action Plan for remedying his deficiencies, and;

Whereas Mr. Brooks remains inefficient in several areas of his Corrective Action Plan for Professional Improvement following the 90 day period which was provided for improvement,

I, Christopher Armstrong, Principal of the Wildwood Middle School and High School, state that Mr. Patrick Brooks remains inefficient in the discharge of his duties as a Guidance Counselor at the Wildwood Middle School/ High School.

Below are the areas of the Action Plan and my subsequent performance evaluation of Mr. Brooks' improvement in each:

Goal # 1:

Increase daily student academic counseling for all at-risk students per progress reports and end of marking periods.

This goal was not successfully met

Mr. Brooks failed to construct a list of at risk students for the 3rd and 4th marking period both at progress report time, and at the end of the marking period. He did not counsel all students in danger of failing a class for the 2010/2011 school year, or students in danger of failing for a marking period during the school year. Mr. Brooks failed to present a list of academically at-risk students to his supervisor. According to his daily logs of counselees, he also failed to demonstrate that he met with all the students he was required to meet with. These deficiencies existed prior to the beginning of the Improvement Period. They were identified in the Action Plan for remediation. The deficiencies continued during the Improvement Period, and were not corrected.

Goal #2:

Increase communication with parents and families by providing information to students and their families regarding students' progress on major assignments, etc.

This goal was not successfully met

Mr. Brooks failed to send failure notices for each marking period for the 2010/2011 school year. He did not send contracts or weekly progress reports to parents. Mr. Brooks did not meet with parents of failing students, and did not respond to parents' communication in a timely manner. Mr. Brooks failed to implement a weekly progress report for a student as instructed to do during a Crisis Intervention Meeting. During the Improvement Period Mr. Brooks failed to send weekly progress reports to failing students in the 3rd and 4th marking period. He did not create a list of failing students following the 4th marking period progress reports. These progress reports were due to the guidance office on May 10, 2011, and were not received. These deficiencies existed prior to the beginning of the Improvement Period. They were identified in the Action Plan for remediation. The deficiencies continued during the Improvement Period, and were not corrected.

Goal #3:

Maintain Child Study Team counseling per the CST's IEP requirement.

This goal was not successfully met

A schedule was created for Mr. Brooks using the guidelines of the Child Study Team for individual and group counseling of students with disabilities. Mr. Brooks did not follow this schedule. Students with disabilities were not seen regularly as mandated by the IEP's. This schedule was created for Mr. Brooks at the start of the school year. The schedule was reviewed with him during the Improvement Period. Mr. Brooks did not demonstrate that he followed this schedule before or during the 90 day Improvement Period. As a result, the records kept by Mr. Brooks in this regard are limited; his records lack detail; and the records reflect that Mr. Brooks failed to meet with the IEP students on a regular basis. He failed to provide these students with the mandated counseling services they were entitled to. These deficiencies existed prior to the beginning of the Improvement Period. They were identified in the Action Plan for remediation. The deficiencies continued during the Improvement Period, and were not corrected.

Goal #4:

Increase students' involvement in Peer Mediation services when appropriately indicated.

This goal was not successfully met

Mr. Brooks did not use the Peer Mediation program successfully this school year. In one incident prior to the Improvement Period Mr. Brooks was directed by the Assistant Principal to use Peer Mediation for students who were involved in an argument. Mr. Brooks did not follow the directive, but instead met with students individually to personally mediate the situation. This required an inordinate amount of Mr. Brooks' time and subverted the peer mediation process. In a subsequent incident which occurred on April 26, 2011, during the Improvement Period, Mr. Brooks was directed by the Principal to meet with students who were involved in a disagreement. He was specifically directed by the Principal not to use Peer Mediators for these individuals because they had been involved in a physical confrontation earlier in the school year, and the Principal was concerned that the problem would escalate quickly. Mr. Brooks did not follow the directive, instead choosing to set up a Peer Mediation for this incident. Vice-Principal Clevenger, upon learning of Mr. Brooks setting up the session canceled the Peer Mediation before it occurred. In addition to being insubordinate, by failing to follow a directive by the Principal, Mr. Brooks' actions could have placed the students at risk. These deficiencies existed prior to the beginning of the Improvement Period. They were identified in the Action Plan for remediation. These deficiencies continued during the Improvement Period, and were not corrected.

Goal #5:

Attend and participate in all requested and contractual meetings (IEP, I&RS, Guidance Dept., Supervisor, Team, etc...)

This goal was successfully met

Mr. Brooks increased his involvement in required meetings.

Goal #6:

Effectively communicate with staff and administration

This goal was not successfully met

Mr. Brooks did not communicate with teachers or administration in writing on a regular basis. He did not use email or voicemail effectively. On several occasions teachers or other staff members emailed the Assistant Principal, or the other counselor because of lack of response to their communication from Mr. Brooks. These deficiencies existed prior to the beginning of the Improvement Period. They were identified in the Action Plan for remediation. These deficiencies continued during the Improvement Period, and were not corrected.

Goal #7:

Implement and oversee all Freshman Guidance areas as outlined in the Guidance Counselor responsibilities list provided

This goal was not successfully met

Mr. Brooks was provided with a detailed list of required duties for a freshman guidance counselor. He did not follow the guidelines during the school year. Prior to the Improvement Period he did not organize or actively participate in the ambassador program for Wildwood, North Wildwood and Wildwood Crest Middle School students. This is an activity directly related to the implementation of incoming Freshman schedules. Subsequent to the beginning of the Improvement Period Mr. Brooks failed to schedule all Eighth Grade students for classes for the upcoming school year. By the end of the school year Mr. Brooks' failure to schedule these students resulted in students not being scheduled for the 2011-2012 school year. These deficiencies existed prior to the beginning of the Improvement Period. They were identified in the Action Plan for remediation. These deficiencies continued during the Improvement Period, and were not corrected.

Goal #8:

Facilitate and maintain students' schedules and student records with regard to transfer in and transfer out

This goal was not successfully met

Mr. Brooks states that he was not trained in this area of counseling. During the fall of 2010 Mrs. Clevenger worked with Mr. Brooks individually to train him on how to register students. She trained him again during the winter/ spring of 2011. Mr. Brooks was also provided with help from another guidance counselor regarding transfer students. Mr. Brooks claims that he still does not know how to create an electronic schedule for students in the Admin Plus student database system. This system has been used by the Wildwood School District and the Guidance Department since the 2003/2004 school year. Mr. Brooks is the only member of the Guidance Department who claims he was not trained in the use of the scheduling module during the eight years it has been in use.

Prior to the Improvement Period Mr. Brooks changed a student's schedule without notifying his supervisor, teachers or parents. He did not change the schedule in the database, but

rather on a piece of paper. He sent a verbal message with the student to tell the teachers that his classes had been changed. Contrary to policy, the classes had been changed without the input of parents or teachers. During the Improvement Period Mr. Brooks still did not use the "Approved Schedule Change Form" which was provided to Mr. Brooks by his supervisor prior to, and during, the Improvement Period. Mr. Brooks continues to state that he was not trained in the use of the proper transfer protocol and the electronic database. During the Improvement Period Mr. Brooks did not ask for any additional training to help him learn how to utilize these systems. These deficiencies existed prior to the beginning of the Improvement Period. They were identified in the Action Plan for remediation. These deficiencies continued during the Improvement Period, and were not corrected.

Goal # 9:

Effectively communicate with outside agencies as required

This goal was not successfully met

Prior to the Improvement Period Mr. Brooks did not return phone calls from a guidance counselor in another district regarding a transfer student. Mr. Brooks did not return phone calls to a DYFS case worker regarding an open DYFS case. Mr. Brooks did not complete a DYFS questioner correctly or completely. Mr. Brooks failed to provide DYFS with requested information regarding a student's attendance on January 21, 2011. This is documented in a memo to Mr. Brooks dated 2/4/ 2011. During the Improvement Period Mr. Brooks again failed to communicate with DYFS during the month of May regarding student issues. On May 23, 2011 a phone message was taken by secretary Carmen Vega from the DYFS Case Worker handling the matter of student C.P. The message states that they, "Need school collateral to close a case ... has been trying to contact Mr. Brooks since last week. Left messages. No answer." Vice Principal Clevenger was notified of this situation and was required to intervene and resolve this matter upon notification of Mr. Brooks' failure to respond. These sorts of deficiencies existed prior to the beginning of the Improvement Period. They were identified in the Action Plan for remediation. These deficiencies continued during the Improvement Period, and were not corrected.

Goal # 10:

Effectively maintain logs and records

This goal was not successfully met

Mr. Brooks did not maintain the filing system which was prepared for him during the summer of 2010. Prior to and during the Improvement Period it was found that some students' files were missing information, others were misfiled, and some transfer students did not have files. Mr. Brooks did not use the conference summary sheet which should be placed in each student's file following a counseling session. Mr. Brooks' daily counseling log sheets consistently lack detail and often have large blocks of unaccounted for time. Mr. Brooks' records continue to be illegible at times, poorly organized, inconsistent, and haphazard. These deficiencies existed prior to the beginning of the Improvement Period. They were identified in the Action Plan for remediation. These deficiencies continued during the Improvement Period, and were not corrected.

Conclusion

Overall, Mr. Brooks has failed to remediate the deficiencies outline in the Charges presented to him. Of the ten goals identified Mr. Brooks only achieved one – attendance at all required meeting.

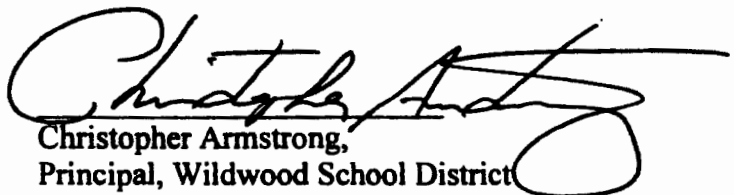
Mr. Brooks has failed to utilize the Action Plan to improve his job performance. He has not availed himself to the assistance offered, both verbally and in writing as part of the Action Plan, to resolve the identified weaknesses in his job performance. Steps outlined in the Action Plan have not been taken, resulting in students being “short changed” in regards to their Guidance services, their federally mandated IEP-related services, their DYFS ordered services, and in other cases their necessary academic counseling. Additionally, in failing to follow clear directives, standard operating procedures, policies, and items outlined in the Action Plan Mr. Brooks may have placed students at risk (see Goal #4 regarding failure to properly handle an issue dealing with students who had been engaged in prior altercations, and see Goal # 9 regarding failure to respond to DYFS for information).

The records of the daily and weekly meetings with Mr. Brooks reflect a total lack of effort on the part of Mr. Brooks to remediate his professional deficiencies, as identified in the Charges and the Action Plan.

It is my professional opinion that Mr. Brooks has failed to improve and has failed to meet the minimum requirements of his position and of the Action Plan.

I, Christopher Armstrong, upon my sworn oath hereby acknowledge that the aforementioned written statement of progress with regard to the charge of inefficiency against Mr. Patrick Brooks is true and accurate to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: July 19, 2011


Christopher Armstrong,
Principal, Wildwood School District

Subscribed and sworn to before
me this 19th day of July, 2011.


A Notary Public of the State of New Jersey

JESSICA ANAYA
Notary Public of New Jersey
My Commission Expires 12/15/2015
ID No. 2184669

WILDWOOD PUBLIC SCHOOLS

OFFICE OF THE BUSINESS ADMINISTRATOR
4300 PACIFIC AVENUE
WILDWOOD, NJ 08260
TEL: 609-522-0786 FAX: 609-523-1014

July 19, 2011

Via USPS Regular Mail and Certified Mail
7006 2760 0003 5536 5740

Mr. Patrick Brooks
321 W. Garfield Avenue
Wildwood, NJ 08260

Dear Mr. Brooks:

Please be advised that on July 19, 2011, Principal Armstrong forwarded a performance report to the Wildwood Board of Education regarding your Professional Improvement Action Plan implemented on March 29, 2011. You will recall the plan was devised to afford you an opportunity to correct the charges of inefficiency that were previously filed with the Board on January 19, 2011 (undertake review) and March 29, 2011 (charges filed). I regret to inform you that Mr. Armstrong's report indicates that 9 of the 10 inefficiencies requiring improvement as set forth in the Professional Improvement Action Plan were *not* corrected. They are as follows:

Goal No. 1: Increased daily student academic counseling for all at risk students per progress reports at the end of marking period. This inefficiency was not corrected.

Goal No. 2: Increased communication with parents and family by providing information to students and their families regarding students' progress on major assignments, etc. This inefficiency was not corrected.

Goal No. 3: Maintain child study team counseling for the CST's IEP requirement. This inefficiency was not corrected.

Goal No. 4: Increase students' involvement in peer mediation services when appropriately indicated. This inefficiency was not corrected.

Goal No. 5: Attend and participate in all requested and contractual meetings (IEP, IAP, RF Guidance Department, Supervisor, Team, etc.). This inefficiency was corrected.

Goal No. 6: Effectively communicate with staff and administration. This inefficiency was not corrected.

Goal No. 7: Implement and oversee all freshman guidance areas as outlined in the Guidance Counselor's Responsibility List provided. This inefficiency was not corrected.

Goal No. 8: Facilitate and maintain student schedules and student records with regard to transfer in and transfer out. This inefficiency was not corrected.

Goal No. 9: Effectively communicate with outside agencies as required. This inefficiency was not corrected.

Goal No. 10: Effectively maintain logs and records. This inefficiency was not corrected.

I have included a copy of Mr. Armstrong's report for your review.

At this juncture, please be advised that you have 15 days from receipt of this notice to respond in writing by filing a Statement of Evidence Under Oath in opposition to these charges with the Board. The Board will meet and make a determination after receiving your written response or upon expiration of the aforementioned 15 day time period should you fail to respond.

Should you have any questions or the need for additional information, do not hesitate to contact me.

Thanking you for your kind attention, I am

Sincerely,


Gregory Rohrman

Enclosure

cc: Personnel File
Dennis J. Anderson, Superintendent
Carol Ann McDonald, WEA President

In The Matter of
PATRICK BROOKS,

**CERTIFICATE OF
DETERMINATION**

I, Gregory Rohrman, Board Secretary for the Wildwood Public School District,
by way of this Certificate of Determination upon my oath hereby, depose and say:

1. I am the Board Secretary for the Wildwood Public School District and am hereby authorized to make representations on its behalf.
2. On Thursday, August 4, 2011 at approximately 5:30 p.m. the School Board for the Wildwood Public School District conducted a closed session meeting in the school library located at 4300 Pacific Avenue, Wildwood New Jersey.
3. The purpose of the meeting was to discuss a charge of inefficiency as it relates to Patrick Brooks, an employee of the Wildwood School District.
4. The District Board of Education determined that the charges and the evidence in support of the charges are sufficient, if true in fact, to warrant the dismissal of Mr. Brooks.
5. The District Board of Education further decided to suspend Mr. Brooks, without pay, effective August 18, 2011.
6. The determinations by the Board were made by a majority vote of the whole number of members of the Wildwood District Board of Education.

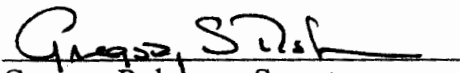
7. In addition, Mr. Brooks was given at least 90 days prior written notice of the nature and particulars involved in the alleged inefficiency.

8. The attorney representing the Board of Education shall be:

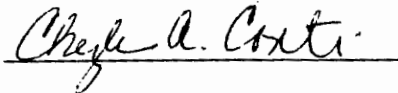
Andrew J. Cafiero, Esquire
CAFIERO & BALLIETTE
3303 New Jersey Avenue
P.O. Box 789
Wildwood, NJ 08260

9. I hereby certify that the foregoing statements made by me are true. If any of the foregoing statements made by me willfully are false, I am subject to punishment.

Dated: 8/18/11


Gregory Rohrman, Secretary
Wildwood Board of Education

Subscribed and sworn to before
me this 18th day of August 2011



CHERYLE A. CONTI
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES 11/12/2014

Law Offices
NED P. ROGOVOY, ESQUIRE, L.L.C.
782 South Brewster Road, Unit A-6
Vineland, New Jersey 08361
(856) 205-9701
Attorney for Patrick Brooks

IN THE MATTER OF THE TENURE
HEARING OF PATRICK BROOKS,
SCHOOL DISTRICT OF THE CITY
OF WILDWOOD, CAPE MAY COUNTY

BEFORE THE COMMISSIONER OF
EDUCATION OF THE STATE OF
NEW JERSEY

Agency Docket No. 238-8/11

RESPONSE TO
TENURE CHARGES

PATRICK BROOKS, of full age, hereby certifies as follows:

1. I do not choose to answer every paragraph of the tenure charges with particularity and respond as follows:

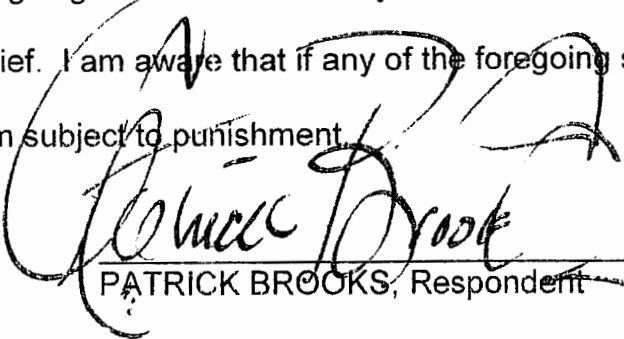
2. I began my employment in the Wildwood School District on or about 1982 and have certainly rendered consistent service up and through the end of the school year in 2010-2011. I have not lost any of my desire nor faculties and am performing the same job now that I have performed for the 29 years that I have served the School District of the City of Wildwood. I have no less energy, no less sincerity and no less desire. If it is perceived that I have all of a sudden become inefficient, I can only say that the wisdom that I have acquired over the years and the knowledge of the District greatly supersedes whatever perceived lack of reporting and record keeping that is alleged.

WHEREFORE, the undersigned, requests that the Statement of Tenure Charges be dismissed, and that I be reinstated with all emoluments.

CERTIFICATION

I hereby certify that the foregoing statements made by me are true and correct to the best of my knowledge and belief. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: 9/1/11, 2011


PATRICK BROOKS, Respondent

RESOLUTION

RESOLUTION OF THE CITY OF WILDWOOD BOARD OF EDUCATION
AUTHORIZING SETTLEMENT "IN THE MATTER OF THE TENURE HEARING
OF PATRICK BROOKS v CITY OF WILDWOOD BOARD OF EDUCATION"
OAL EDU10771-2011S and AGENCY REFERENCE NO. 238-8/11

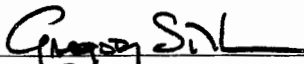
WHEREAS, the City of Wildwood School District Board of Education ("Board")
desires to resolve the pending Petition before the Commissioner of Education between
Patrick Brooks and the City of Wildwood Board of Education;

WHEREAS, the Board agrees to accept the proposed Settlement Agreement "In
the Matter of The Tenure Hearing of Patrick Brooks v. City of Wildwood Board of
Education" based on the essential core terms as discussed in executive session at the
November 16, 2011 Board Meeting which language was affirmed as discussed in
executive session at the December 21, 2011 Board Meeting;

NOW THEREFORE BE IT RESOLVED that the Board does hereby accept
and ratify the terms of the Written Settlement Agreement "In the Matter of The Tenure
Hearing of Patrick Brooks v. City of Wildwood School Board" as discussed at the
Board's executive session on November 16, 2011 and discussed, reviewed and affirmed
in the executive session at the December 21, 2011 Board Meeting.

Dated: December 21, 2011

This is to certify the above is a true copy of a motion adopted by the Board of Education
of the City of Wildwood School District Board of Education, in the County of Cape May,
New Jersey, at the December 21, 2011 Board Meeting.



Gregory Rohrman
School Business Administrator/Board Secretary

EXHIBIT D

Andrew J. Cafiero, Esquire
CAFIERO & BALLIETTE
3303 New Jersey Avenue
P. O. Box 789
Wildwood, New Jersey 08260
(609) 522-0511

IN THE MATTER OF THE TENURE	: COMMISSIONER OF EDUCATION OF
HEARING OF PATRICK BROOKS	: THE STATE OF NEW JERSEY
	:
CITY OF WILDWOOD BOARD	: OAL DOCKET NO. EDU10771-2011S
OF EDUCATION	: AGENCY REF. NO. 238-8/11
	:
	: AFFIDAVIT OF PATRICK BROOKS

STATE OF NEW JERSEY)
 :SS:
COUNTY OF)

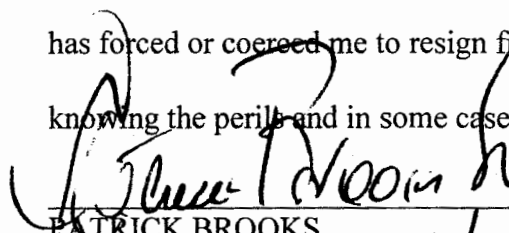
PATRICK BROOKS, of full age, being duly sworn according to law upon his oath
deposes and says:

1. I have reviewed the Settlement Agreement and all of its terms and conditions contained therein and understand its ramifications, including the fact that the Board of Examiners will independently review the facts surrounding the tenure charges and have the right to bring an Order to Show Cause to suspend or revoke my license.
2. Additionally, I was advised that I could have proceeded to trial, cross-examined the Board's witnesses, presented evidence and testified on my own behalf and presented witnesses to testify in my defense. I fully understand that, after considering the Board's

W OFFICES
and Balliette
W JERSEY AVENUE
O. BOX 789
OD, N. J. 08260

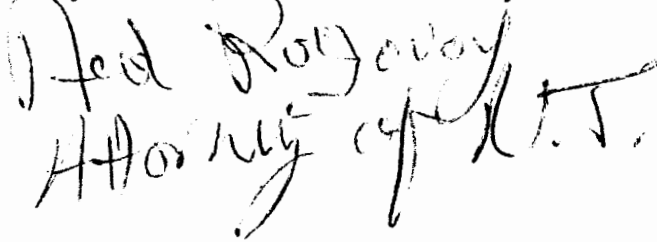
accusations and my defense, the judge would have made a determination regarding whether or not the Board of Education had, by a preponderance of the evidence, proved that there was and is an inefficiency, including but not limited to a continued "inability and/or unwillingness to efficiently and effectively perform my duties by (a) failing to communicate with teachers and parents; (b) failing to perform my job responsibilities as required and outlined by the District; (c) failing to respond to e-mails and voice mails; (d) failing to meet with students in need of guidance counseling services as required; (e) failing to keep accurate and consistent counseling logs; (f) failing to turn in appointment logs; and (g) falsifying and fabricating information on the appointment logs and/or counseling logs.

3. I have entered into the Settlement Agreement freely and voluntarily and no one has forced or coerced me to resign from my position. I have done so at my own free will, knowing the perils and in some cases benefits, that I will or could derive.


PATRICK BROOKS

Subscribed and sworn to
before me this 21st day of
December, 2011

A Notary Public of the State of New Jersey


H. H. H. H. H.

OAL DKT. NO. EDU 3980-04
 AGENCY DKT. NO. 464-12/03

BARBARA HOWARD,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF :	:	DECISION
THE CITY OF NEWARK, ESSEX COUNTY	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


 ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/21/12

Date of Mailing: 2/22/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3980-04

AGENCY DKT. NO. 464-12/03

BARBARA HOWARD,

Petitioner,

v.

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

Respondent.

Gregory T. Syrek, Esq., for petitioner (Bucceri & Pincus, attorneys)

Bernard Mercado, Esq., for respondent

Record Closed: January 5, 2012

Decided: January 6, 2012

BEFORE **JEFFREY A. GERSON, ALJ:**

STATEMENT OF THE CASE

This matter was transferred to the Office of Administrative Law on May 3, 2004. The matter was placed on the inactive list on May 27, 2004 since the claim asserted at OAL was dependent upon the outcome of a companion Worker's Compensation petition. On August 31, 2011, the undersigned was notified by counsel for respondent that the Worker's Compensation case was concluded and requested that the matter be reinstated

to the active hearing calendar. A hearing was scheduled for November 21, 2011 but the date was adjourned because the parties were discussing settlement.

On December 7, 2011 during a telephone status conference conducted by ALJ Jones, the parties advised that a settlement had been reached. A signed Stipulation of Settlement was forwarded to the OAL on January 5, 2012 and is attached hereto and made part hereof.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

January 6, 2012

DATE

Jeffrey A. Gerson /cjd
JEFFREY A. GERSON, ALJ

Date Received at Agency:

1-11-12
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:

JAN 11 2012

sej

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139
Attorneys for Respondent

RECEIVED
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BARBARA HOWARD,	:	OFFICE OF ADMINISTRATIVE LAW
	:	
Petitioner,	:	
	:	
	:	OAL DKT. NO. EDUOA-03980-2004N
vs.	:	
	:	
STATE-OPERATED SCHOOL	:	SETTLEMENT AGREEMENT
DISTRICT OF THE CITY OF	:	
NEWARK,	:	
Respondent.	:	

The parties in this appeal have voluntarily and amicably resolved all disputed matters and enter into the following settlement that fully disposes of all issues in controversy between Petitioner Barbara Howard ("Petitioner" or "Howard") and Respondent State-Operated School District of the City of Newark ("Respondent" or the "District") as follows:

1. Petitioner hereby agrees to withdraw, with prejudice, her appeal and request for a hearing, filed under OAL Docket No. EDUOA-03980-2004N which involves her appeal and request for a hearing relating to improper sick days charged to her during the 2002-03 and 2003-04 school years.

2. In turn, Respondent will be permitted to convert thirty one (31) sick days on the basis of the conversion formula contained in Art. 8, Section 10 in the Collective Bargaining Agreement between the District and the Newark Teachers Union dated July 1, 2003 to June 30, 2006 so that Petitioner will receive from Respondent four thousand one hundred eighty five dollars (\$4,185.00), representing compensation for her unused sick days (31 days) at the contractual reimbursement rate of \$135.00 per day. The District will take all mandatory and standard deductions and withholdings.

3. Except as noted above, Petitioner waives all claims of any nature against Respondent with regard to this matter, including fees, or other monetary relief.

4. By entering into this Settlement Agreement, Petitioner releases and discharges the District with respect to all claims or rights that she may have against the District. This includes without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Petitioner's employment with the District. It specifically includes, without limitation, all claims which Petitioner may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; the New Jersey Workers' Compensation Law, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above) and/or any other alleged violation of any federal, state or local law, regulation or ordinance, and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on her employment by and the termination of her employment with the District, including, but not limited to,

any claim for wrongful discharge, back pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys' fees, costs, and/or future wage loss, with the exception of workers' compensation claims and claims arising under N.J.S.A. 18A:16-6 and N.J.S.A. 18A:16-6.1.

5. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Petitioner of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Petitioner acknowledges that she: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given at least twenty-one (21) days within which to consider this Agreement; and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. Petitioner understands that she may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the seven-day period.

6. The parties respectively acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party.

7. This Stipulation constitutes the full agreement between the parties, and shall be construed and enforced in accordance with New Jersey law.

8. This agreement shall not constitute a precedent in any matters involving other employees.

9. The terms of this Settlement Agreement shall not be construed as an admission of guilt or wrongdoing by either party and will not be utilized against either party in any future proceeding.

10. If any provision of this Settlement Agreement is held by a court of competent jurisdiction, or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions will continue in full force and effect.

11. This Agreement is subject to the approval of the State District Superintendant of the State-operated School District of the City of Newark and will only become effective upon the approval of the Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

12. This Agreement is subject to and contingent upon final approval by the Commissioner of Education and will only become effective upon the approval of the Commissioner of Education at which time the sum specified in Paragraph 2 shall be paid within forty five (45) calendar days of the approval of this Agreement by the Commissioner of Education. Any disapproval by the Commissioner of Education shall not interfere with the rights of either party to pursue the matter further.

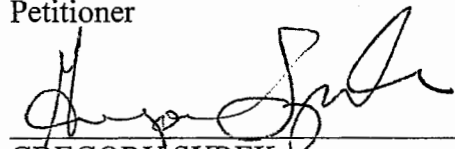
Dated:

Dec. 9, 2011


BARBARA HOWARD
Petitioner

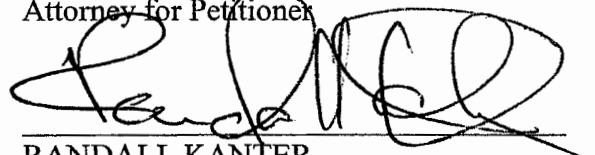
Dated:

12/12/11


GREGORY SYREK
Attorney for Petitioner

Dated:

12/19/11


RANDALL KANTER
Interim Executive Director
Human Resources, Newark Public Schools

Dated:

12/19/11


BERNARD MERCADO
Associate Counsel
Newark Public Schools

CERTIFICATION

I, BARBARA HOWARD, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED:

Dec. 9 2011


BARBARA HOWARD

BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF HAZLET,	:	
MONMOUTH COUNTY	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF EDUCATION, OFFICE OF SCHOOL	:	
FUNDING,	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioner claims that respondent incorrectly determined that the Hazlet school district is responsible for the cost of educating J.M. – a student receiving special education services in a residential placement – for the 2010-2011 school year. Petitioner also sought an order declaring that J.M. is a resident within the Matawan-Aberdeen Regional School District because J.M. resides in the Matawan district with his father, K.M., pursuant to a guardianship order, and because J.M. has not lived with S.M., his mother, in the Hazlet District since 2009. Respondent contends that it properly determined, pursuant to *N.J.S.A. 18A:7B-12b*, that Hazlet was the district of residence for J.M. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact and the matter is ripe for summary decision; petitioner bears the burden of proving that the Department's residency determination was arbitrary, capricious or unreasonable; pursuant to *N.J.S.A. 18A:7B-12b* and *N.J.A.C. 6A:23A-19.2(a)(1)-(2)*, J.M.'s district of residence is his mother's present district of residence in Hazlet because he lived with her prior to placement and she is the custodial parent, and because the terms of the parents' divorce decree stipulates that J.M. is domiciled in Hazlet and would be educated in the Hazlet district. Accordingly, the ALJ concluded that the petitioning school district is responsible for J.M.'s education costs, granted respondent's motion for summary decision and denied petitioner's appeal.

Upon full and careful consideration, the Commissioner adopted the Initial Decision as the final decision in this matter as he concurred that – given the undisputed facts – summary disposition was appropriate, respondent's motion for summary disposition was properly granted and petitioner's motion for summary disposition was properly denied – for the reasons stated in the ALJ's decision.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 6170-11
 AGENCY DKT. NO. 116-5/11

BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF HAZLET,	:	
MONMOUTH COUNTY	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF EDUCATION, OFFICE OF SCHOOL	:	
FUNDING,	:	
RESPONDENT.	:	
_____	:	

The Commissioner has reviewed the record of this matter and the Initial Decision of the Office of Administrative Law (OAL) on the parties' cross motions for summary decision. The ALJ granted intervener status to Matawan-Aberdeen Regional School District by virtue of a companion case currently before him.¹ Petitioner, Board of Education of the Township of Hazlet (Hazlet) filed exceptions, and respondent, Office of School Funding (OSF) filed reply exceptions as provided by *N.J.A.C.* 1:1-18.4.

Hazlet argues in its exceptions that the ALJ erred as a matter of law when he determined that the 2009 Judgment of Incapacitation did not supersede the 2001 custody agreement, which granted custodial rights of J.M. to the mother, S.M. Moreover, Hazlet asserts that the ALJ relied, to its detriment, on facts not clearly established in the record regarding the parents' intent that S.M. should continue as the custodial, residential parent of J.M.

¹ See *Matawan-Aberdeen Regional School District v. Board of Education of the Township of Hazlet*, OAL Dkt. No. EDU 08759-10, Agency Dkt. No. 143-7/10. Since these matters involved substantially similar issues, the ALJ with the consent of the parties decided the cases concurrently.

In response, OSF agrees with the findings of the ALJ and argues that Hazlet offered no evidence that OSF's determination of residency was arbitrary, capricious or unreasonable. Additionally, it contends that the Judgment of Incapacitation, effective after J.M.'s placement at the residential facility, has no impact on the issue of domicile, which OSF determined to be pursuant to *N.J.S.A. 18A:7B-12b*, i.e., "the district of residence for children who are" placed in residential facilities "shall be the present district of residence of the parent...with whom the child lived prior to the most recent placement...."

Upon his considered review of the record and a thorough reading of the deposition transcripts,² the Commissioner concurs with the Administrative Law Judge (ALJ) that this matter is ripe for summary decision as there are no genuine issues of material fact to resolve. For the reasons convincingly presented in the ALJ's decision, the Commissioner agrees that the OSF did not act arbitrarily, capriciously or unreasonably in its determination that the Township of Hazlet is the district of residence and is, consequently, responsible for the cost of educating J.M.

Accordingly, summary disposition is granted to respondent OSF and the petitioner's cross motion is hereby denied. Moreover, the appeal of petitioner Hazlet is dismissed.

IT IS SO ORDERED.³


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/21/12

Date of Mailing: 2/22/12

² Depositions of parents K.M and S.M on behalf of J.M. were conducted *ad seriatim* on December 7, 2010.

³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING

SUMMARY DECISION

OAL DKT. NO. EDU 6170-11

AGENCY DKT. NO. 116-5/11

**BOARD OF EDUCATION OF THE
TOWNSHIP OF HAZLET,
MONMOUTH COUNTY,**

Petitioner,

v.

**NEW JERSEY STATE DEPARTMENT
OF EDUCATION, OFFICE OF SCHOOL
FUNDING,**

Respondent.

Gabrielle Pettineo, Esq., for petitioner (Kenny, Gross, Kovats & Parton, attorneys)

Diana C. Sierotowicz, Deputy Attorney General, for respondent (Paula T. Dow, Attorney General of New Jersey, attorney)

David B. Rubin, Esq., for intervening party Board of Education of the Township of Matawan-Aberdeen Regional, Monmouth County

Record Closed: October 17, 2011

Decided: November 21, 2011

BEFORE EDWARD J. DELANOY, JR., ALJ:

STATEMENT OF THE CASE

Petitioner Township of Hazlet Board of Education ("Hazlet District") seeks a determination that respondent New Jersey Department of Education, Office of School Funding ("OSF") incorrectly determined that Hazlet District is responsible for the cost of educating J.M., a student receiving special education services, for the 2010-2011 school year. Petitioner also seeks an order declaring that J.M. is a resident of the Board of Education of Matawan-Aberdeen Regional School District ("Matawan District"), because J.M. resides in Matawan District with his father pursuant to a guardianship order, and because J.M. has not lived with his mother in the Hazlet District since August, 2009.

PROCEDURAL HISTORY

On May 6, 2011, Hazlet District filed a petition for due process with the Bureau of Controversies & Disputes of the New Jersey Department of Education (DOE). The matter was transmitted for a hearing to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-2(b) and N.J.A.C. 4A:2-2.9(b), on May 31, 2011. On August 10, 2011, a Motion to Dismiss in Lieu of Answer was filed by respondent. Matawan District was granted intervener status by virtue of a Consent Order executed by the parties dated August 5, 2011. The Matawan District was granted intervener status by virtue of a concurrent companion dispute between it and Hazlet District regarding which district was the responsible party for the cost of educating J.M., for the 2010-11 school year. In that companion matter, entitled "*Matawan-Aberdeen Regional School District v. Board of Education of Township of Hazlet*," OAL Docket # *EDU 08759-2010*, Agency Ref. No. 143-7/10, each District counters that the other is the responsible party for the cost of educating J.M. Both parties in that matter brought cross-motions for summary decision, which decision shall be made concurrently with the decision herein. The Motion to Dismiss in Lieu of Answer filed by respondent was converted to a Motion for Summary Decision, and all parties herein now bring cross-

motions for summary decision. Briefs were filed in this case on or before October 17, 2011, and as a result, the record closed herein on October 17, 2011.

FACTUAL DISCUSSION

Having reviewed the submissions of the parties, I **FIND** the following as **FACT**: J.M. was born on November 13, 1991, and is currently nineteen years old. (Petitioner's Brief, Cert. of Susan Galbraith at page 1, para. 3.¹) In particular, since July 1998, J.M. has been classified as "Multiply Disabled," based on mild cognitive impairment, a learning disability, and Pervasive Developmental Disorder on mild Autistic Spectrum and Specific Learning Disability. He has been placed in both district and out-of-district schools throughout his educational career. (Petitioner's Brief, Cert. of Susan Galbraith at page 1, para. 3-4, Respondent's Brief at page 2² (1T 6:21-7:15.³))

In 2001, when J.M. was ten years old, his parents S.M. and K.M. divorced. The Dual Judgment of Divorce and Agreement divorce decree ("Divorce Decree") ordered and adjudged on July 23, 2001, contained a custody arrangement that gave "joint legal custody" to both parents but designated the mother, S.M., as the "residential custodial parent and primary caretaker." (Petitioner's Brief Ex. B.⁴) J.M. continued to reside with S.M. in Hazlet, and he remained enrolled in the Hazlet District, attending a series of out-of-district day placements. (Petitioner's Brief Ex. M and N, 1T 9:12-15; 2T 8:16-9:4.) The Divorce Decree provided that it was S.M. and K.M.'s intention that J.M. continue to be educated in and through the Hazlet school system. It also specified, in relevant part, that J.M. would be emancipated when he turned eighteen or graduated from high school, whichever occurred later. (Petitioner's Brief Ex. B at page 8.⁵) At all times

¹ Petitioner's motion for summary decision was received by the OAL on September 30, 2011, and will be referred to as "Petitioner's Brief" throughout this Decision.

² Respondent's motion for summary decision was received by the OAL on October 3, 2011, will be referred to as "Respondent's Brief" throughout this Decision.

³ The transcripts from the deposition of K.M. and S.M. taken on December 7, 2010 and attached to petitioner's motions (transcripts are attached to petitioner's motion as Exhibit M and Exhibit N attached to petitioner's motion) will be referred to as 1T and 2T, respectively, throughout this memo.

⁴ Petitioner's Ex. will refer to the exhibits appended to petitioner's motion for summary decision throughout this Decision.

⁵ Respondent's Ex. will refer to the exhibits appended to respondent's motion for summary decision with the numbered notations referring to the tabulations.

relevant to this matter, K.M. lived in the Township of Aberdeen, a constituent municipality of the Matawan District. (Petitioner's Brief, Cert. of Susan Galbraith at page 2, para. 10.)

In August 2009, J.M. physically assaulted S.M. As a result, J.M. was placed in the Willowglen Residential Center (Willowglen) in New Lisbon, New Jersey by the Department of Children and Families (DCF). (Petitioner's Brief Ex. M and N, 1T 16:23-17:25; 2T 11:16-12:5) Willowglen is a residential placement for children with emotional and behavioral disorders. When J.M. was first placed at Willowglen, the Hazlet District provided transportation to and from Willowglen to the Jackson Regional Day School, where J.M. received his education. The Hazlet District paid the tuition for J.M.'s education at Jackson Regional Day School. (Petitioner's Brief, Cert. of Susan Galbraith at page 2, para. 6.) On November 13, 2009, J.M. turned eighteen years old. (1T 10:2-3.)

On or about January 22, 2010, J.M. was placed at the Willowglen facility in Sparta, New Jersey, where he currently resides and receives his education, pursuant to an Individualized Education Program (IEP) drafted by the Hazlet District's Child Study Team. He attends school on campus at the Sparta facility, and no longer travels to the Jackson Regional Day School. (Petitioner's Brief, Cert. of Susan Galbraith at page 2, para. 7.).

On January 25, 2010, K.M. filed for and was granted permanent sole legal guardianship over J.M. and his property because J.M. "is an incapacitated person as a result of unsoundness of mind and is incapable of governing himself and managing his own affairs." (Petitioner's Brief, Ex. C, Cert. of Susan Galbraith at page 2, para. 11.) S.M. and K.M. jointly agreed that, as a guardian, K.M. would handle J.M.'s "legal and financial matters" and because "[J.M.] has problems making the correct decisions." (1T 10:4-13:3; 2T 10:1-11:15.) The guardianship documents did not mention S.M. or J.M.'s living arrangements. (Petitioner's Brief, Ex. C.)

On or about April 7, 2010, after the Hazlet School District was notified of K.M.'s appointment as J.M.'s legal guardian, Dr. William George, the Superintendent of School for the Hazlet School District, notified Dr. Richard O'Malley, then the Superintendent of Schools for the Matawan-Aberdeen District, that K.M. had been appointed legal guardian of J.M. and that K.M. lived in Aberdeen. (Petitioner's Brief, Ex. D, Cert. of Susan Galbraith at page 2, para. 13.) On that same date, K.M. was notified that the Hazlet School District was aware that K.M. had been appointed as the guardian of J.M. and requested that K.M. enroll him in the Matawan-Aberdeen District, where K.M. lives (Petitioner's Brief, Ex. E, Cert. of Susan Galbraith at page 2, para. 14.) Also on that date, the Hazlet School District notified the principal of Willowglen, Susan Hackett, that K.M. had been appointed the permanent guardian of J.M. and that as a result, his residency was in Aberdeen, and the Matawan-Aberdeen District was responsible for J.M.'s tuition as of April 15, 2010. (Petitioner's Brief, Ex. F, Cert. of Susan Galbraith at page 2, para. 15.) Joel Glastein, the former Deputy Superintendent of the Matawan-Aberdeen District, contacted the Hazlet Department of Special Services to inform it that the Matawan-Aberdeen District did not believe it was responsible for J.M.'s education. (Petitioner's Brief, Cert. of Susan Galbraith at page 2, para. 16.)

When J.M. is able to leave Willowglen on short home visits, he stays overnight at his father's house, where J.M. has a bedroom, but also visits his mother's house during the day. (1T 14:24-16:9; 1T 30:13-15; 2T 12:19-14:6.) J.M. has spent "the bulk of his time" at S.M.'s house "on a number of occasions," despite not spending the night at S.M.'s house. (1T 16:5-9.) K.M. and S.M. are trying to gradually reintroduce J.M. back into S.M.'s home and life and are planning on letting him spend nights at S.M.'s house during home visits as long as he is acting appropriately. (1T 17:15-19; 1T 30:19-31:11; 2T 19:23-20:9.) K.M. characterized J.M.'s "home" as S.M.'s house because "reason number one, the [divorce] decree says so, reason number two that's what his mother wants, [and] [r]eason number three is I have a number of medical conditions that prevent me from having full time residential custody of my son." (1T 30:2-6.) Additionally, S.M. and K.M. discussed J.M.'s living arrangements if and when he comes home from Willowglen, and in S.M.'s view, J.M. would be living with both K.M. and her, but J.M. would predominately stay with her. (2T 14:7-18; 2T 18:8-16; 2T 19:23-20:9.)

Both parents conceded that there was no firm agreement in place that ultimately determined where J.M. would be staying if he left Willowglen. (1T 16:10-20; 2T 14:14-18.)

On or about December 26, 2010, the DCF asked the OSF to determine the district of residence of J.M in response to a dispute over who was responsible for J.M.'s education costs. (Respondent's Brief, Ex. B.)⁶ On February 9, 2011, the Hazlet District received a determination from the OSF that Hazlet was J.M.'s district of residence, and that it was financially responsible. (Petitioner's Brief, Ex. I, Cert. of Susan Galbraith at page 3, para. 21.) The OSF based its finding that J.M. resided in Hazlet with his mother on N.J.S.A. 18A:7B-12b, which states:

The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private school or out-of-state facilities shall be the present district of residence of the parent or guardian with whom the child lived with prior to his most recent admission to a State facility or most recent placement by a State agency.

[Ibid.]

On March 8, 2011, the Hazlet District submitted written notification to the Assistant Commissioner of Finance contesting the determination made by the OSF pursuant to N.J.A.C. 6A:23-19.2(d). (Petitioner's Brief, Ex. J, Cert. of Susan Galbraith at page 3, para. 23.) On April 8, 2011, Yut'se Thomas, the Acting Assistant Commissioner of Finance, by letter upheld OSF's determination regarding Hazlet's responsibility for the costs of J.M.'s education. (Petitioner's Brief, Ex. K, Cert. of Susan Galbraith at page 3, para. 24.) According to Assistant Commissioner Thomas, the Hazlet District is responsible for the costs of J.M.'s education under N.J.S.A. 18A:7B-12(b) because J.M. resided with his mother in Hazlet immediately prior to the date of his placement, and she still lives there. Ibid. Thomas stated that K.M.'s appointment as an "adult guardian"

⁶ Respondent's Ex. will refer to the exhibits appended to respondent's motion for summary decision throughout this Decision.

over J.M. was irrelevant because the mother's parental rights were not terminated, and "[u]nless the mother's parental rights have been terminated by court order, she remains the child's parent/guardian for district of residence purposes." Ibid. Thomas also noted that the Hazlet District would continue to be responsible for J.M.'s education costs as long as S.M. remained a resident of Hazlet.

LEGAL DISCUSSION

N.J.A.C. 1:1-12.5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The provisions of N.J.A.C. 1:1-12.5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment, and, as such, when entertaining motions for summary decision, a "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue [to proceed to a hearing]." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)) (first brackets in original). A judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Ibid. In determining whether summary decision is appropriate, this tribunal is required to do "the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter proceeds to a hearing. Id. at 539-40. The facts relevant to a decision on this motion are not in dispute. Therefore, pursuant to N.J.A.C. 1:1-12.5(b) and Brill, supra, **FIND** that there are no genuine issues of material fact and that this matter is ripe for summary decision.

It is well-settled that a school district challenging DOE's district of residency determination bears the burden of proving the decision was arbitrary, capricious or

without reason. Board of Education of Delaware, Hunterdon County v. New Jersey Dep't of Education, EDU 08011-05S, 2006 N.J. AGEN LEXIS 644, Final Decision (May 10, 2006). Additionally, the DOE's decision is entitled to a presumption of correctness. Ibid.

1. District of Residence, Domicile, Guardianship, and Custody

District of Residence

According to the State Facilities Education Act of 1979, N.J.S.A. 18A:7B-1 to -13, for school funding purposes, the Commissioner of Education shall determine district residence as follows:

b. The district of residence for children who are in residential State facilities or have been placed by State agencies in group homes, skill development homes, private school or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.

[N.J.S.A. 18A:7B-12(b).]

The regulations implementing Title 18A define "present district of residence" as follows:

(a) The district of residence for school funding purposes shall be determined according to the following criteria:

1. The "present district of residence" of a child in a residential state facility defined in N.J.S.A. 18A:7F-45 and referred to in the first paragraph of N.J.S.A. 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16.

2. The "present district of residence" of a child placed by a State agency in a group home, skill development home,

approved private school for students with disabilities or out-of-state facility also referred to in the first paragraph of N.J.S.A. 18A:7B-12b means the New Jersey district of residence of the child's parents(s) or guardian(s) as of the date of the child's most recent placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in (a)1 above.

[N.J.A.C. 6A:23A-19.2(a)(1) to -(2).]

Thus, the "present district of residence" of a child placed in a residential facility by a State agency is the district of residence of the parent with whom the child lived prior to his most recent placement by the State agency. N.J.A.C. 6A:23A-19.2(a)(2). In subsequent school years, the "present district of residence" will be the district of residence of the child's parent as of the last school day prior to October 16. Id. at § 19.2(a)(1). A child's district of residence is responsible for the costs of his education. See Bd. of Educ. of the Lower Camden County Reg'l Sch. Dist. No. 1 v. State of New Jersey, Dep't. of Educ., Bureau of Sch. Fin., EDU 8578-98, Initial Decision (June 4, 1999), adopted, Acting Comm'r. (Aug. 13, 1999), affirmed, State Bd. of Educ. (July 5, 2000) (finding that the "present district of residence" is the residence of the child's parent as of the last school day prior to October 16 and if this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement, and the custodial parent is the parent whose district of residence is considered to determine which district is responsible for tuition⁷); Bd. of

⁷ At the time of the Lower Camden County, supra decision, the relevant provision of N.J.S.A. 18A:7B-12 (1999) read:

b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.

If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.

[L. 1999, c. 114, § 1060. (emphasis added).]

Educ. of the City of Wildwood v. New Jersey State Dep't of Educ., EDU 8017-94, Final Decision, State Bd. of Educ., (June 7, 2000) (noting that N.J.S.A. 18A:7B-12 controls the financial responsibility of residential placements).

Domicile and Custody

The Legislature has provided that public education shall be free to any person over five and under twenty years of age who is domiciled within the school district. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). Under the school laws, a residence is defined as "domicile, unless a temporary residence is indicated." N.J.S.A. 18A:1-1. Domicile, generally, is the place where a person has his true, fixed, and permanent home, and whenever he is absent, he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955); In Re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991). While a person can have many residences, a person can have only one domicile at any one time. Benny, *supra*, 20 N.J. at 254.

In an education law context, determining the domicile of a student is usually based on the domicile of the child's parent or guardian. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48, 109 S. Ct. 1597, 1608, 104 L. Ed. 2d, 46 (1989); Roxbury Twp. Bd. of Educ. v. West Milford Bd. of Educ. 283 N.J. Super. 505, 521-22(citations omitted). The regulations implementing N.J.S.A. 18A:38-1 specify where a child is domiciled when his or her parents live in different districts:

1. A student is domiciled in the school district when he or she is the child of a parent or guardian whose permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.
 - i. where a student's parents or guardians are domiciled within different school districts and where there is no court order or written agreement

- between the parents designating the school district for school attendance, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year regardless of which parent has legal custody
- ii. Where a student's physical custody is shared on an equal-time, alternating week/month or other similar basis such that the student is not living with one parent for a majority of the school year, and where there is no court order or written agreement between the parents designating the school district for school attendance, the student's domicile is the present domicile of the parent with whom the student resided on the last school day prior to October 16 preceding the date of application.

[N.J.A.C. 6A:22-3.1(a)(1).]

After a divorce or judicial separation, a custody order is persuasive evidence of a child's domicile. See, e.g., W.A. O/B/O/ B.A. v. South Plainfield Bd. of Educ., EDU 4016-00, Initial Decision, (July 12, 2001), adopted, Comm'r. (August 27, 2001) (noting that even where a custody order is in place, the Commissioner will look to see where a minor child is actually residing, and a custody order is not always dispositive); D.M. v. Bd. of Educ. of the Twp. of Ewing, EDU 6448-00, Initial Decision,⁸ (January 18, 2002), rejected, Comm'r. (March 11, 2002), rev'd, State Bd. of Educ. (November 5, 2003) (finding that a child was domiciled with her mother, and not her sister, because the only evidence shown that the child lived with the sister was a temporary custody order); Bd. of Educ. of the City of Absecon v. M.L.G., EDU 10944-99, Initial Decision, (April 18, 2000), reversed Comm'r. (July 13, 2000) (finding that once a child's great aunt assumed legal and physical custody of a child, the only inquiry left for the Board was whether both the aunt and the child were domiciled in the district, and that absent a showing of fraud, a custody order must be accepted on its face); L.D.M. v. Bd. of Educ. of the Twp. of West Orange, EDU 3590-00, Initial Decision, (March 22, 2001), reversed, Comm'r., (May 11, 2001) (finding that where a child's sister assumed legal custody of him, the only appropriate inquiry was whether the sister and the child were domiciled in the district); V.S.-L. v. Bd. of Educ. of the City of Garfield, EDU 10879-06, reversed, Comm'r. (July 9, 2007) (finding that when a court order is entered awarding custody of a

⁸ The Initial Decision is not found on the Rutgers Library website or Lexis.

minor to an individual, the minor's domicile is determined by the domicile of that custodial individual, and this determination should only be reversed if there is overwhelming evidence that the child was not actually living with the individual that was granted custody); B.C. v. Bd. of Educ. of the City of Atlantic City, EDU 2623-08, Initial Decision, (October 19, 2009), adopted, Comm'r. (November 18, 2009) (finding that a child was domiciled with the grandmother because the grandmother had sole custody and guardianship of the child, and there was only speculative evidence presented by the school district that the child was not domiciled with the grandmother); R.A.R., O/B/O/ minor child R.D.R. v. Bd. of Educ. of the Black Horse Pike Reg'l High Sch. Dist., EDU 8849-07, Initial Decision, (January 25, 2008), adopted, Comm'r. (March 5, 2008) (finding that even though the mother had primary physical custody of a child, the child was permitted to attend the school district where the father was domiciled because the child actually permanently lived with the father and the custody order did not designate a school district for her attendance)

Some courts have emphasized that the parents' united intent should determine the child's district of domicile. In Roxbury, supra, 283 N.J. Super. at 513, divorced parents had joint custody and the mother had physical custody of a special education child.⁹ The mother lived in West Milford and the father lived in Roxbury Township. Ibid. The Law Division disagreed with the administrative law judge's (ALJ) conclusion that a person can have more than one domicile and determined that Roxbury and West Milford should split the cost of the child's education.¹⁰ Id. at 521. The Law Division required that the divorced parents have a united intent to establish a district in which their child should receive his education and that their decision would be determinative if reasonable and based on good faith considerations. Id. at 522. Based on these considerations, the Law Division determined, and the Appellate Division affirmed, that the child was domiciled with the mother in West Milford from the date that physical custody was transferred to her because the parents intended the mother's home to be the child's residence, the mother and her new husband intended the child to live with

⁹Because the court distinguished between the parents sharing "joint custody" and the mother having "physical custody," this Decision will assume that "joint custody" refers to joint legal custody although this is not explicit in the decision.

¹⁰ Jurisdiction of the Law Division was invoked pursuant to the provision of the IDEA, 20 U.S.C.A. § 1415(e)(2), and N.J.A.C. 1:6A:-18.3(a).

them if he no longer required a residential placement, and the child had a room and furniture at the mother's home. Ibid.

In Bd. of Educ. City of Summit v. Bd. of Educ. of Twp. of Millburn, 95 N.J.A.R. 2d (EDU) 506, temporary residence did not determine domicile and the ALJ would only look to the divorce decree if there was ambiguity as to domicile. In Summit, the divorce decree allowed for joint custody, but the father had physical custody. By mutual consent of her parents, the child had lived with her mother for most of her life except for intermittent occasions on which the mother was unable to care for her because she was committed to a psychiatric hospital. The ALJ determined that the only way that the domicile would change to that of the father is if the mother's intermittent incapacity to care for the child shifted the major parental responsibility to the father and if he exercised parental authority in decisions regarding his daughter's welfare. Id. at 507. Additionally, the ALJ held that if there was any ambiguity with respect to the child's domicile, the judgment of divorce might be determinative, but because there was no ambiguity with respect to where the child spent most of her time, the judgment of divorce was not controlling.¹¹

Another case that relied on the intent of the parents is Clifton v. Bd. of Educ. v. Sauro, 96 N.J.A.R.2d (EDU) 497. In that case, the parents were divorced, lived in two different cities, and had shared custody of their children who split time every week in each household. Under the original custody order, the mother was awarded custody while the father was granted liberal and reasonable rights of visitation. The mother began having difficulty with the children and let them spend more time with the father in Clifton, where they began attending school. After the Superior Court reaffirmed the mother's custody, the children began spending more time at the mother's house in Passaic. In finding that the children were domiciled in Clifton from the first day of the school year until entry of the Superior Court's custody order, and in Passaic thereafter, the ALJ relied on the reasoning of Roxbury, supra, and gave deference to the divorced parents' united intent to establish Clifton as their child's district. The ALJ determined

¹¹ It is important to keep in mind that the united intent of the parents' weighed heavily in determining the outcomes in both Summit and Roxbury, while in Roxbury, there was a custodial determination that did play some part in the holding.

that the decision to enroll the children in the district of the father's domicile was a united decision, reasonable, and made in good faith. It was only until the children began living with the mother more frequently after the reaffirmation of the mother's custody that the children were domiciled in Passaic and not entitled to attend school in Clifton. The Commissioner adopted the ALJ's decision, adding that an analysis of domicile does not necessarily depend on the "majority of the time" paradigm and that it is the parents' choice of domicile for their children during the operative time period, rather than their choice of school districts, that is determinative.

Dual domicile has been found in very narrow circumstances. For example, in Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 9 (App. Div. 2000), a special education child lived with each of his divorced parents, who shared joint legal and physical custody on an alternating week schedule. The child was placed at an out-of-district placement, and the school districts of Manville, the mother's domicile, and Somerville, the father's domicile, entered into an oral agreement to share the costs of the child's special education on an alternating year basis. Somerville, *supra*, 332 N.J. Super. at 9. After five years of alternating the special education costs, the Manville school district determined it would no longer pay the child's tuition. *Id.* at 9-10. The Appellate Division reversed the Law Division's determination that the child was a domiciliary of Somerville because the father resided there, and instead held that fairness dictated that both districts must equally bear the costs of the child's education. *Id.* at 17. Other cases have relied on Somerville's narrow holding. In Cumberland Reg'l High Sch. Dist. Bd. of Educ. v. Freehold Reg'l High Sch. Dist. Bd. of Educ., 293 Fed. Appx. 900 (3d Cir. 2008), the court held that two school districts had to share the costs of a child's education where the divorced parents had joint legal and physical custody of the child and the child did not have a clear domicile.¹² *Id.* at 904. The court's determination that the absence of a pre-existing agreement to share the costs of a child's education like in Somerville was not dispositive, the court concluded, because the holding of Somerville was based on equitable considerations rather than contractual ones. *Ibid.*

¹²This decision is not precedential under the third circuit internal operating procedure rule 5.7.

Guardianship

Under, N.J.S.A. 3B:1-1, Administration of Estates, a “guardian” is defined as a person who has qualified as a guardian of the person or incapacitated individual pursuant to court appointment. An individual for whom a guardian is appointed is defined as a “ward.” N.J.S.A. 3B:1-2. An “incapacitated person” is someone who, in relevant part, is so impaired because of mental deficiency that he lacks sufficient capacity to govern himself and manage his affairs. Ibid. A general guardian appointed for an incapacitated individual shall exercise all rights and powers of the incapacitated person. N.J.S.A. 3B:12-24.1. The powers and duties conferred upon a guardian are all the powers conferred upon the guardian by law and the provisions of this chapter except as limited by the judgment. N.J.S.A. 3B:12-48. In accordance with N.J.S.A. 3B:12-24.1, a guardian “shall exercise authority over matters relating to the rights and best interests of the ward’s personal needs, only to the extent adjudicated by a court of competent jurisdiction,” giving deference to the preferences of the ward, if known to the guardian. N.J.S.A. 3B:12-57(f). “To the extent that it is consistent with the terms of any order by a court of competent jurisdiction, the guardian shall . . . take custody of the ward and establish the ward’s place of abode in or outside” of New Jersey. Id. § (f) to (f)(1) (emphasis added).

II. Hazlet is responsible for the costs of J.M.’s education because Hazlet is both J.M.’s district of residence and his domicile.

Hazlet District is responsible for the costs of J.M.’s education because Hazlet is both J.M.’s district of residence and his domicile. First, Hazlet is J.M.’s district of residence because Hazlet is the present district of residence of S.M., with whom J.M. lived with prior to his most recent placement by the DCF. In the subsequent time spent at Willowglen, S.M., J.M.’s custodial parent, continued to live in Hazlet as of the last school day prior to October 16, 2010. Second, J.M. is domiciled in Hazlet because the Divorce Decree provides that J.M. be domiciled and educated in Hazlet, J.M.’s parents continue to intend that J.M. be domiciled and educated in Hazlet, the Divorce Decree

supersedes the guardianship order with respect to J.M.'s domicile, and the overnight visits at his father's household do not affect a finding that J.M. is domiciled in Hazlet.

Under N.J.S.A. 18A:7B-12(b) and N.J.A.C. 6A:23A-19.2(a)(1) to -(2), J.M.'s district of residence is his mother's present district of residence in Hazlet because he lived with her prior to placement, she continues to live in Hazlet, and she is the custodial parent. Similar to the decision in Wildwood, supra, two determinations must be made before deciding which district is financial responsible for the child's tuition. The first determination is which district is responsible for the initial obligation when the placement was first made. Immediately prior to his placement in Willowglen by the DCF, he lived with his mother, who currently resides in Hazlet. So Hazlet District is responsible for tuition for the initial year at Willowglen. The second determination is the obligation for tuition in the subsequent time spent at the Willowglen. N.J.A.C. 6A:23A-19.2(a)(2). The subsequent time that J.M. has been at Willowglen is governed by N.J.A.C. 6A:23A-19.2(a)(1) which is the "the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16." Still, the present district of residence is in Hazlet because S.M. was living in Hazlet prior to October 16, 2010, and she is still J.M.'s custodial parent. As a result, Hazlet District is responsible for the costs of J.M.'s education. See Lower Camden County, supra; Wildwood, supra.

Even if N.J.S.A. 18A:7B-12(b) does not apply here, Hazlet District is responsible for the costs of J.M.'s education because J.M. is domiciled in Hazlet for purposes of N.J.S.A. 18A:38-1 and N.J.A.C. 6A:22-3.1(a)(1)(i). According to N.J.S.A. 18A:38-1, a student is entitled to a free education from the district in which he is domiciled. And, under N.J.A.C. 6A:22-3.1(a)(1)(i), where a student's parents are domiciled in different school districts, the student's domicile may be determined by a court order or written agreement between the parents designating the school district for school attendance. Here, the Divorce Decree designates S.M. as J.M.'s residential custodian, Hazlet as J.M.'s place of residence, and Hazlet as the school district through which J.M. shall receive his education. The Divorce Decree provides this should only change if the parents jointly and mutually agree to remove J.M. from the Hazlet school system, and

the parents have not made such an agreement. Instead, the parents continue to intend that J.M. be domiciled and educated in Hazlet.

Moreover, the Divorce Decree, and not the guardianship order, is determinative of J.M.'s domicile. First, if K.M. took custody of J.M. and established his domicile in Aberdeen, this would be inconsistent with the sections of the Divorce Decree that name S.M. as the residential custodial parent and Hazlet as J.M.'s school district and place of residence.

The guardianship order did not terminate J.M.'s residential custodian rights. The guardianship order was executed pursuant to a judgment of incapacity that declared K.M. guardian over J.M.'s "person and property." The guardianship order gives K.M. control of his son's legal and financial issues but does not terminate the custodial rights of S.M. A guardian may take custody of the ward and establish the ward's place of abode, N.J.S.A. 3B:12-57(f)(1), but only "to the extent that it is consistent with the terms of any order by a court of competent jurisdiction" N.J.S.A. 3B:12-57(f) (emphasis added). Here, an arrangement by which K.M. took custody of J.M. and established J.M.'s domicile would be inconsistent with the terms of the Divorce Decree, an order by a court of competent jurisdiction.

Second, even though generally a child is legally emancipated at eighteen years old, the Divorce Decree here, presumably because of J.M.'s disabilities, specified that he would not be emancipated until, inter alia, he reached the age of eighteen or he graduated from high school, whichever occurred later. When emancipation occurs, "a parent relinquishes the right to custody and is relived of the duty to support a child." Newburg v. Arrigo, 88 N.J. 529, 543 (1982). In New Jersey, emancipation of a minor does not necessarily occur when a child turns eighteen; such an event establishes prima facie evidence of emancipation but not conclusive proof. Bishop v. Bishop, 287 N.J. Super. 593, 597 (Ch. Div. 1996) (citing Newburgh, supra, 88 N.J. at 543). This issue is fact sensitive and depends on the circumstances of the case. Ibid. A child is emancipated when "the fundamental dependant relationship between parent and child is terminated." Bishop, supra, 287 N.J. Super. at 598. Emancipation can occur, for

example, upon a child's marriage, upon induction into military service, by court order based on the child's best interest, or by attainment of an appropriate age. Id. at 598 (internal citations omitted). Unless that dependant relationship has ceased, regardless of a child's chronological age, parental support obligations continue. Ibid.

If the terms of emancipation are incorporated in the custody agreement, it should be enforced by the courts. For example, in Dolce v. Dolce, 383 N.J. Super. 11, 21 (App. Div. 2006), the court found that the unambiguous terms of a property settlement agreement (PSA), which was incorporated into a divorce decree, were enforceable "as written and agreed to by the parties, absent a substantial change in circumstances." The parties agreed that the mother would have primary residential custody and the father would pay child support until the son's emancipation, which would occur when he turned twenty-three or completed college. Id. at 16. Despite the provision in the parents' PSA establishing age twenty three as an emancipation event, the father in Dolce wanted the son declared emancipated because he had turned eighteen. Ibid. While the Family Part declared the son emancipated, the Appellate Division found that the father could not demonstrate any unfairness or inequity in the PSA which the court said was "plain and explicit . . . [and] le[ft] no room for interpretation." Id. at 21. As a result, the Appellate Division vacated the order of the Family Part that declaring the son emancipated and terminating the father's child support obligation. Ibid.

While this case concerns custody and domicile, and not support obligations, the same analysis can be used. J.M. is not independent of his parents and no event triggering emancipation under the Divorce Decree has occurred. The guardianship order did not override the determination of custody, the emancipation triggers, or the residency arrangement contained in the Divorce Decree. There is no inequity, unfairness, or ambiguity regarding the Divorce Decree, and the terms of the agreement specifying J.M.'s emancipation event, district of education, and district of residence, should be enforced as written.

Finally, J.M.'s overnight visits at his father's house should not serve to change J.M.'s domicile to Aberdeen. A student's residence is his "domicile, unless temporary

residence is indicated." N.J.S.A. 18A:1-1. Temporary residence does not determine domicile and if there is any ambiguity as to domicile, the divorce decree should be looked to for guidance. See Summit, supra. In the same vein as Summit, domicile should only change if the temporary residence of J.M. shifted the major parental responsibility and authority regarding his son's welfare to the father. It is important to note that J.M. has been improving behaviorally, and while it is not guaranteed that he will continue to transition to going back to his mother's home, the intent of the parents is that he will go back to the mother's home. While K.M. has taken on more responsibility (J.M. sleeps at his house when visiting), this has not fundamentally shifted the exercise of parental responsibility and authority to him. S.M. has retained those responsibilities despite the temporary living arrangements made in response to the incident in which J.M. assaulted his mother.

I therefore **CONCLUDE** that Hazlet District is responsible for J.M.'s education costs because Hazlet is both J.M.'s district of residence and the town in which he is domiciled. Hazlet is J.M.'s district of residence because J.M. lived with his mother in Hazlet immediately prior to his placement by the State in a residential facility, his mother continues to reside in Hazlet, and his mother is his custodial parent. Alternatively, J.M. is domiciled in Hazlet because the Divorce Decree stipulates that J.M. is domiciled in Hazlet and is to be educated there, the parents continue to intend for Hazlet to be J.M.'s domicile and the district through which he receives his education, the guardianship order does not supersede the Divorce Decree with respect to J.M.'s domicile, and J.M.'s overnight visits at his father's house in Aberdeen do not change J.M.'s domicile. Hazlet District has not proven that the decision of OSF was arbitrary, capricious or without reason.

ORDER

Respondent's motion for summary decision is **GRANTED**, and petitioner's cross-motion for summary decision is **DENIED**. Petitioner's appeal of the decision of OSF is **DENIED**. Petitioner shall continue to be responsible for the costs of educating J.M.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10. Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 21, 2011

DATE



EDWARD J. DELANOY, JR., ALJ

Date Received at Agency:

11-21-11

Date Mailed to Parties:

NOV 28 2011

/lam

BOARD OF EDUCATION OF THE
MATAWAN-ABERDEEN REGIONAL
SCHOOL DISTRICT,
MONMOUTH COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE
TOWNSHIP OF HAZLET,

MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner Matawan-Aberdeen Regional Board of Education (Matawan) sought a determination that respondent Hazlet Board of Education (Hazlet) is the party responsible for the cost of educating J.M. – a student receiving special education services in a residential placement – for the 2010-2011 school year. Since the divorce of his parents in 2001, J.M.'s custody has been governed by a divorce decree which gave joint legal custody to both parents but designated his mother, S.M., as the residential custodial parent and primary caretaker, and further provided that it was the parents' intention that their son continue to be educated in and through the Hazlet school district. In January 2010, J.M.'s father – K.M., who resides in Aberdeen – filed for permanent sole legal guardianship of his son, under which K.M. would handle J.M.'s legal and financial matters. The guardianship documents did not cover J.M.'s living arrangements. Hazlet contended that petitioning Board is responsible for the cost of educating J.M. pursuant to the guardianship order. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact and the matter is ripe for summary decision; pursuant to *N.J.S.A. 18A:7B-12b* and *N.J.A.C. 6A:23A-19.2(a)(1)-(2)*, J.M.'s district of residence is his mother's present district of residence in Hazlet because he lived with her prior to placement and she is the custodial parent, and because the terms of the parents' divorce decree stipulates that J.M. is domiciled in Hazlet and would be educated in the Hazlet district; the divorce decree and not the guardianship order is determinative of J.M.'s domicile; and the guardianship order did not terminate J.M.'s residential custodial rights as it was executed pursuant to a judgment of incapacity that declared K.M. guardian over J.M.'s legal and financial issues. The ALJ concluded that the respondent school district, Hazlet, is responsible for J.M.'s education costs and, accordingly, granted petitioner's motion for summary decision.

Upon full and careful consideration, the Commissioner adopted the Initial Decision as the final decision in this matter as he concurred that – given the undisputed facts – summary disposition was appropriate, petitioner's motion for summary disposition was properly granted and respondent's motion for summary disposition was properly denied – for the reasons stated in the ALJ's decision.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

February 21, 2012

OAL DKT. NO. EDU 8759-10
 AGENCY DKT. NO. 143-7/10

BOARD OF EDUCATION OF THE
 MATAWAN-ABERDEEN REGIONAL
 SCHOOL DISTRICT,
 MONMOUTH COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE
 TOWNSHIP OF HAZLET,

MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The Commissioner has reviewed the record of this matter and the Initial Decision of the Office of Administrative Law (OAL) on the parties' cross motions for summary decision. Respondent (Hazlet) filed exceptions, and Petitioner (Matawan-Aberdeen) filed reply exceptions as provided by *N.J.A.C.* 1:1-18.4.

Hazlet¹ argues in its exceptions that the ALJ erred as a matter of law when he determined that the 2009 Judgment of Incapacitation did not supersede the 2001 custody agreement, which granted custodial rights of J.M. to the mother, S.M. Moreover, Hazlet asserts that the ALJ relied, to its detriment, on facts not clearly established in the record regarding the parents' intent that S.M. should continue as the custodial, residential parent of J.M.

¹ On May 31, 2011, Respondent Hazlet filed a companion case, *Hazlet Township Board of Education v. New Jersey Department of Education, Office of School Funding*, EDU 6170-11, Agency Dkt. No. 116-5/11. Since the new matter involved substantially similar issues, the ALJ – with the consent of the parties – decided the cases concurrently.

In response, Matawan-Aberdeen agrees with the findings of the ALJ and argues that both parents, K.M. and S.M., testified without contradiction during depositions² that their son, J.M., was domiciled in Hazlet – residing initially with his parents and then solely with his mother after the divorce. Moreover, both parents testified that after a transition period J.M. would once again enjoy overnight stays at his mother's home. The father testified that his poor health made it impossible for him to undertake full custodial responsibility of his son.

Upon his considered review of the record and a thorough reading of the deposition transcripts, the Commissioner concurs with the Administrative Law Judge (ALJ) that this matter is ripe for summary decision as there are no genuine issues of material fact to resolve. For the reasons convincingly presented in the ALJ's decision, the Commissioner agrees that the Township of Hazlet is the district of residence; Hazlet is the district of S.M.'s residence, and J.M. lived with her prior to the residential placement. Alternatively, Hazlet is J.M.'s domicile in accordance with the Divorce Decree; therefore, the Hazlet Board of Education is responsible for the cost of his education.

Accordingly, summary disposition is granted to petitioner Matawan-Aberdeen Regional School District, and respondent Hazlet's cross motion is hereby denied.

IT IS SO ORDERED.³


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/21/21

Date of Mailing: 2/22/12

² Depositions of parents K.M and S.M on behalf of J.M. were conducted *ad seriatim* on December 7, 2010.

³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36. (N.J.S.A. 18A:6-9.1)*



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING

SUMMARY DECISION

OAL DKT. NO. EDU 8759-10

AGENCY DKT. NO. 143-7/10

**BOARD OF EDUCATION OF THE
MATAWAN-ABERDEEN REGIONAL,
MONMOUTH COUNTY,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF HAZLET,
MONMOUTH COUNTY.**

Respondent.

David B. Rubin, Esq., for petitioner

Gabrielle Pettineo, Esq., for respondent (Kenny, Gross, Kovats & Parton,
attorneys)

Record Closed: October 17, 2011

Decided: November 21, 2011

BEFORE EDWARD J. DELANOY, JR., ALJ:

STATEMENT OF THE CASE

Petitioner Matawan-Aberdeen Regional Board of Education (Matawan-Aberdeen District) seeks a determination that respondent Hazlet Board of Education (Hazlet School District) is the responsible party for the cost of educating J.M., a student receiving special education services, for the 2010-11 school year. Hazlet School District counters that Matawan-Aberdeen District is the responsible party for the cost of educating J.M. Both parties bring cross-motions for summary decision.

PROCEDURAL HISTORY

Matawan-Aberdeen District filed a petition for due process dated July 9, 2010, with the Bureau of Controversies & Disputes of the New Jersey Department of Education (DOE). On July 30, 2010, an Answer was filed by respondent Hazlet School District, and the matter was transmitted for a hearing to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-2(b) and N.J.A.C. 4A:2-2.9(b), where it was filed on August 19, 2010.

Upon the motion of the parties, an order for the depositions of J.M.'s mother (S.M.) and father (K.M.) was entered on October 20, 2010. Depositions of S.M. and K.M. were taken on December 7, 2010. Petitioner and respondent then filed cross-motions for summary decision on or before April 26, 2011. Subsequently, a companion case was filed on May 31, 2011, involving substantially similar issues entitled, "*Hazlet Township Board of Education v. New Jersey Department of Education, Office of School Funding*", EDU 06170-2011, Agency Ref. No. 116-5/11 ("Companion Case"). Upon consent of the parties, the record in this matter remained open to allow for the cross-filing of motions for summary decision in the Companion Case. In that matter, Hazlet School District claims the Office of School Funding erred when it found that Hazlet School District was responsible for the costs of educating J.M. Motions and briefs were filed in the Companion Case on or before October 17, 2011, and the decision in the Companion Case shall be made concurrently with the decision herein. As a result, the record closed herein on October 17, 2011.

FACTUAL DISCUSSION

Having reviewed the submissions of the parties, as well as the depositions of K.M. and S.M., I **FIND** the following as **FACT**: J.M. was born on November 13, 1991, and is currently nineteen years old. (Petitioner's Brief at 2 to -3.¹) He was adopted by K.M. and S.M., who were then living in Hazlet. J.M. was enrolled in the Hazlet School District at an early age and it was determined he was eligible for special education and related services. Id. In particular, since July 1998, J.M. has been classified as "Multiply Disabled," based on mild cognitive impairment, a learning disability, and Pervasive Developmental Disorder on mild Autistic Spectrum and Specific Learning Disability. He has been placed in out-of-district schools since the fourth grade. (Respondent's Brief at 2² (citing Cert. of Susan Galbraith; 1T 6:21-7:15.³))

In 2001, when J.M. was ten years old, his parents divorced. The Dual Judgment of Divorce and Agreement divorce decree ("Divorce Decree") ordered and adjudged on July 23, 2001, contained a custody arrangement that gave "joint legal custody" to both parents but designated the mother, S.M., as the "residential custodial parent and primary caretaker." (Petitioner's Ex. 5a.⁴) J.M. continued to reside with S.M. in Hazlet, and he remained enrolled in the Hazlet School District, attending a series of out-of-district day placements. (1T 9:12-15; 2T 8:16-9:4; Petitioner's Brief at 2-3.) The Divorce Decree provided that it was S.M. and K.M.'s intention that J.M. continue to be educated in and through the Hazlet School District. It also specified, in relevant part, that J.M. would be emancipated when he turned eighteen or graduated from high school, whichever occurred later. (Respondent's Ex. at 1.⁵) At all times relevant to this

¹ Petitioner's motion for summary decision was received by the OAL on February 18, 2011, and will be referred to as "Petitioner's Brief" throughout this Decision.

² Respondent's motion for summary decision was received by the OAL on February 18, 2011, will be referred to as "Respondent's Brief" throughout this Decision.

³ The transcripts from the deposition of K.M. and S.M. taken on December 7, 2010 and attached to both petitioner and respondent's motions (transcripts are attached to respondent's motion and part of Exhibit 6 and Exhibit 7 attached to petitioner's motion) will be referred to as 1T and 2T, respectively, throughout this memo.

⁴ Petitioner's Ex. will refer to the exhibits appended to petitioner's motion for summary decision throughout this Decision.

⁵ Respondent's Ex. will refer to the exhibits appended to respondent's motion for summary decision with the numbered notations referring to the tabulations.

matter, K.M. lived in the Township of Aberdeen, a constituent municipality of the Matawan-Aberdeen District. (Respondent's Ex. at 4; Respondent's Brief at 3; Petitioner's Brief at 2.)

In August, 2009, J.M. physically assaulted S.M. As a result, J.M. was placed in the Willowglen Residential Center (Willowglen) in Lisbon, New Jersey by the Department of Children and Families (DCF). (T1 16:23-17:25; T2 11:16-12:5; Respondent's Petition of Appeal at para. 4-6⁶) Willowglen is a residential placement for children with emotional and behavioral disorders. (Respondent's Brief at 2 (citing Cert. of Galbraith at 6).) When J.M. was first placed at Willowglen, the Hazlet School District provided transportation to and from Willowglen to the Jackson Regional Day School, where J.M. received his education. (Respondent's Brief at 3 (citing Cert. of Galbraith at 6); Respondent's Petition of Appeal.) The Hazlet School District paid the tuition for J.M.'s education at Jackson Regional Day School. Ibid. On November 13, 2009, J.M. turned eighteen years old. (1T 10:2-3.) On or about January 22, 2010, J.M. was placed at the Willowglen facility in Sparta, where he currently resides and receives his education, pursuant to an Individualized Education Program (IEP) drafted by the Hazlet School District's Child Study Team. Ibid.

On January 25, 2010, K.M. filed for permanent sole legal guardianship over J.M. and his property because J.M. "is an incapacitated person as a result of unsoundness of mind and is incapable of governing himself and managing his own affairs." (Respondent's Ex. 2.⁷) S.M. and K.M. jointly agreed that, as a guardian, K.M. would handle J.M.'s "legal and financial matters" and because "[J.M.] has problems making the correct decisions." (1T 10:4-13:3; 2T 10:1-11:15.) The guardianship documents did not mention S.M. or J.M.'s living arrangements. (Respondent's Ex. 2.)

⁶ On May 6, 2011, Respondent filed with the Department of Education, Bureau of Controversies and Disputes a Petition of Appeal challenging a determination by the Department of Education, Office of School Funding (OSF) that Hazlet Board of Education is responsible for J.M.'s education costs pursuant to N.J.S.A. 18A:7B 12.

⁷ Exhibit 2 attached to respondent's motion, is an amended judgment of incapacitation of J.M. that finds that J.M. is an incapacitated person and grants guardianship to K.M. as "Permanent Guardian."

On or about April 7, 2010, after the Hazlet School District was notified of K.M.'s appointment as J.M.'s legal guardian, Dr. William George, the Superintendent of School for the Hazlet School District, notified Dr. Richard O'Malley, then the Superintendent of Schools for the Matawan-Aberdeen District, that K.M. had been appointed legal guardian of J.M. and that K.M. lived in Aberdeen. (Respondent's Ex. 3.) On that same date, K.M. was notified that the Hazlet School District was aware that K.M. had been appointed as the guardian of J.M. and requested that K.M. enroll him in the Matawan-Aberdeen District, where K.M. lives. (Respondent's Ex. 4.⁸) Also on that date, the Hazlet School District notified the principal of Willowglen, Susan Hackett, that K.M. had been appointed the permanent guardian of J.M. and that as a result, his residency was in Aberdeen, and the Matawan-Aberdeen District was responsible for J.M.'s tuition as of April 15, 2010. (Respondent's Ex. 5.) Joel Glastein, the former Deputy Superintendent of the Matawan-Aberdeen District, contacted the Hazlet Department of Special Services to inform it that the Matawan-Aberdeen District did not believe it was responsible for J.M.'s education. (Respondent's Brief at 5 citing Cert. of Galbraith at 16.)

When J.M. is able to leave Willowglen on short home visits, he stays overnight at his father's house, where J.M. has a bedroom, but also visits his mother's house during the day. (1T 14:24-16:9; 1T 30:13-15; 2T 12:19-14:6.) J.M. has spent "the bulk of his time" at S.M.'s house "on a number of occasions," despite not spending the night at S.M.'s house. (1T 16:5-9.) K.M. and S.M. are trying to gradually reintroduce J.M. back into S.M.'s home and life and are planning on letting him spend nights at S.M.'s house during home visits as long as he is acting appropriately. (1T 17:15-19; 1T 30:19-31:11; 2T 19:23-20:9.) K.M. characterized J.M.'s "home" as S.M.'s house because "reason number one, the [divorce] decree says so, reason number two that's what his mother wants, [and] [r]eason number three is I have a number of medical conditions that prevent me from having full time residential custody of my son." (1T 30:2-6.) Additionally, S.M. and K.M. discussed J.M.'s living arrangements if and when he comes home from Willowglen, and in S.M.'s view, J.M. would be living with both K.M. and her, but J.M. would predominately stay with her. (2T 14:7-18; 2T 18:8-16; 2T 19:23-20:9.)

⁸Exhibit 4 attached to respondent's motion is a letter from K.M. from Susan Galbraith, the Director of Special Services from the Hazlet School District.

Both parents conceded that there was no firm agreement in place that ultimately determined where J.M. would be staying if he left Willowglen. (1T 16:10-20; 2T 14:14-18.)

Sometime after J.M. was placed in Willowglen by the DCF, the DCF asked the Office of School Funding (OSF) to determine the district of residence of J.M in response to a dispute over who was responsible for J.M.'s education costs. On February 9, 2011, the Hazlet School District received a determination from the OSF that Hazlet was financially responsible. (Respondent's Petition of Appeal.) The OSF based its finding that J.M. resided in Hazlet with his mother on N.J.S.A. 18A:7B-12b, which states:

The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private school or out-of-state facilities shall be the present district of residence of the parent or guardian with whom the child lived with prior to his most recent admission to a State facility or most recent placement by a State agency.

[Ibid.]

On April 8, 2011, Yut'se Thomas, the Acting Assistant Commissioner, Division of Finance, by letter upheld OSF's determination regarding Hazlet's responsibility for the costs of J.M.'s education. According to Assistant Commissioner Thomas, the Hazlet Board of Education is responsible for the costs of J.M.'s education under N.J.S.A. 18A:7B-12(b) because J.M. resided with his mother in Hazlet immediately prior to the date of his placement, and she still lives there. Ibid. She stated that K.M.'s appointment as an "adult guardian" over J.M. was irrelevant because the mother's parental rights were not terminated, and "[u]nless the mother's parental rights have been terminated by court order, she remains the child's parent/guardian for district of residence purposes." Ibid. Thomas also noted that the Hazlet Board of Education would continue to be responsible for J.M.'s education costs as long as S.M. remained a resident of Hazlet.

On May 31, 2011, the Hazlet School Board filed a Petition of Appeal challenging the district of residence determination, alleging that J.M. resided in Aberdeen with his father pursuant to the guardianship order and the fact that he has not lived with his mother since August 2009. Hazlet School Board also alleged that the OSF “unreasonably refused to stay its determination despite having notice of controlling litigation in the [OAL]” Ibid.

LEGAL DISCUSSION

N.J.A.C. 1:1-12.5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided “that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b). The provisions of N.J.A.C. 1:1-12.5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment, and, as such, when entertaining motions for summary decision, a “judge’s function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue [to proceed to a hearing].” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)) (first brackets in original). A judge must “consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.” Ibid. In determining whether summary decision is appropriate, this tribunal is required to do “the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter proceeds to a hearing. Id. at 539-40. The facts relevant to a decision on this motion are not in dispute. Therefore, pursuant to N.J.A.C. 1:1-12.5(b) and Brill, supra, **FIND** that there are no genuine issues of material fact and that this matter is ripe for summary decision.

1. District of Residence, Domicile, Guardianship, and Custody

District of Residence

According to the State Facilities Education Act of 1979, N.J.S.A. 18A:7B-1 to -13, for school funding purposes, the Commissioner of Education shall determine district residence as follows:

b. The district of residence for children who are in residential State facilities or have been placed by State agencies in group homes, skill development homes, private school or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.

[N.J.S.A. 18A:7B-12(b).]

The regulations implementing Title 18A define "present district of residence" as follows:

(a) The district of residence for school funding purposes shall be determined according to the following criteria:

1. The "present district of residence" of a child in a residential state facility defined in N.J.S.A. 18A:7F-45 and referred to in the first paragraph of N.J.S.A. 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16.

2. The "present district of residence" of a child placed by a State agency in a group home, skill development home, approved private school for students with disabilities or out-of-state facility also referred to in the first paragraph of N.J.S.A. 18A:7B-12b means the New Jersey district of residence of the child's parents(s) or guardian(s) as of the date of the child's most recent placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's

“present district of residence” shall be determined in the same manner as for a child in a residential State facility as set forth in (a)1 above.

[N.J.A.C. 6A:23A-19.2(a)(1) to -(2).]

Thus, the “present district of residence” of a child placed in a residential facility by a State agency is the district of residence of the parent with whom the child lived prior to his most recent placement by the State agency. N.J.A.C. 6A:23A-19.2(a)(2). In subsequent school years, the “present district of residence” will be the district of residence of the child’s parent as of the last school day prior to October 16. Id. at § 19.2(a)(1). A child’s district of residence is responsible for the costs of his education. See Bd. of Educ. of the Lower Camden County Reg’l Sch. Dist. No. 1 v. State of New Jersey, Dep’t. of Educ., Bureau of Sch. Fin., EDU 8578-98, Initial Decision (June 4, 1999), adopted, Acting Comm’r. (Aug. 13, 1999), affirmed, State Bd. of Educ. (July 5, 2000) (finding that the “present district of residence” is the residence of the child’s parent as of the last school day prior to October 16 and if this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement, and the custodial parent is the parent whose district of residence is considered to determine which district is responsible for tuition⁹); Bd. of Educ. of the City of Wildwood v. New Jersey State Dep’t of Educ., EDU 8017-94, Final Decision, State Bd. of Educ., (June 7, 2000) (noting that N.J.S.A. 18A:7B-12 controls the financial responsibility of residential placements).

Domicile and Custody

⁹ At the time of the Lower Camden County, supra decision, the relevant provision of N.J.S.A. 18A:7B-12 (1999) read:

b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.

If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.

[L. 1999, c. 114, § 1060. (emphasis added).]

Additionally, N.J.A.C. 6:20-5.3 was the applicable regulation at the time of the decision.

The Legislature has provided that public education shall be free to any person over five and under twenty years of age who is domiciled within the school district. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). Under the school laws, a residence is defined as "domicile, unless a temporary residence is indicated." N.J.S.A. 18A:1-1. Domicile, generally, is the place where a person has his true, fixed, and permanent home, and whenever he is absent, he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955); In Re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991). While a person can have many residences, a person can only one domicile at any one time. Benny, supra, 20 N.J. at 254.

In an education law context, determining the domicile of a student is usually based on the domicile of the child's parent or guardian. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48, 109 S. Ct. 1597, 1608, 104 L. Ed. 2d, 46 (1989); Roxbury Twp. Bd. of Educ. v. West Milford Bd. of Educ. 283 N.J. Super. 505, 521-22(citations omitted). The regulations implementing N.J.S.A. 18A:38-1 specify where a child is domiciled when his or her parents live in different districts:

1. A student is domiciled in the school district when he or she is the child of a parent or guardian whose permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.
 - i. where a student's parents or guardians are domiciled within different school districts and where there is no court order or written agreement between the parents designating the school district for school attendance, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year regardless of which parent has legal custody
 - ii. Where a student's physical custody is shared on an equal-time, alternating week/month or other similar basis such that the student is not living with one parent for a majority of the school year, and

where there is no court order or written agreement between the parents designating the school district for school attendance, the student's domicile is the present domicile of the parent with whom the student resided on the last school day prior to October 16 preceding the date of application.

[N.J.A.C. 6A:22-3.1(a)(1).]

After a divorce or judicial separation, a custody order is persuasive evidence of a child's domicile. See, e.g., W.A. O/B/O/ B.A. v. South Plainfield Bd. of Educ., EDU 4016-00, Initial Decision, (July 12, 2001), adopted, Comm'r. (August 27, 2001) (noting that even where a custody order is in place, the Commissioner will look to see where a minor child is actually residing, and a custody order is not always dispositive); D.M. v. Bd. of Educ. of the Twp. of Ewing, EDU 6448-00, Initial Decision,¹⁰ (January 18, 2002), rejected, Comm'r. (March 11, 2002), rev'd, State Bd. of Educ. (November 5, 2003) (finding that a child was domiciled with her mother, and not her sister, because the only evidence shown that the child lived with the sister was a temporary custody order); Bd. of Educ. of the City of Absecon v. M.L.G., EDU 10944-99, Initial Decision, (April 18, 2000), reversed Comm'r. (July 13, 2000) (finding that once a child's great aunt assumed legal and physical custody of a child, the only inquiry left for the Board was whether both the aunt and the child were domiciled in the district, and that absent a showing of fraud, a custody order must be accepted on its face); L.D.M. v. Bd. of Educ. of the Twp. of West Orange, EDU 3590-00, Initial Decision, (March 22, 2001), reversed, Comm'r., (May 11, 2001) (finding that where a child's sister assumed legal custody of him, the only appropriate inquiry was whether the sister and the child were domiciled in the district); V.S.-L. v. Bd. of Educ. of the City of Garfield, EDU 10879-06, reversed, Comm'r. (July 9, 2007) (finding that when a court order is entered awarding custody of a minor to an individual, the minor's domicile is determined by the domicile of that custodial individual, and this determination should only be reversed if there is overwhelming evidence that the child was not actually living with the individual that was granted custody); B.C. v. Bd. of Educ. of the City of Atlantic City, EDU 2623-08, Initial Decision, (October 19, 2009), adopted, Comm'r. (November 18, 2009) (finding that a

¹⁰ The Initial Decision is not found on the Rutgers Library website or Lexis.

child was domiciled with the grandmother because the grandmother had sole custody and guardianship of the child, and there was only speculative evidence presented by the school district that the child was not domiciled with the grandmother); R.A.R., O/B/O/ minor child R.D.R. v. Bd. of Educ. of the Black Horse Pike Reg'l High Sch. Dist., EDU 8849-07, Initial Decision, (January 25, 2008), adopted, Comm'r. (March 5, 2008) (finding that even though the mother had primary physical custody of a child, the child was permitted to attend the school district where the father was domiciled because the child actually permanently lived with the father and the custody order did not designate a school district for her attendance)

Some courts have emphasized that the parents' united intent should determine the child's district of domicile. In Roxbury, supra, 283 N.J. Super. at 513, divorced parents had joint custody and the mother had physical custody of a special education child.¹¹ The mother lived in West Milford and the father lived in Roxbury Township. Ibid. The Law Division disagreed with the administrative law judge's (ALJ) conclusion that a person can have more than one domicile and determined that Roxbury and West Milford should split the cost of the child's education.¹² Id. at 521. The Law Division required that the divorced parents have a united intent to establish a district in which their child should receive his education and that their decision would be determinative if reasonable and based on good faith considerations. Id. at 522. Based on these considerations, the Law Division determined, and the Appellate Division affirmed, that the child was domiciled with the mother in West Milford from the date that physical custody was transferred to her because the parents intended the mother's home to be the child's residence, the mother and her new husband intended the child to live with them if he no longer required a residential placement, and the child had a room and furniture at the mother's home. Ibid.

¹¹Because the court distinguished between the parents sharing "joint custody" and the mother having "physical custody," this Decision will assume that "joint custody" refers to joint legal custody although this is not explicit in the decision.

¹² Jurisdiction of the Law Division was invoked pursuant to the provision of the IDEA, 20 U.S.C.A. § 1415(e)(2), and N.J.A.C. 1:6A:-18.3(a).

In Bd. of Educ. City of Summit v. Bd. of Educ. of Twp. of Millburn, 95 N.J.A.R. 2d (EDU) 506, temporary residence did not determine domicile and the ALJ would only look to the divorce decree if there was ambiguity as to domicile. In Summit, the divorce decree allowed for joint custody, but the father had physical custody. By mutual consent of her parents, the child had lived with her mother for most of her life except for intermittent occasions on which the mother was unable to care for her because she was committed to a psychiatric hospital. The ALJ determined that the only way that the domicile would change to that of the father is if the mother's intermittent incapacity to care for the child shifted the major parental responsibility to the father and if he exercised parental authority in decisions regarding his daughter's welfare. Id. at 507. Additionally, the ALJ held that if there was any ambiguity with respect to the child's domicile, the judgment of divorce might be determinative, but because there was no ambiguity with respect to where the child spent most of her time, the judgment of divorce was not controlling.¹³

Another case that relied on the intent of the parents is Clifton v. Bd. of Educ. v. Sauro, 96 N.J.A.R.2d (EDU) 497. In that case, the parents were divorced, lived in two different cities, and had shared custody of their children who split time every week in each household. Under the original custody order, the mother was awarded custody while the father was granted liberal and reasonable rights of visitation. The mother began having difficulty with the children and let them spend more time with the father in Clifton, where they began attending school. After the Superior Court reaffirmed the mother's custody, the children began spending more time at the mother's house in Passaic. In finding that the children were domiciled in Clifton from the first day of the school year until entry of the Superior Court's custody order, and in Passaic thereafter, the ALJ relied on the reasoning of Roxbury, supra, and gave deference to the divorced parents' united intent to establish Clifton as their child's district. The ALJ determined that the decision to enroll the children in the district of the father's domicile was a united decision, reasonable, and made in good faith. It was only until the children began living

¹³ It is important to keep in mind that the united intent of the parents' weighed heavily in determining the outcomes in both Summit and Roxbury, while in Roxbury, there was a custodial determination that did play some part in the holding.

with the mother more frequently after the reaffirmation of the mother's custody that the children were domiciled in Passaic and not entitled to attend school in Clifton. The Commissioner adopted the ALJ's decision, adding that an analysis of domicile does not necessarily depend on the "majority of the time" paradigm and that it is the parents' choice of domicile for their children during the operative time period, rather than their choice of school districts, that is determinative.

Dual domicile has been found in very narrow circumstances. For example, in Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 9 (App. Div. 2000), a special education child lived with each of his divorced parents, who shared joint legal and physical custody on an alternating week schedule. The child was placed at an out-of-district placement, and the school districts of Manville, the mother's domicile, and Somerville, the father's domicile, entered into an oral agreement to share the costs of the child's special education on an alternating year basis. Somerville, *supra*, 332 N.J. Super. at 9. After five years of alternating the special education costs, the Manville school district determined it would no longer pay the child's tuition. *Id.* at 9-10. The Appellate Division reversed the Law Division's determination that the child was a domiciliary of Somerville because the father resided there, and instead held that fairness dictated that both districts must equally bear the costs of the child's education. *Id.* at 17. Other cases have relied on Somerville's narrow holding. In Cumberland Reg'l High Sch. Dist. Bd. of Educ. v. Freehold Reg'l High Sch. Dist. Bd. of Educ., 293 Fed. Appx. 900 (3d Cir. 2008), the court held that two school districts had to share the costs of a child's education where the divorced parents had joint legal and physical custody of the child and the child did not have a clear domicile.¹⁴ *Id.* at 904. The court's determination that the absence of a pre-existing agreement to share the costs of a child's education like in Somerville was not dispositive, the court concluded, because the holding of Somerville was based on equitable considerations rather than contractual ones. *Ibid.*

Guardianship

¹⁴This decision is not precedential under the third circuit internal operating procedure rule 5.7.

Under, N.J.S.A. 3B:1-1, Administration of Estates, a “guardian” is defined as a person who has qualified as a guardian of the person or incapacitated individual pursuant to court appointment. An individual for whom a guardian is appointed is defined as a “ward.” N.J.S.A. 3B:1-2. An “incapacitated person” is someone who, in relevant part, is so impaired because of mental deficiency that he lacks sufficient capacity to govern himself and manage his affairs. Ibid. A general guardian appointed for an incapacitated individual shall exercise all rights and powers of the incapacitated person. N.J.S.A. 3B:12-24.1. The powers and duties conferred upon a guardian are all the powers conferred upon the guardian by law and the provisions of this chapter except as limited by the judgment. N.J.S.A. 3B:12-48. In accordance with N.J.S.A. 3B:12-24.1, a guardian “shall exercise authority over matters relating to the rights and best interests of the ward’s personal needs, only to the extent adjudicated by a court of competent jurisdiction,” giving deference to the preferences of the ward, if known to the guardian. N.J.S.A. 3B:12-57(f). “To the extent that it is consistent with the terms of any order by a court of competent jurisdiction, the guardian shall . . . take custody of the ward and establish the ward’s place of abode in or outside” of New Jersey. Id. § (f) to (f)(1) (emphasis added).

II. Hazlet is responsible for the costs of J.M.’s education because Hazlet is both J.M.’s district of residence and his domicile.

Hazlet School Board is responsible for the costs of J.M.’s education because Hazlet is both J.M.’s district of residence and his domicile. First, Hazlet is J.M.’s district of residence because Hazlet is the present district of residence of S.M., with whom J.M. lived with prior to his most recent placement by the DCF. In the subsequent time spent at Willowglen, S.M., J.M.’s custodial parent, continued to live in Hazlet as of the last school day prior to October 16, 2010. Second, J.M. is domiciled in Hazlet because the Divorce Decree provides that J.M. be domiciled and educated in Hazlet, J.M.’s parents continue to intend that J.M. be domiciled and educated in Hazlet, the Divorce Decree supersedes the guardianship order with respect to J.M.’s domicile, and the overnight visits at his father’s household do not affect a finding that J.M. is domiciled in Hazlet.

Under N.J.S.A. 18A:7B-12(b) and N.J.A.C. 6A:23A-19.2(a)(1) to -(2), J.M.'s district of residence is his mother's present district of residence in Hazlet because he lived with her prior to placement, she continues to live in Hazlet, and she is the custodial parent. Similar to the decision in Wildwood, supra, two determinations must be made before deciding which district is financial responsible for the child's tuition. The first determination is which district is responsible for the initial obligation when the placement was first made. Immediately prior to his placement in Willowglen by the DCF, he lived with his mother, who currently resides in Hazlet. Therefore, Hazlet School Board is responsible for tuition for the initial year at Willowglen. The second determination is the obligation for tuition in the subsequent time spent at the Willowglen. N.J.A.C. 6A:23A-19.2(a)(2). The subsequent time that J.M. has been at Willowglen is governed by N.J.A.C. 6A:23A-19.2(a)(1) which is the "the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16." Still, the present district of residence is in Hazlet because S.M. was living in Hazlet prior to October 16, 2010, and she is still J.M.'s custodial parent. As a result, Hazlet School Board is responsible for the costs of J.M.'s education. See Lower Camden County, supra; Wildwood, supra.

Even if N.J.S.A. 18A:7B-12(b) does not apply here, Hazlet School Board is responsible for the costs of J.M.'s education because J.M. is domiciled in Hazlet for purposes of N.J.S.A. 18A:38-1 and N.J.A.C. 6A:22-3.1(a)(1)(i). According to N.J.S.A. 18A:38-1, a student is entitled to a free education from the district in which he is domiciled. And, under N.J.A.C. 6A:22-3.1(a)(1)(i), where a student's parents are domiciled in different school districts, the student's domicile may be determined by a court order or written agreement between the parents designating the school district for school attendance. Here, the Divorce Decree designates S.M. as J.M.'s residential custodian, Hazlet as J.M.'s place of residence, and Hazlet as the school district through which J.M. shall receive his education. The Divorce Decree provides this should only change if the parents jointly and mutually agree to remove J.M. from the Hazlet school system, and the parents have not made such an agreement. Instead, the parents continue to intend that J.M. be domiciled and educated in Hazlet.

Moreover, the Divorce Decree, and not the guardianship order, is determinative of J.M.'s domicile. First, if K.M. took custody of J.M. and established his domicile in Aberdeen, this would be inconsistent with the sections of the Divorce Decree that name S.M. as the residential custodial parent and Hazlet as J.M.'s school district and place of residence.

The guardianship order did not terminate J.M.'s residential custodian rights. The guardianship order was executed pursuant to a judgment of incapacity that declared K.M. guardian over J.M.'s "person and property." The guardianship order gives K.M. control of his son's legal and financial issues but does not terminate the custodial rights of S.M. A guardian may take custody of the ward and establish the ward's place of abode, N.J.S.A. 3B:12-57(f)(1), but only "to the extent that it is consistent with the terms of any order by a court of competent jurisdiction . . ." N.J.S.A. 3B:12-57(f) (emphasis added). Here, an arrangement by which K.M. took custody of J.M. and established J.M.'s domicile would be inconsistent with the terms of the Divorce Decree, an order by a court of competent jurisdiction.

Second, even though generally a child is legally emancipated at eighteen years old, the Divorce Decree here, presumably because of J.M.'s disabilities, specified that he would not be emancipated until, inter alia, he reached the age of eighteen or he graduated from high school, whichever occurred later. When emancipation occurs, "a parent relinquishes the right to custody and is relieved of the duty to support a child." Newburg v. Arrigo, 88 N.J. 529, 543 (1982). In New Jersey, emancipation of a minor does not necessarily occur when a child turns eighteen; such an event establishes prima facie evidence of emancipation but not conclusive proof. Bishop v. Bishop, 287 N.J. Super. 593, 597 (Ch. Div. 1996) (citing Newburgh, supra, 88 N.J. at 543). This issue is fact sensitive and depends on the circumstances of the case. Ibid. A child is emancipated when "the fundamental dependant relationship between parent and child is terminated." Bishop, supra, 287 N.J. Super. at 598. Emancipation can occur, for example, upon a child's marriage, upon induction into military service, by court order based on the child's best interest, or by attainment of an appropriate age. Id. at 598

(internal citations omitted). Unless that dependant relationship has ceased, regardless of a child's chronological age, parental support obligations continue. Ibid.

If the terms of emancipation are incorporated in the custody agreement, it should be enforced by the courts. For example, in Dolce v. Dolce, 383 N.J. Super. 11, 21 (App. Div. 2006), the court found that the unambiguous terms of a property settlement agreement (PSA), which was incorporated into a divorce decree, were enforceable "as written and agreed to by the parties, absent a substantial change in circumstances." The parties agreed that the mother would have primary residential custody and the father would pay child support until the son's emancipation, which would occur when he turned twenty-three or completed college. Id. at 16. Despite the provision in the parents' PSA establishing age twenty three as an emancipation event, the father in Dolce wanted the son declared emancipated because he had turned eighteen. Ibid. While the Family Part declared the son emancipated, the Appellate Division found that the father could not demonstrate any unfairness or inequity in the PSA which the court said was "plain and explicit . . . [and] le[ft] no room for interpretation." Id. at 21. As a result, the Appellate Division vacated the order of the Family Part that declaring the son emancipated and terminating the father's child support obligation. Ibid.

While this case concerns custody and domicile, and not support obligations, the same analysis can be used. J.M. is not independent of his parents and no event triggering emancipation under the Divorce Decree has occurred. The guardianship order did not override the determination of custody, the emancipation triggers, or the residency arrangement contained in the Divorce Decree. There is no inequity, unfairness, or ambiguity regarding the Divorce Decree, and the terms of the agreement specifying J.M.'s emancipation event, district of education, and district of residence, should be enforced as written.

Finally, J.M.'s overnight visits at his father's house should not serve to change J.M.'s domicile to Aberdeen. A student's residence is his "domicile, unless temporary residence is indicated." N.J.S.A. 18A:1-1. Temporary residence does not determine domicile and if there is any ambiguity as to domicile, the divorce decree should be

looked to for guidance. See Summit, supra. In the same vein as Summit, domicile should only change if the temporary residence of J.M. shifted the major parental responsibility and authority regarding his son's welfare to the father. It is important to note that J.M. has been improving behaviorally, and while it is not guaranteed that he will continue to transition to going back to his mother's home, the intent of the parents is that he will go back to the mother's home. While K.M. has taken on more responsibility (J.M. sleeps at his house when visiting)), this has not fundamentally shifted the exercise of parental responsibility and authority to him. S.M. has retained those responsibilities despite the temporary living arrangements made in response to the incident in which J.M. assaulted his mother.

I therefore **CONCLUDE** that Hazlet School Board is responsible for J.M.'s education costs because Hazlet is both J.M.'s district of residence and the town in which he is domiciled. Hazlet is J.M.'s district of residence because J.M. lived with his mother in Hazlet immediately prior to his placement by the State in a residential facility, his mother continues to reside in Hazlet, and his mother is his custodial parent. Alternatively, J.M. is domiciled in Hazlet because the Divorce Decree stipulates that J.M. is domiciled in Hazlet and is to be educated there, the parents continue to intend for Hazlet to be J.M.'s domicile and the district through which he receives his education, the guardianship order does not supersede the Divorce Decree with respect to J.M.'s domicile, and J.M.'s overnight visits at his father's house in Aberdeen do not change J.M.'s domicile.

ORDER

Petitioner's motion for summary decision is **GRANTED**, and respondent's cross-motion for summary decision is **DENIED**. Respondent shall continue to be responsible for the costs of educating J.M.

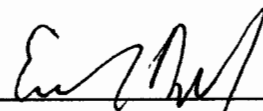
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 21, 2011

DATE



EDWARD J. DELANEY, JR., ALJ

Date Received at Agency:

11-21-11

Date Mailed to Parties:

NOV 28 2011

/lam

YOLANDA KLEIN,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF EDUCATION, CRIMINAL HISTORY	:	
REVIEW UNIT,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a school bus driver – appealed the Department’s determination to suspend her school bus endorsement pursuant to *N.J.S.A.* 18A:39-28 after an incident in which a child was left on her bus in December 2010 when petitioner failed to conduct the mandated visual inspection at the end of her route. Petitioner acknowledged that she had mistakenly left a child on the school bus unattended, but contended that she had not completed the end of her transportation route as she had two more school runs for which she was responsible. Petitioner further asserted that she left the school bus for only three minutes, and – by going into the school – did not leave the vicinity of the bus.

The ALJ found, *inter alia*, that: on December 1, 2010, petitioner drove a school bus carrying kindergarten students for a 12:15 drop-off at an elementary school; petitioner exited the bus after the students without doing a full visual inspection, locked the bus, and went into the school building for approximately 3 minutes; upon returning to complete her afternoon routes, petitioner found that one child had not exited, but instead was standing inside the locked bus, crying; petitioner acknowledged that she had improperly left a child on the bus, albeit mistakenly; petitioner was suspended as a school bus driver two days later, and subsequently resigned in lieu of termination; the rules by which petitioner’s conduct must be judged are ambiguous, as the statutes do not define “end of transportation route” nor “vicinity of the school bus”; the school district’s policy manual implicitly defines the end of the transportation route as the depot where the bus is parked after all school runs are completed; petitioner had been a school bus driver for more than 14 years, had a prior unblemished record; and was visibly distraught and remorseful during her testimony. The ALJ concluded that respondent did not prove by a preponderance of the evidence that petitioner failed to conduct a visual inspection of her bus at the end of her transportation route or that she left the vicinity of the school bus in violation of state law; accordingly, the ALJ reversed respondent’s decision to suspend petitioner’s school bus endorsement.

Upon full review and consideration, the Commissioner rejected the Initial Decision of the OAL, concluding *inter alia* that “end of route” pursuant to *N.J.S.A.* 18A:39-26 terminates at the point where all of the children in a particular group leave the bus to enter their school and before the driver moves on to her next route; petitioner failed to inspect the bus before exiting and locking it; petitioner’s distress and remorse over the incident cannot mitigate the severity of her breach of duty and the concomitant imposition of the mandated 6-month penalty for the first infraction. Accordingly, the decision of the respondent Office of Criminal History Review was affirmed, and the petition was dismissed. The respondent was directed to notify the Motor Vehicle Commission of its obligation to suspend petitioner’s school bus endorsement pursuant to *N.J.S.A.* 18A:39-28 et seq., and to notify petitioner’s employer that she is ineligible for the period of suspension for continued employment as a school bus driver.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 00852-11
 AGENCY DKT. NO. 713-12/10

YOLANDA KLEIN,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF EDUCATION, CRIMINAL HISTORY	:	
REVIEW UNIT,	:	
	:	
RESPONDENT.	:	

The record of this matter¹ and the Initial Decision of the Office of Administrative Law have been reviewed as have the respondent's exceptions, filed pursuant to *N.J.A.C.* 1:1-18.4. The petitioner did not file a reply thereto.

In its exceptions, the respondent agrees with the findings of the Administrative Law Judge (ALJ) that the petitioner left a child unattended on a school bus, and that the child was left alone for a period of approximately three minutes. The petitioner admits to having done so. However, the respondent asserts that the ALJ erred in his reasoning and conclusions, requiring reversal of the Initial Decision. Respondent argues that in reaching his decision, the ALJ relied heavily on the Wayne "Driver's Handbook," which it maintains is a private policy not relevant to determine statutory intent or language. The respondent further challenges the conclusions of the ALJ that the term "vicinity" is ambiguous because it is undefined in the statute and that "end of the route" is similarly ambiguous since the term is unclear. The respondent correctly points out that the term "vicinity" is nowhere mentioned in the relevant

¹ The record contains no transcripts from the hearing conducted at the OAL on August 11, 2011.

statute, the "School Bus Safety Act", and that a visual inspection at "end of the route," based on case law and a common sense application of the intent of the statute must certainly mean an inspection after each distinct, discernible route where the group of children is dropped off at the final destination and the bus is no longer in use for that group.

Upon review of the record of this matter and the Initial Decision of the Office of Administrative Law, the Commissioner agrees with the exceptions advanced by the respondent and rejects the Initial Decision of the ALJ. In his assessment, the Commissioner concludes that the "end of the route" pursuant to *N.J.S.A. 18A:39-26* of the "School Bus Safety Act" terminates at the point where all of the children in that group leave the bus to enter their school and the bus is empty of riders, and before the driver moves on to her next route. At that point, the driver shall inspect the bus for any remaining students. That did not happen here. The record shows that petitioner, by walking to the back of the bus on that day, turning off the "Child Minder" button, taking the keys out of the ignition, letting the children out, and locking the doors, fulfilled all indicia of "end of the route" activities save one: She did not inspect the bus. Accepting petitioner's argument that the inspection did not have to take place until the bus returned to the depot at the end of the day defies reason and eviscerates the fundamental purpose of the statute – to protect our children and ensure their safety. Additionally, petitioner's argument that she never left the vicinity of the bus is contradicted by the fact that she had entered two sets of glass doors, walked behind an interior cement wall, and entered the Ladies' Room – almost 122 feet away from her bus. Certainly, petitioner could not see her vehicle from that vantage point as it was out of her line of sight.

Contrary to the ALJ's finding, the Commissioner determines that the Wayne Board of Education did not misinterpret the meaning of "end of the route" and took this

breach of duty very seriously. The Board has a policy to have their drivers inspect the bus at the conclusion of midday and afternoon routes. The petitioner did not notify the Transportation Office on the day of the incident. Her supervisor was contacted by the child's mother. Upon learning of her failure to inspect, petitioner's supervisor placed her on administrative leave the next day. Within six days of the incident, the Board recommended petitioner's termination. The petitioner elected to resign rather than be terminated.

Finally, the Commissioner determines that the ALJ erred by allowing the petitioner's distress and remorse over her inspection failure to mitigate the severity of her breach of duty and the concomitant imposition of the penalty. Here, the petitioner admitted that she left a child on the bus unattended. The "School Safety Bus Act" clearly mandates a 6-month penalty for the first infraction. There are no mitigating circumstances.

Accordingly, the decision of the Criminal History Review Unit is hereby affirmed, and the petition is dismissed. Respondent is directed to notify the Motor Vehicle Commission of its obligation, pursuant to *N.J.S.A. 18A:39-28 et seq.*, to suspend petitioner's school bus "S" endorsement on her driver's license for six months and to notify petitioner's employer that she is ineligible – for the period of suspension – to continue employment as a school bus driver.

IT IS SO ORDERED.²


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/21/12
Date of Mailing: 2/22/12

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 00852-11

AGENCY DKT. NO. 713-12/10

YOLANDA KLEIN,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

CRIMINAL HISTORY REVIEW UNIT,

Respondent.

Yolanda Klein, pro se

Bryant Lawrence Horsley, Jr., Deputy Attorney General, for respondent (Paula
T. Dow, Attorney General of New Jersey, attorney)

Record Closed: October 7, 2011

Decided: January 5, 2012

BEFORE LELAND S. McGEE, ALJ:

STATEMENT OF THE CASE

Petitioner Yolanda L. Klein appeals the determination of respondent New Jersey Department of Education, Criminal History Review Unit, that petitioner left a child on a school bus to which she was assigned, having failed to conduct a visual inspection of

the school bus at the end of her transportation route in violation of N.J.S.A. 18A:39-28 et seq.

PROCEDURAL HISTORY

The Commissioner of Education transmitted the matter to the Office of Administrative Law on January 18, 2010, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Following a Pre-Hearing Conference held on April 27, 2011, a Pre-Hearing Order was issued on May 3, 2011. On August 4, 2011, respondent filed a Motion for Summary Decision, which was denied, and a hearing was held on August 11, 2011. A post-hearing briefing schedule was established for two specific issues, and the record was held open until October 7, 2011.

STATEMENT OF FACTS

The following are stipulated facts of this case, and I **FIND** the following to be the **FACTS** of this case.

In December 2010 petitioner held an "S" endorsement on her driver's license, which authorized her to drive a school bus. On December 1, 2010, petitioner was employed as a school bus driver for the Wayne Township Board of Education. She was assigned to four school drop-offs, one of which was the 12:15 p.m. bus route to drop off the "p.m. kindergarten" students at the John F. Kennedy Elementary School. Petitioner was the only adult on board the bus that afternoon. In December 2010, A.O. was an afternoon kindergarten student at John F. Kennedy Elementary School, and on December 1, 2010, A.O. was assigned to the 12:15 p.m. bus route driven by petitioner. In December 2010, petitioner's supervisor was Darryl Fennell (Fennell).

On December 1, 2010, upon arrival at John F. Kennedy Elementary School for the 12:15 drop-off, petitioner placed the bus in park and traveled to the back of the bus to press the "child minder" button. She turned off the engine, and opened the

passenger doors to let the children exit. All of the students were required to exit the bus upon arrival at the school. Petitioner also exited the bus at that time, took the keys, and left the bus door closed and locked. She had a personal emergency and hurriedly entered the school, to visit the nearest women's restroom, a total distance of approximately 93 feet.

Petitioner thereafter returned to the bus and found that A.O. had not exited the bus, but remained unattended for approximately two to three minutes. When she returned to the bus, A.O. was standing, locked inside the bus, crying. Petitioner escorted A.O. to the principal's office, and then proceeded to a subsequent school bus pick-up at New Beginnings School in Fairfield, New Jersey. This pick-up was an emergency early dismissal which petitioner had been notified of only moments before arriving at John F. Kennedy Elementary School. Thereafter, she was responsible to pick up students at two other schools as a part of her afternoon route. After completing her routes for these schools, petitioner returned the bus to the bus depot known as the North Cove.

Petitioner acknowledged that, although mistakenly, she improperly left a child on the school bus. On or about December 3, 2010, the Wayne Board of Education suspended petitioner as a driver as a result of leaving A.O. on the bus unattended. Petitioner subsequently resigned her employment with the Wayne Board of Education in lieu of termination effective December 16, 2010.

LEGAL ANALYSIS AND DISCUSSION

The statute governing the proper inspection of a school bus at the end of a driver's transportation route, N.J.S.A. 18A:39-28 states, in pertinent part, that

[a] school bus driver shall visually inspect the school bus to which he is assigned at the end of the transportation route to determine that no pupil has been left on the bus.

N.J.S.A. 18A:39-29 provides the following penalties for violating this provision:

In the event that, after notice and opportunity to be heard, a school bus driver is found to have left a pupil on the school bus **at the end of his route**, his school bus endorsement shall be:

- a. suspended for six months, for a first offense; or
- b. permanently revoked, for a second offense.

(Emphasis added)

N.J.A.C. 6A:3-13.1(b) limits the aspects of the CHRU's determination that may be contested by the driver and states:

The following aspects of the Department's determination
May be contested:

1. That a pupil was left on the bus at the end of the driver's route;
2. That the incident in question was the driver's second offense;
3. That the pupil was harmed as a result of foreseeable danger; and
4. That the driver acted with gross negligence.

In the within matter, the criteria for contesting respondent's determination set forth in 2 through 4 above are not applicable. Respondent does not assert that the incident was a second offense or that the child was harmed as a result of a foreseeable danger and that petitioner acted with gross negligence. The issue in this case is whether petitioner left the vicinity of the bus thereby leaving A.O. on the bus at the end of her transportation route.

Petitioner contends that she had not completed the end of her "transportation route." She had two more school runs for which she was responsible and the end of her transportation route was at the depot known as North Cove. Further, she contends that she parked the bus directly in front of the school's entrance where teachers and other staff were stationed. She left the bus for only three minutes, and by going into the school, she did not leave the "vicinity" of the bus.

The Wayne Board of Education Bus Driver's Handbook and Policies and Procedures states:

SLEEPING CHILDREN

At the conclusion of the morning, mid-day and afternoon routes, check the bus for items left behind and sleeping children. Place the "Bus Empty" sign in the back window if your bus is not equipped with the Child Minder® system. ***This procedure must be performed at the North Cove.*** THIS IS NOT OPTIONAL. If time allows, you ***can*** also check your bus after unloading students at their respective school.

(R-2, page CHRU-034) (**emphasis added**)

Further, the manual states, in part:

POST TRIP

At the conclusion of each route, check the bus for sleeping children or any items left behind. All items should be reported to the Transportation Office at the conclusion of the day.

All bus windows are to be closed ***at the end of the route . . .***

(R-2, page CHRU 032-0330) (**emphasis added**)

The Wayne Board of Education Report of a Student Left on the School Bus Unattended states:

A student is considered to have been left unattended on the school bus at the end of the route when the driver has left the vicinity of the bus.

(R-3, page CHRU-015)

"End of the transportation route" is not defined in either N.J.S.A. 18A or N.J.A.C. 6A. While a definition may be provided in the company's manual, the undersigned recognizes that it is not binding on the Courts or indicative of the Legislature's intention. Legislative intent, however, may be gleaned from the language of the statute. It is clear that the safety of the children who ride the bus is paramount. That is, to avoid having a bus driver park a vehicle at the end of a route and go home leaving a child in a bus.

Respondent asserts that a "common sense" reading of the statute leads one to the conclusion that the "end of the transportation route" occurs at the point that the bus arrives at each individual school. It cites Firman v. N.J. Dept. of Ed., Crim. Hist. Rev. Unit, OAL Dkt. No. EDU 04415-10, Initial Decision (February 7, 2011), *adopted, Comm'r, Final Decision*, (March 24, 2011). In Firman the bus driver completed the mid-day run, then parked the bus "in a spot that was close to my p.m. run and where management would be able to reach me." The driver turned the bus off, removed the keys and then entered a pizza shop to use the restroom. Firman, *supra*, at page 4. Respondent suggests that when the Administrative Law Judge in Firman granted the Summary Decision motion against the bus driver, the judge implicitly affirmed that the end of the transportation route was the end of the drop-off at the school. However, the judge was silent on this issue as is the statute.

In the present case, respondent also offered substantial evidence concerning the distance from the school bus to the restroom inside of the John F. Kennedy Elementary School. The distance was a total of approximately 93 feet. The bathroom does not have windows and therefore the bus was not visible to petitioner.

Petitioner stopped the bus in front of John F. Kennedy School, the proscribed location for dropping off the students. There were teachers and other staff stationed outside of the front door where the vehicle was stopped. Neither N.J.S.A. 18A:39-28 nor N.J.S.A. 18A:39-29 defines "in the vicinity" of the bus. As distinguished from Firman, petitioner was still on school grounds at the time that she exited the bus. Further, Fennell testified that it is common for a bus driver to enter a school to use the restroom after delivering children. This was not a stop at a pizza shop as in Firman. Further, these statutes do not state that the inspection is to be conducted at the end of the "students" transportation route, or after each time that a driver exits the vehicle. Certainly the undersigned does not suggest that failure to inspect under any of these circumstances is appropriate, however, the rules by which petitioner's conduct is to be judged is ambiguous.

Arguably the "P.M. run" is not ended until the bus is returned to the depot. A review of the personnel manual which guides the conduct of the bus drivers, provides insight into, and "notice" of, actionable conduct. The section entitled "Sleeping Children" expressly states that the inspection procedure "must be performed at the North Cove" and expressly states that this policy is NOT OPTIONAL. However, with respect to inspecting the bus after unloading students it states, "[i]f time allows, you can also check your bus after unloading students at their respective school." Here, inspections are optional and to be performed only if time allows. Arguably, the emergency pick up at the New Beginnings School in the next town created a circumstance in which petitioner did not have sufficient time to conduct a thorough inspection. In any event, it is clear that the School District's interpretation of the statute is that the "end of the transportation route" is not at the end of a drop-off at each individual school but at the depot.

Further insight is found in respondent's policy manual section entitled "Post Trip" which, in addition to discussing inspections, requires that all windows in the bus be closed "at the end of the route." Certainly there would be no reason to close the windows on a hot summer day if the driver still has afternoon school runs to conduct. It is therefore clear from the plain language of the policy that the Board contemplated "end of the route" to be the point where the vehicle is parked at the North Cove depot.

Perhaps the Policy's safety concern focused on a child potentially being left on the bus for an extended period of following the driver leaving the vicinity of the vehicle at the end of the day. That would mean after all school runs are completed and the bus is parked at the depot. Clearly the Board did not have an expectation that by inadvertently leaving a child on a bus, in front of the school, for three minutes, with staff present, that a bus driver could lose her "S" endorsement and her ability to drive a bus for six months.

The undersigned recognizes that the neither N.J.S.A. 18A:39-28 nor N.J.S.A. 18A:39-29 are specific intent statutes. However, the undersigned had the opportunity to observe petitioner's demeanor. It was clear during her testimony that she was

extremely distraught and remorseful. It is more likely that the incident was an aberration. In fact, petitioner has been a school bus driver in this district for more than fourteen (14) years and no such incident has previously occurred in this or any other district. There is no evidence that the child was harmed when petitioner escorted her to the Principal's office. There is no evidence of any residual harm following the incident. There is no dispute that petitioner had an emergency which required a quick exit to the restroom. Her supervisor confirmed that there was a last-minute emergency at the New Beginnings School in Fairfield and that petitioner received instructions to go to that location just prior to her arrival at John F. Kennedy School. Finally, a review of the video depicting the incident indicated that petitioner did conduct a visual inspection of the bus, notwithstanding the fact that it was inadequate and resulted in a student being left after everyone else exited.

CONCLUSION AND ORDER

The governing statute is ambiguous as to the definition of vicinity of the school bus and the end of the transportation route. The School District's policy manual implicitly defines the end of the transportation route as the North Cove depot where the bus is parked after all school runs are completed. Petitioner parked in front of the school and never left school grounds. For the foregoing reasons I **CONCLUDE** that respondent did not prove by a preponderance of the evidence that petitioner failed to conduct a visual inspection of her bus at the end of her transportation route or that she left the vicinity of the school bus in violation of New Jersey law.

I therefore **ORDER** that the decision of the Criminal History Review Unit be and is hereby **REVERSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

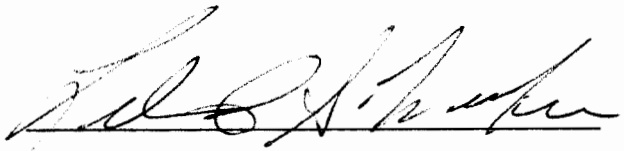
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

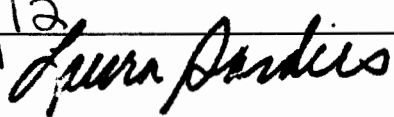
Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 5, 2012

DATE


LELAND S. McGEE, ALJ

Date Received at Agency:

1/5/12

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Mailed to Parties:
LSM/kep

JAN 11 2012

APPENDIX

Witnesses

For Petitioner:

Yolanda Klein

For Respondent:

Darryl Fennell, Transportation Supervisor

Exhibits

For Petitioner:

None

For Respondent:

- R-1 Bus Route Detail for John F. Kennedy Elementary School
- R-2 Wayne Board of Education Transportation Department Bus Driver's Handbook
- R-3 Report of a Student Left on School Bus Unattended
- R-4 Letter dated December 3, 2010, from petitioner to the Transportation Department, Board of Education, or Whom This May Concern
- R-5 Memo dated December 3, 2010, to Juanita Petty, Business Administrator, from Darryl A. Fennell, Transportation Supervisor
- R-6 Memo dated December 7, 2010, to Juanita Petty, Business Administrator, from Darryl Fennell, Transportation Supervisor
- R-7 Notice to petitioner dated December 10, 2010, from James Campbell, Interim Superintendent
- R-8 Marked but not admitted
- R-9 Marked but not admitted
- R-10 Letter dated December 15, 2010, from petitioner to To Whom It May Concern
- R-11 Marked but not admitted
- R-12 Video recording of incident of December 1, 2010

#72-12R

IN THE MATTER OF THE TENURE	:	
HEARING OF LOURDES LEON,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
ELIZABETH, UNION COUNTY.	:	DECISION

SYNOPSIS

In 2007, the petitioning Board certified charges of conduct unbecoming against respondent – a tenured administrator – based on allegations that, *inter alia*, respondent directed the alteration and/or falsification of official school records. A settlement agreement was reached in these consolidated cases in 2009; however, the agreement included a clause which stated that the school district agreed that referral of the matter to the State Board of Examiners (SBE) was not warranted. The Commissioner approved the settlement, but referred the case to the SBE. Respondent then asked the Commissioner to reconsider the referral, arguing that the settlement agreement precluded the Commissioner from referring the case to the SBE, and further arguing that although she accepted responsibility for the actions at issue in this case, she denied any wrongdoing therein. The Commissioner therefore vacated the settlement decision and remanded the case to the OAL. Subsequently, the respondent became ill and requested a medical leave of absence, which was approved by the district, and advised that she would retire at the end of her medical leave.

The ALJ found that: since the date the parties settled this case, respondent became ill and requested a medical leave of absence, which the district approved; respondent additionally advised that she would be retiring at the end of her medical leave, on December 31, 2012; the educational programs of the school district would have continued to have been disrupted and substantial costs to the district would have continued to accrue if litigation were to continue; the student records in question have already been corrected; and both parties now fully acknowledge that the Commissioner has the duty to refer the case to the SBE. Accordingly, the ALJ concluded that a withdrawal in this case disposes of all of the issues in controversy, and should be approved.

Upon review, the Commissioner concurred with the findings and determination of the ALJ and deemed the matter to no longer be a contested case before the Commissioner. Accordingly, the matter was dismissed and a copy of the decision was sent to the SBE for action as that body deems appropriate.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

February 24, 2012

OAL DKT. NO. EDU 7233-09
AGENCY DKT. NO. 96-4/07 AND 360-11/07 (CONSOLIDATED)
(EDU 5073-07 AND EDU 12540-07 (ON REMAND))

IN THE MATTER OF THE TENURE	:	
HEARING OF LOURDES LEON,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
ELIZABETH, UNION COUNTY.	:	DECISION

The record, transcript¹ and Initial Decision Withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 17:27-19.2 have been reviewed. Under circumstances set forth, the Commissioner approves the consensual withdrawal by both parties of the instant tenure charges in these consolidated cases on remand. The Commissioner agrees that withdrawal is appropriate since respondent is currently on medical leave for a chronic, ongoing illness and that she has advised the District that she will resign from employment with the Board and apply for retirement at the end of her leave, effective December 31, 2012. Consequently, the matter is no longer deemed to be a contested case before the Commissioner and is accordingly dismissed.

By copy of this decision, the State Board of Examiner is notified of the instant tenure charges, which involve allegations of conduct unbecoming a public employee and the circumstances underlying its withdrawal.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/24/12
Date of Mailing: 2/27/12



¹ The parties placed the withdrawal of the charges on the record before the ALJ on January 4, 2012.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

(CONSOLIDATED)

WITHDRAWAL

OAL DKT. NO. EDU 07233-09
AGENCY DKT. NOS. 96-4/07
AND 360-11/07

ON REMAND

OAL DKT. NOS. EDU 05073-07
AND EDU 12540-07
AGENCY DKT. NOS. 96-4/07
AND 360-11/07

**IN THE MATTER OF THE TENURE
HEARING OF LOURDES LEON,
SCHOOL DISTRICT OF THE CITY
OF ELIZABETH, UNION COUNTY.**

Karen A. Murray, Esq., for petitioner (The Murray Law Firm, attorneys)

Wayne J. Oppito, Esq., for respondent

Richard Rinaldo, Esq., for respondent

Record Closed: January 4, 2012

Decided: January 10, 2012

BEFORE BARRY E. MOSCOWITZ, ALJ:

STATEMENT OF THE CASE

Even though petitioner withdrew the charges in this case, respondent understands that the Commissioner has the duty to refer the case to the State Board of Examiners for possible suspension or revocation of certificates. Should the Commissioner approve the withdrawal? Yes. Although the Commissioner must approve any withdrawal under N.J.A.C. 6A:3-5.6(a)(6), the teaching staff member must still understand that the Commissioner has the duty to refer the case to the State Board of Examiners.

PROCEDURAL HISTORY

The Charges

On April 20, 2007, the Department of Education, Bureau of Controversies and Disputes, referred a set of tenure charges to the Office of Administrative Law (OAL) under N.J.S.A. 18A:6-16.

The Director of the Bureau of Controversies determined that the charges, if true, were sufficient to warrant dismissal or reduction in salary.

The charges allege conduct unbecoming a public employee and specify that respondent, a tenured principal at Donald Stewart Early Childhood Education Center, School No. 51, ordered a secretary to falsify or improperly record the absences or lateness of several students during the 2005-06 school year in direct contravention of the school district's attendance policy and in violation of the tenured principal's ethical duty to preserve and protect student records.

The charges also specify discriminatory treatment of students as well as verbal abuse and public humiliation of staff.

On April 26, 2007, the OAL received the charges under Agency Docket No. 96-4/07 and assigned them Docket No. EDU 5073-07. The case was then assigned to me for a hearing under N.J.S.A. 52:14B-10.1. During the initial telephone conference, the parties acknowledged that the case would require at least twelve days of hearings because it would require the testimony of many witnesses and the consideration of voluminous documents. In fact, the parties spent an entire day in the hearing room just marking documents for identification.

On December 4, 2007, the Department referred a second set of tenure charges to the OAL under N.J.S.A. 18A:6-16. The Director again determined that the charges, if true, were sufficient to warrant dismissal or reduction in salary. The second set of tenure charges allege the same misconduct as the first but for the school year 2006-07.

On December 21, 2007, the OAL received the second set of charges under Agency Docket No. 360-11/07 and assigned them OAL Docket No. EDU 12540-07. The case was then assigned to me for a hearing under N.J.S.A. 52:14B-10.1. During the next telephone conference, the parties acknowledged that the second case would require at least another twelve days of hearings because it would require the testimony of additional witnesses and the consideration of additional documents. Given these circumstances, the parties renewed their settlement efforts.

The Settlement

At the conclusion of discovery, the parties reached a global settlement. In short, the parties reviewed the facts and decided that the expense and uncertainty of litigation militated against a full hearing. Toward this end, I consolidated the two cases and approved the settlement.

In approving the settlement, I found that the settlement agreement acknowledged the continued disruption to the educational programs in the school district that the continued litigation would have caused by the continued absence of administrators, teachers, and students alike who would have had to testify at the

hearing. In addition, I found that the settlement agreement acknowledged the substantial costs that the school district, which is an Abbot District, would have had to incur during what would have amounted to more than two dozen days of hearing. Moreover, I found that the settlement agreement acknowledged that the student records had already been corrected.

The Remand

The school district, however, had agreed that referral to the State Board of Examiners was not warranted. In addition, the school district had agreed that referral, upon respondent's resignation, was not required. In approving the settlement, I similarly suggested that referral to the State Board of Examiners was not warranted.

On May 7, 2009, the Commissioner approved the settlement but referred the case to the State Board of Examiners.

Respondent then asked the Commissioner to reconsider the referral. But in doing so, respondent argued that the settlement agreement precluded the Commissioner from referring the case to the State Board of Examiners. Respondent also argued that her acceptance of responsibility was not an admission of wrongdoing. As a result, the Commissioner vacated the settlement and remanded the case to the OAL for a revision of the settlement agreement or a full hearing on the merits.

On June 16, 2009, the Director of the Bureau of Controversies and Disputes transmitted the case to the OAL. On June 22, 2009, the OAL received the remand and assigned it OAL Docket No. EDU 07233-09. On January 3, 2012, the school district withdrew the tenure charges due to changed circumstances—new circumstances that had arisen since the parties had initially settled the case.

FINDINGS OF FACT

Based on the documentation submitted, the testimony provided, and the representations the parties made, I **FIND** as follows:

The Withdrawal

Since the date the parties initially settled this case, respondent became ill and requested a medical leave of absence, which the school district approved. In addition, respondent advised that she would be retiring at the end of her medical leave. As a result, the school district withdrew its tenure charges.

This approved leave and subsequent withdrawal is memorialized in a letter from the school district dated January 3, 2012:

Please be advised that the District has agreed to a medical leave or absence for Ms. Leon in view of her ongoing and chronic medical issues. Ms. Leon will be retiring December 31, 2012. As a result of this situation, the District is withdrawing the pending tenure charges to enable Ms. Leon to address her medical needs and also because her retirement will moot all issues.

[(P-1.)]

The Understanding

The reported ongoing and chronic medical issues aside, many of the other considerations in approving the initial settlement still obtain.

In particular, the educational programs in the school district would have continued to have been disrupted and the substantial costs to the school district would have continued to have been incurred if the litigation continued.

In addition, the student records have already been corrected.

Moreover, both parties now fully acknowledge that the Commissioner has the duty to refer the case to the State Board of Examiners.

Indeed, respondent testified that she fully understands this after consultation with her attorneys about the distinction between a withdrawal and a retirement under N.J.A.C. 6A:3-5.6(a) and N.J.A.C. 6A:3-5.6(d), respectively.

CONCLUSIONS OF LAW

Given my findings of fact, I **CONCLUDE** as follows:

Under N.J.A.C. 6A:3-5.6(a), once tenure charges are certified to the Commissioner, such charges may be withdrawn or settled only with the Commissioner's approval, and any proposed withdrawal must include the following: (1) documentation as to the nature of the charges; (2) explication of the circumstances justifying the withdrawal; (3) consent of both parties; (4) indication that the charged party fully understands his or her rights; (5) a showing that the withdrawal is in the public interest; and (6) a showing that the teaching staff member has been advised of the Commissioner's duty to refer the case to the State Board of Examiners for possible suspension or revocation of certificates.

Parenthetically, respondent notes that under N.J.A.C. 6A:3-5.6(d), where tenure proceedings are concluded before adjudication because the charged party has unilaterally retired, the Commissioner has the discretion to refer the case to the State Board of Examiners.

In this case, documentation as to the nature of the charges is already of record and repeated in the findings of facts.

Similarly, explication of the circumstances justifying the withdrawal is already of record and repeated in the findings of fact.

In addition, both parties consent to the withdrawal and respondent fully understands her rights.

Moreover, withdrawal is in the public interest for the same reasons withdrawal is justified—namely the continued disruption to the educational programs in the school district, the continued cost to the school district, and the uncertainty of litigation.

Finally, respondent testified that she had been advised of the Commissioner's duty to refer this case to the State Board of Examiners for possible suspension or revocation of certificates under N.J.A.C. 6A:3-5.6(a), and that this is no longer an open issue.

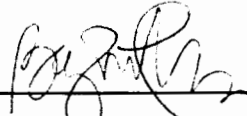
Given this application of the law to the facts, this withdrawal disposes all of the issues in controversy in this case under N.J.A.C. 1:1-19.1, and the Commissioner should approve it.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for his consideration.

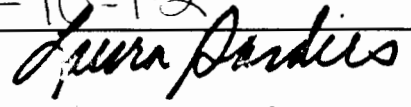
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and the time limit is not otherwise extended, then this recommended decision shall become a final decision under N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

1/10/12
DATE


BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

1-10-12

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Mailed to Parties:
dr

JAN 11 2012

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

Leon Lourdes

EXHIBITS

For Petitioner:

P-1 Letter from petitioner to tribunal dated January 3, 2012

For Respondent:

None

#73-12

OAL DKT. NO. EDU 10998-11
 AGENCY DKT. NO. 189-7/11

SHARON BURKARD,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF WYCKOFF, BERGEN	:	
COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter, the proposed Settlement and Release returning forty-four (44) days to petitioner's sick bank and the Initial Decision issued by the Office of Administrative Law recommending acceptance of said settlement pursuant to *N.J.A.C. 1:1-19.1* have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the recommended decision of the OAL as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/24/12

Date of Mailing: 2/27/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10998-11

AGENCY DKT. NO. 189-7/11

SHARON BURKARD,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF WYCKOFF, BERGEN
COUNTY,**

Respondent.

Randi Doner April, Esq., for petitioner
(Oxfeld Cohen, attorneys)

Elizabeth Farley Murphy, Esq., for respondent
(Bauch, Zucker & Hatfield, attorneys)

Record Closed: January 5, 2012

Decided: January 11, 2012

BEFORE **RICHARD McGILL, ALJ:**

Sharon Burkard filed a petition with the Commissioner of Education seeking payment of salary without being charged sick days by the Board of Education of the Township of Wyckoff for absences caused by a work-related injury in accordance with

N.J.S.A. 18A:30-2.1. The matter was transmitted to the Office of Administrative Law on September 15, 2011, for determination as a contested case.

Subsequent to completion of a workers' compensation case, the parties to this matter agreed to an amicable resolution and submitted a written Stipulation of Settlement and Release along with a copy of respondent's resolution approving the settlement.

Having reviewed the record and the terms of settlement, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Jan. 11, 2012
DATE

Date Received at Agency:

Richard McGill
RICHARD MCGILL, ALJ

1-13-12

Mailed to Parties:

JAN 13 2012
DATE
lr

Laura Sardis
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

Oxfeld Cohen, PC
60 Park Place, 6th Floor
Newark, New Jersey 07102-5504
973-642-0161
Attorneys for Petitioner

SHARON BURKARD,	:	BEFORE THE COMMISSIONER OF
	:	EDUCATION
Petitioner,	:	
	:	OAL DOCKET NO.: EDU 10998-2011
	:	AGENCY REF NO. 189-7/11
WYCKOFF BOARD OF EDUCATION,	:	STIPULATION OF SETTLEMENT AND
Respondent	:	RELEASE

This Settlement Agreement and Mutual Release ("Agreement") is made and entered into by and between counsel for petitioner, Sharon Burkard ("Burkard") and respondent, Wyckoff Board of Education ("Board") for full settlement of all claims,

WHEREAS, on or about July 14, 2011, Burkard filed a Petition of Appeal before the State of New Jersey Commissioner of Education (the "Commissioner"), captioned *Burkard v. Wyckoff Bd. Of Edu.*, OAL Docket No. EDU 10998-2011, for reinstatement sick days;

WHEREAS, the Petitioner's Workers' Compensation claim which had been filed in or around 2007 was resolved via an Order Approving Settlement dated May 31, 2011;

WHEREAS, this matter is currently pending before the Honorable Richard McGill, A.L.J.; and

WHEREAS, the parties to this Agreement desire to amicably resolve their differences and avoid additional expenses of further litigation in connection with the Petition of Appeal.

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable

consideration, it is hereby agreed by and between the parties hereto as follows:

1. This Agreement shall not be construed as an admission by the Parties of any acts or omissions alleged or those that could have been alleged by any of the Parties, or of any acts or omissions alleged or which could have been alleged against any of the Parties. Each party to this Agreement specifically denies any liability.

2. In exchange for the valuable consideration set forth herein, the Parties mutually release and give up any and all claims and rights they may have against each other for any damages or injuries claims that could have been alleged by either party in connection with this matter.

The Parties specifically release the following claims as to each other

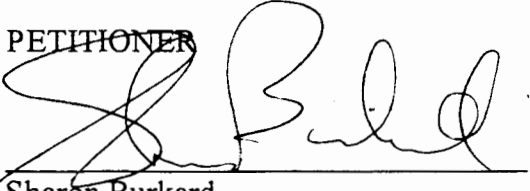
(a) Any and all claims and counterclaims that were brought and that could have been brought in the Petition of Appeal bearing OAL Docket No. EDU 10998-2011; and

(b) Any and all claims for attorneys' fees and expert costs, and any other fees and costs.

3. In total and complete settlement of any and all potential claims referred to above, the Board shall return forty-four (44) days to Burkard's sick bank.

4. The Parties acknowledge that they are fully satisfied with their respective legal representation in this matter and that they have reviewed the terms of this Agreement with their respective counsel.

PETITIONER


Sharon Burkard

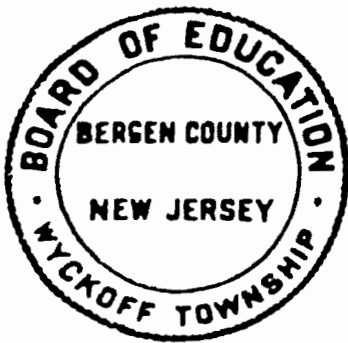
Dated:

RESPONDENT


Alan Reiffe

Board Secretary/Business Administrator
Wyckoff Board of Education

Dated:



BOARD OF EDUCATION

241 Morse Avenue
Wyckoff, N.J. 07481

201-848-5700

January 5, 2012

To Whom It May Concern:

I, Alan C. Reiffe, as the Board Secretary of the Wyckoff Board of Education, certify that the Wyckoff Board of Education at its Regular Business Meeting on November 14, 2011 approved the following roll call vote:

Motion: Raymond Hovey

Seconded: Lisa Martone

ITEM # PERS.16 To approve the Stipulation of Settlement and Release agreement between the Board of Education and Sharon Burkard regarding the reinstatement of forty-four (44) days into her sick bank.

Roll Call Vote:

Degregorio - X	Della Pietra - X	Hovey - X
Martone - X	Mortimer - X	Runge - X
		Francin - X

Alan C. Reiffe, CPA
Board Secretary

#74-12

BOARD OF EDUCATION OF THE
TOWNSHIP OF NUTLEY

PETITIONER,

V.

STATE OF NEW JERSEY, DEPARTMENT
OF EDUCATION, OFFICE OF FISCAL
ACCOUNTABILITY AND COMPLIANCE

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner challenged respondent's determination that petitioner improperly failed to solicit bids in conformity with the Public School Contracts Law, *N.J.S.A. 18A:18A-1 et seq.*, when it awarded a contract for construction management to Tri-Tech Engineering (Tri-Tech) that improperly relied upon the "Extraordinary Unspecifiable Services" (EUS) exception contained in that statute, and additionally exceeded the multi-year provision of *N.J.S.A. 18A:18A-42*. Petitioner denies that its use of the EUS exception was improper, and asserts an appropriate exception to the two-year contract limitation pursuant to *N.J.S.A. 18A:18A-42(k)*. Respondent argued that – regardless of whether or not the EUS exception applies in this case – the January 2001 contract with Tri-Tech, by law, expired on or about January 31, 2003 and any further payments to Tri-Tech beyond that date were inappropriate as they were made without the solicitation of bids as required pursuant to *N.J.S.A. 18A:1A-4*. Respondent demanded repayment of \$326,004.47 in state aid expended by the petitioner to pay Tri-Tech after the expiration of the contract in 2003.

The ALJ found, *inter alia*, that: this dispute involves the question of whether the legality of petitioner's actions in regard to Tri-Tech should be based upon the January 2001 contract or upon the absence of any legally effective contract subsequent to January 31, 2003; the long-range project which was the subject of the January 2001 contract and the two defeated 2002 voter referenda was not in any sense the same project as those that were later offered to and approved by voters in three subsequent referenda; therefore, the multi-year exception for "any single project" pursuant to *N.J.S.A. 18A:18A-42(k)* cannot be used to defend the length of Nutley's January 2001 contract with Tri-Tech and, as such, the petitioner had no effective contract with Tri-Tech after the expiration of 24 months following January 31, 2001; petitioner continued to treat the 2001 contract as if it were still effective, and made substantial payments to Tri-Tech under the terms of that contract after it expired in January 2003; and petitioner's failure to bid a new contract encompassing the terms of the limited project as approved by voters in 2003, or at least to authorize a new contract with Tri-Tech or some other company utilizing the EUS exception, led to a violation of the bidding statute. Accordingly, the ALJ concluded that respondent is entitled to recoup state aid in the amount of \$326,004.47.

Upon full review and consideration, the Commissioner concurred with the ALJ's findings of fact and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. Accordingly, he granted summary decision to the respondent and ordered petitioner to return \$326,004.47 in state aid. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

February 27, 2012

OAL DKT. NO. EDU 1662-10
AGENCY DKT. NO. 371-12/09

BOARD OF EDUCATION OF THE
TOWNSHIP OF NUTLEY

PETITIONER,

V.

STATE OF NEW JERSEY, DEPARTMENT
OF EDUCATION, OFFICE OF FISCAL
ACCOUNTABILITY AND COMPLIANCE

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The Commissioner has reviewed the record of this matter and the Initial Decision of the Office of Administrative Law (OAL) on the parties' cross-motions for summary decision. Petitioner (Nutley) filed exceptions, and the respondent (OFAC) filed a reply thereto as provided by *N.J.A.C. 1:1-18.4*.

Upon his considered review, the Commissioner concurs with the Administrative Law Judge (ALJ) that this matter is ripe for summary decision as there are no genuine issues of material fact to resolve. For the reasons cogently presented in the ALJ's decision, the Commissioner agrees that respondent OFAC did not act arbitrarily, capriciously or unreasonably when it determined that the contract Nutley Board of Education had entered into with Tri-Tech for additions and restorations to its seven schools exceeded the 24-month limitation for such contracts, in violation of *N.J.S.A. 18A:18A-42*.

Consequently, the Nutley Board of Education is ordered to return \$326,004.47, the state aid portion of the amount of money the Board paid to Tri-Tech after their contract expired in 2003.

Accordingly, summary disposition is granted to the respondent and the petition is dismissed.

IT IS SO ORDERED.¹

A handwritten signature in black ink, consisting of several fluid, connected strokes, positioned above the title of the official.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/27/12

Date of Mailing: 2/27/12

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 01662-10

AGENCY DKT. NO. 371-12/09

**TOWNSHIP OF NUTLEY BOARD OF
EDUCATION,**

Petitioner,

v.

**STATE OF NEW JERSEY, DEPARTMENT
OF EDUCATION, OFFICE OF FISCAL
ACCOUNTABILITY AND COMPLIANCE,**

Respondent.

Mark A. Wenczel, Esq., for petitioner (Gaccione & Pomaco, attorneys)

Joyce D. Williams and **Christopher Huber**, Deputy Attorneys General, for
respondent (Jeffrey S. Chiesa, Attorney General of New Jersey, attorney)

Record Closed: November 30, 2011

Decided: January 13, 2012

BEFORE **JEFF S. MASIN**, ALJ:

This case involves a demand by the State of New Jersey, Department of Education, Office of Fiscal Accountability and Compliance (OFAC), that the Nutley Board of Education (Nutley) repay the State \$326,004.47 in State aid which the school district received in connection with certain activities undertaken by the Board. The

entire matter arises from plans that Nutley had to undertake work, described as "additions and restorations", to seven schools located within the District. As will be detailed, in 2001 Nutley executed a contract with Tri-Tech Engineering (Tri-Tech) to act as construction manager for this work. However, the original concept that Nutley had of the project to undertake this work, which had been developed as a district-wide facilities improvement plan, ran into difficulties. As a result, only some parts of the overall concept were later undertaken. OFAC contends that in contracting with Tri-Tech, Nutley improperly failed to solicit a contract in conformity with the Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq., instead improperly relying upon the "Extraordinary Unspecifiable Services" ("EUS") exception contained in that statute. Additionally, OFAC contends that the contract entered into with Tri-Tech exceeded the multi-year provision of N.J.S.A. 18A:18A-42. Nutley denies that its use of the EUS exception was improper, and argues alternatively, that to the extent that it may have improperly relied upon that exception, the provisions of N.J.S.A. 18A:18A-46.1 limit the State's recovery of funds to \$25,000, as both parties agree that none of the exceptions to that limitation apply in this case.

The demand for recoupment came in a report entitled "Nutley School District Building Program Irregularities OFAC Case #1587" issued by OFAC under cover letter dated February 11, 2009. Nutley appealed, and the matter was reviewed first by OFAC, which determined that it would not change its findings and determination, a determination conveyed to Nutley by letter dated March 25, 2009. Thereafter, a second review was conducted at Nutley's request by John J. Hart, then the Chief of Staff of the DOE. He denied the appeal and determined that rescission of the demand for recoupment was not appropriate. Nutley then invoked its right to seek review by the Commissioner of Education and the Commissioner forwarded the contested case for hearing at the Office of Administrative Law, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The case was assigned to Honorable Imre Karaszegi. After discovery, the parties filed cross-motions for summary decision, pursuant to N.J.A.C. 1:1-12.5. Oral argument was conducted on November 30, 2011. In order to assure that the matter would be decided promptly given Judge Karaszegi's docket, determination of the cross-motions was transferred to Administrative Law Judge Jeff S.

Masin. Judge Masin reviewed the briefs and listened to the recorded oral argument. The parties were advised of the transfer of responsibility by letter dated January 4, 2012.

The undisputed record establishes that Nutley approved the retention of Tri-Tech to provide "construction management services" by Resolution of the Board dated December 18, 2000. The exact description of the purpose of this was to provide those services "in connection with future facility improvement projects." The Resolution further defines the services to be rendered by Tri-Tech as "an extraordinary, unspecifiable service which cannot be reasonably described by written specifications due to the qualitative nature of the service to be provided." This language is significant due to the wording of the Public School Contracts Law ("PSCL"), N.J.S.A. 18A:18A-1 et seq., more specifically at N.J.S.A. 18A:18A-5. This section addresses situations where a Board of Education may contract without proceeding through the normal bidding process.

Any contract, the amount of which exceeds the bid threshold, shall be negotiated and awarded by the board of education by resolution at a public meeting without public advertising for bids and bidding therefor if

a. The subject matter thereof consists of:

. . . .

(2) Extraordinary unspecifiable services which cannot reasonably be described by written specifications. The application of this exception as to extraordinary unspecifiable services shall be construed narrowly in favor of open competitive bidding where possible and the Director of the Division of Local Government Services in the Department of Community Affairs is authorized to establish rules and regulations after consultation with the Commissioner of Education limiting its use in accordance with the intention herein expressed; and the board of education shall in each instance state supporting reasons for its action in the resolution awarding the contract for extraordinary unspecifiable services and shall forthwith cause to be printed, in the manner set forth in paragraph (1)

of this subsection, a brief notice of the award of such contract;

[Ibid.]

N.J.S.A. 18A:18A-2(g) defines "extraordinary unspecifiable services" as "services which are specialized and qualitative in nature requiring expertise, extensive training and proven reputation in the field of endeavor."

Following the adoption of this Resolution, Nutley and Tri-Tech entered into a contract. That agreement was memorialized in a "Standard Form of Agreement Between Owner and Construction Manager." This document was an American Institute of Architects ("AIA") Form Document B801/CMa. By its terms the agreement was for "the following Project" described as "[a]dditions and restorations of 7 schools in the Nutley School District." The Contract is dated January 31, 2001. In the section of the Agreement addressing "Basis of Compensation" compensation is broken down into that provided for Basic Services in the Pre-Construction and Construction Phases and "Compensation for Additional Services." According to a Certification provided by John C. Sincaglia, who served as the Business Administrator and Board Secretary for the Nutley Board from 1986 until his retirement in June 2002, the Contract was conditioned upon passage of a referendum to provide for the funding of the work. The Contract provides that "Pre-Referendum services" will not exceed \$44,500. A referendum seeking approval of \$49,000,000 in bonding for this school facilities project was submitted to the voters in January 2002, but it did not pass. Another such referendum, this time for \$31,876,285 to fund the seven school project, also failed to pass in December 2002. Thereafter, the Board decided that rather than seek approval of the entire "project", it would submit the matter to the voters in phases. As will be discussed, this decision is a critical element with regard to the arguments of the parties.

Another feature of the Agreement was the provision that defined the length of the Contract. As modified by the Addendum to Standard Form of Agreement, section 13.5.1 provided for the "Basic Services" covered by the Agreement to be completed within twenty-eight (28) months of January 31, 2001.

The entire Nutley effort arose at a time when funding for up to 40% of such projects was available under the Educational Facilities Construction and Financing Act (EFCFA"), N.J.S.A. 18A:7g-1 to -44. The requirements for obtaining such funding included that the school district provide and obtain approval of a five-year long range facilities plan, or LRFP. It was in pursuit of such funding that Nutley prepared and submitted its LRFP. Mr. Sincaglia presents that he attended an informational training seminar in or about September 2000, provided by the DOE. At this session, it was offered that prior to the execution of a construction management contract, the contract would have to be approved by Board resolution and that "such a contract could be approved by the District under either the professional service or extraordinary unspecifiable services . . . provisions to the . . . PSCL."

After the defeat of the two referenda in January and December 2001, the Nutley Board decided that it would not again seek to obtain voter approval for the entire package of seven schools. Instead, it determined to proceed with smaller phases of work. In April 2003, it sought approval for \$2,923,604 for bonds to fund a portion of an estimated cost of \$4,872,673 for the renovation of Nutley High School. Subsequently, it sought and obtained approval in September 2004, for the bonds to assist in the funding of additions and renovations to the Franklin Middle School. The voters approved the issuance of \$14,930,383, of a total cost estimate of \$23,700,000. In December 2006, Nutley voters approved another referendum for bonding of \$23,357,783, with the estimated cost of this work on the High School and elementary schools of \$38,500,000.

Nutley received approval from the DOE in March 2003, for the high school portion of its long range facilities plan, which, according to the letter issued by the Director, Office of School Facilities, was "consistent with the District's approved long-range facilities plan . . . as approved or as amended as of October 7, 2002." According to a Certification provide by Dennis Oblack, assistant to the business administrator for the District from December 2001 through June 30, 2004, Tri-Tech was utilized as the construction manager for the high school project approved by the DOE in March, 2003. According to Mr. Oblack, as "the high school was a component part of the long-range

facilities improvement plan of the District, and the District already had a contract in place for Tri-Tech . . . at a fixed percentage, the District utilized Tri-Tech as construction manager for this aspect of the project." Oblack "prepared the Checklist for the Design Phase of the high school for submission to the New Jersey Schools Construction Corporation ("NJSCC"), a pre-condition to the District receiving the second disbursement of the Grant . . . and advised that the District was utilizing a construction manager . . . pursuant to the extraordinary and unspecifiable services ("EUS") provision of the . . . ("PSCL")" He advised the NJSCC that the Board resolution approving this contract was adopted on December 18, 2000. Similar approval was sought for the Franklin Middle School work and Bernard E. Piaia, Jr., the DOE's Director, Office of Facilities, issued a letter dated April 30, 2004, approving this "school facilities project".

In May of 2004, the Board adopted a Resolution No. 19, which provided for a Contract Amendment for the Tri-Tech contract, which amendment placed in the contract certain language required by the Section 15 Grant Agreement between the District and the NJSCC. Nutley points to the Guidelines for such agreements, provided by the NJSCC for School Business Administrators, which contains a section regarding exceptions to the requirement for advertising for bids where professional services are involved, as provided for in N.J.S.A. 18A:18A-5(a) (1 & 2). The Guidelines state that all construction services valued above the bid threshold must be bid,

With the exception of professional services . . . or obtained using the Extraordinary Unspecifiable Services . . . process. Construction Management Firms (CMFs) do not qualify as a "professional service" **unless 1.0 they are licensed to perform architectural and/or engineering services AND 2.0 they are engaged to perform such work for the school district.** Therefore, a district must publicly bid CMF services (or obtain them using the EUS process) that are valued at a amount above the bid threshold unless they meet both 'professional service' tests listed above.

It is undisputed that from January 31, 2003, through the termination of the Contract with Tri-Tech, Nutley paid that company \$1,656,109.74. This represents the period following the expiration of twenty-four months from the date of the execution of the Contract, January 21, 2001.

In addition to the Certifications supplied by Oblack, Sincaglia and by Michael DeVita, who was employed in several capacities for the Board during the period from September 2004 to December 2009, the DOE has offered the Certification of Bernard E. Piaia, Jr., the Director of the Office of School Facilities for the DOE. Mr. Piaia has served in that position since May 6, 2000. In his Certification, Mr. Piaia offers what can best be described as the opinions and positions of the person in charge of the Office of Facilities and it is fair to say that his comments include his description of what he purports to be at least his understanding of the meaning of such terms as "project" in the context of the laws in question in this case, as well as comments on procedural and technical aspects of the process that engages his office and school districts with respect to school construction planning (LRFPs) and approval by the DOE. To some degree, Nutley objects to the scope of Piaia's comments, as it believes that he offers opinions that he is not competent to provide, particularly as to the meaning of "project", which, as will be explained, is arguably a vital element of the case.

In its Report of Examination, issued in February 2009, OFAC listed several specific areas in which it determined that Nutley violated its legal obligations regarding its agreement with and dealings with Tri-Tech. For the purposes of this contested case, the important issues noted were "1. The Nutley Board of Education entered into a contract with Tri-Tech Engineering prior to approval of a bond referendum"; "2. The board did not solicit contract bids as required under the provisions of N.J.S.A. 18A:18A-4, Contracts and agreements requiring advertising"; "4. The Nutley School Board has failed to adhere to the statutory provisions requiring approval for the redefining of construction projects and performing renovations that were not voter approved."

Summary Decision

Summary decision, or as it is known in judicial matters summary judgment, is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute and the application to that set of material facts of the applicable law and standard of proof lead to a

determination of the case without the necessity of a hearing at which evidence and testimony need be taken. The standards for determining motions for summary judgment were defined in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). More recently, the Supreme Court has elaborated on the motion and its standard in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). Under the Brill standard, as in Judson, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The facts upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . .," Judson, supra, at 75 (citations omitted). The Brill decision focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill, supra at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 536, quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202, 214. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment

as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held.

N.J.S.A. 18A:18A-46.1 reads

a. Notwithstanding any law to the contrary, except as otherwise provided in this section, the Commissioner of Education shall not withhold State funds from any school district, or require any school district to remit any State funds previously paid to that district, because of any act or omission by the district which the commissioner determines to have been taken or permitted to occur in violation of the extraordinary unspecifiable services exception to the requirements for public advertisement and bidding as set forth in N.J.S. 18A:18A-5, unless the commissioner determines that: (1) the act or omission was the result of any collusion between any officer or employee of the district and any contract vendor; or (2) the act or omission was prompted by an intent on the part of any officer or employee of the district to evade the public advertisement and bidding requirements of the "Public School Contracts Law," N.J.S. 18A:18A-1 et seq.; or (3) a prior act or omission resulted in a withholding of State funds or a remission of State funds due to a violation of the extraordinary unspecifiable services exception to the requirements for public advertisement and bidding as set forth in N.J.S. 18A:18A-5.

b. If the commissioner determines that the violation was caused by negligence and none of the provisions in paragraph (3) in subsection a. are met, the amount of State funds withheld shall not exceed 10% of the contract amount, or in the case of multiple contracts, 10% of the total amount of the contracts, or \$ 25,000, whichever is less.

c. Any school district from which the commissioner withheld funds or has sought to collect funds prior to the effective date of this act due to a determination that the district acted or permitted an action to occur in violation of the extraordinary unspecifiable services exception to the requirements for public advertising and bidding as set forth in N.J.S. 18A:18A-5 may apply to the commissioner for restoration of funds so withheld. If the commissioner determines that none of the provisions set forth in paragraph

(1), (2) or (3) in subsection a. or in subsection b. applies, the commissioner shall remit to the school district the applicable funds previously withheld or forgive any amounts pending collection.

d. The limitations placed upon the commissioner pursuant to this act shall not restrict the commissioner's authority to supervise the compliance by school districts with the requirements of the "Public School Contracts Law," N.J.S.18A:18A-1 et seq., and to seek all other remedies pursuant to Title 18A of the New Jersey Statutes.

[N.J.S.A. 18A:18A-46.1.]

The DOE does not contend that Nutley acted in any collusive manner, with any intent to evade the public advertisement or bidding requirements of the PSCL, or that Nutley had ever previously been the object of any withholding or remission of funds due to a previous violation of the EUS exception. Additionally, the DOE does not contend that any negligence was involved in this matter. However, while the Board argues that it acted in compliance with the EUS exception with regard to its contract with Tri-Tech and that no recoupment of State funds is proper in this matter, the DOE contends that the EUS issue is not relevant. It instead claims that because the Tri-Tech contract violated the provision that precludes a contract of longer than twenty-four months duration, the EUS exception presented in support of the Board's not bidding the January 2001, contract has no application to the circumstances attendant to the Board's conduct after January 31, 2003. As there was no valid contract after that date, and as its recoupment of funds is limited to the period after the two-year duration allowable for the Tri-Tech contract even were it valid (thus a proper EUS exception), the EUS issue is not germane.

In its Report, OFAC condemned Nutley's contract with Tri-Tech as violating the prohibition on a contract exceeding twenty-four consecutive months, a prohibition that is contained in N.J.S.A. 18A:18A-42. "All contracts for the provision or performance of goods and services shall be awarded for a period not to exceed 24 consecutive months." Nutley argues that it properly considered the management contract to encompass the entire seven school rehabilitation "project" that was the subject of the

Long Range Facilities Plan and as such, it believes that the two-year limitation does not apply. It points to N.J.S.A. 18A:18A-42(k), which provides an exception to the two-year limitation for

Any single project for the construction, reconstruction or rehabilitation of any public building, structure or facility, or any public works project, including the retention of the services of any architect or engineer in connection therewith, for the length of time authorized and necessary for the completion of the actual construction;

[Ibid.]

It points to several instances where it conceives that even OFAC agreed that the entire plan constituted one project, such as in Allegation and Finding #1 of the Report where "OFAC recognized the seven schools project as one project in finding: 'The funding for the renovations and alterations to the seven district schools was not approved under one referendum but was approved incrementally by the voters of the District over several years.'" And the original Long Range Facilities Plan was approved by DOE in January 2001, which Nutley also perceives supports its assertion that the entire "Plan" constituted one project. In response, the DOE argues that the original plan, as presented to the voters as one project to renovate seven schools, was twice defeated by those voters and then was effectively separated into smaller individual "projects", each submitted to the voters in three separate referenda that were ultimately approved by the voters. The defeat of the original seven school "project" meant that there was not approved funding for that proposal, and funding for any of the work contemplated by the original Plan was only authorized by the voters in regard to separate, smaller, allotments that were tied to the lessened scope of the work offered for approval in the three referenda that were ultimately approved. As such, it is proper to consider that each separate proposal offered to the voters was a separate "project" and that as such, the contract for services as to each of these separate "projects" was surely not that created with Tri-Tech in January 2001. Any subsequent contract that might have been entered into for any of the three later approved "projects" might well have been for a period exceeding twenty-four months, as authorized by N.J.S.A. 18A:18A-42(k), but the January 2001, contract, which was tied to a "project" that the voters never approved

and which never was funded, cannot be sheltered from the twenty-four-month rule by the exception in (k).

In support of its view that each of the three approved referenda funded separate "projects" and that Nutley's view of one "project" under one long-term contract entered into in January 2001, is legally incorrect, the DOE offers Bernard Piaia's interpretation that

In the case of the construction in Nutley school district, each bond referendum that was passed represents a different project because each one is funded by a separate funding source and each bond referendum constitutes an explanation of the work to be performed with that funding if the bond is approved.

Nutley objects to consideration of this position, arguing that Piaia seeks to "supplant the judicial function of the court by having Mr. Piaia conclude, as a matter of law, that contracts for school facilities projects cannot be initiated before funding is secured and that each project is defined by its funding stream." It urges that no deference be accorded to Piaia's opinion, which it deems conclusory and not dictated by statutory references or case law.

The crux of the dispute between these parties is over the question as to whether the legality of Nutley's actions in regard to Tri-Tech is to be determined based upon the January 2001, contract or based upon the absence of any legally effective contract from on or about January 31, 2003. In OFAC's view, as of that date any contract that purportedly lawfully existed between them had to have terminated due to the twenty-four-month limitation that is imposed by statute. Whatever the legality then of that January 2001, contract, whether it was properly awarded without bidding under the EUS exception or not, once that contract expired, as a matter of law, any further payments to Tri-Tech were made without the solicitation of bids as required by N.J.S.A. 18A:1A-4. Any payments made to Tri-Tech without the solicitation of bids were not appropriate and recoupment is called for.

The parties have each presented their own spin as to what constitutes a "project." The term has significance respecting the allowable length of a contract because of its use in N.J.S.A. 18A:18A-42(k), where the exception to the twenty-four-month limit is for "[a]ny single project for the construction, reconstruction or rehabilitation of any public building, structure or facility, or any public works project." Thus, here we must determine the relationship of a "Plan" to a "project" and the most reasonable approach to defining what exactly is addressed by this exception to the general rule governing the length of such contracts.

As noted, Nutley had created a Long Term Facilities Plan. This Plan contemplated that the district would perform work on seven buildings. In and of itself, the Plan was not a means to either carry out or to fund the work. Approval of the Plan by the DOE neither created contracts for performance nor provided the approval necessary for bonding to obtain the funding. And there is no evidence here that in fulfillment of its Plan, Nutley was ever required to attempt to obtain public approval for the funding for the entire seven-building vision at one time. In determining how best to achieve the goals of the Plan, once it was itself approved by the DOE, the District was presumably free to judge how best to effectuate the Plan, given its resources, its relationship with its constituency, time constraints and other considerations. Nutley chose to put all of its eggs in one basket, so to speak, and to seek approval by referendum for the funding necessary to carry out the whole plan. In that sense, it offered to the voters of the District a "project." The scope of that project was the total Plan. And the District chose to enter into a contract with Tri-Tech based upon its endeavor to carry out the full Plan. But the voters determined that the project, as presented them as a total package in January and December 2002, was unacceptable, as demonstrated by their rejection of the referenda on those two occasions. The District, no doubt taken aback by these rejections, did not give up hope that it would eventually be able to fulfill the Plan. But instead of once again presenting to the voters the same description of the work, that is, of the project, that was to be funded and carried out as the result of passage of the next referendum presented, a scope of work that had already been twice rejected, the District drew back from the total package and reformulated what it asked the voters to approve: a lessened scope and frankly, a

newly defined project. It is certainly not too much to say that once the original conception offered the voters was scaled back, from the original amount sought for approval of \$44,000,000 to the \$31,876,285 sought in the second referendum to the \$2,923,604 sought and approved in the third, April 2003, High School-only, referendum, that the "project" offered to the voters for approval changed. This is most clearly, although not exclusively, the case in regard to the difference between the seven-building referenda of 2002 and the 2003, and the single-building proposal approved in April 2003. The voters were not asked to approve the work to be done on all seven of the schools addressed in the Plan, but to approve only a very limited portion of the work contemplated by the Plan, that which was needed for the High School. Indeed, the later, December 2006 referendum also provided funding for some work at the High School, so it may be that the approval sought in 2003 for High School work did not seek to address even all of that school's needs. Regardless, there is no sense in considering that a proposal to the voters to fund \$44,000,000 for work at seven buildings is the same as a proposal to fund \$2,000,000 for work on one building. It is true that all of this work was part of the grand conception of the Plan, that in a sense it "related back" to that Plan as approved by the DOE, but it is simply too much to consider that these constituted the same "project." DOE's perception of the breakup of the larger project into discreet, smaller projects is a far more reasonable approach that takes into account both the scope of the actual work at issue in any given situation, as well as the very important question of what, at any given time, the voters were being asked to approve. Having rejected the "big" "project(s)" offered to them in 2002, the voters might be quite surprised to learn that they were approving the very same "project" in April 2003.

Nutley objects to Mr. Piaia's expression of his position as to the meaning of "project." He is the Director of the Office of School Facilities for the DOE, and as such, he is not an outside expert but instead is a person directly involved in the day-to-day operations of that unit of the DOE. An agency must undertake to understand and to implement the legislative directions and mandates it receives and in so doing, must, where the legislation is not in itself so crystal clear in its wording as to dictate the exact meaning of words and phrases, to formulate its interpretation of the meaning and import of the language. Even where language is clear, the day-to-day management of a

statutory mandate requires agency personnel to seek to understand how the language applies to differing scenarios. As is commonly known, appellate courts give substantial deference to an agency's understanding and interpretation of the legislation entrusted to its care by the Legislature. Here, it is not offered by either party that the Commissioner of the DOE has issued any decision as to the meaning of "project" in connection with this legislation and this type of circumstance, or that the appellate courts have spoken as to the meaning of the term in this context. In such a circumstance, while neither the Commissioner nor an administrative law judge sitting for the Commissioner in a contested case is required to defer to the understanding of DOE staff personnel regarding the meaning of a term or phrase, that said, neither should either be precluded from hearing and considering the views of those most directly involved in the day-to-day implementation of the legislation. Thus, Mr. Piaia's views are properly offered and if they are in accord with those expressed herein, that is simply a reflection of the fact that both he and this judge may see the matter similarly, not that this judge must accept or defer to that which he offers. Indeed, here, the concept that a project offered at referendum and rejected is not the same project as a substantially altered one offered at another referendum makes great sense and is persuasive.

Guidance as to how to understand the concept of a "project" can be garnered from a review of the regulations attendant to the "management of capital projects" as described in N.J.A.C. 6A:26-4.4. A portion of this regulation is the basis for the finding in the report of irregularities issued by OFAC. It found that the district had failed to adhere to the provisions that require approval where a construction project is "redefined." N.J.A.C. 6A:26-1.2, defines both a "capital project and a "school facilities project"

"Capital project" means a school facilities project, other capital project or land acquisition project.

"School facilities project" means the acquisition, demolition, construction, improvement, repair, alteration, modernization, renovation, reconstruction or capital maintenance of all or any part of a school facility or of any other personal property necessary for, or ancillary to, any school facility, and shall include fixtures, furnishings and equipment, and shall also

include, but is not limited to, site acquisition, site development, the services of design professionals such as engineers and architects, construction management, legal services, financing costs and administrative costs and expenses incurred in connection with the project. To qualify as a school facilities project, the project must be new construction in order to meet the housing needs of unhoused students, or rehabilitation for the purpose of keeping a school facility functional for its original purpose or for a new purpose accomplished within the gross square footage of the original building. Maintenance projects intended solely to achieve the design life of a school facility and routine maintenance do not constitute school facilities projects.

[Ibid.]

N.J.A.C. 6A:26-4.4(a)4 provides options for a school district where there are insufficient funds to complete a capital project

Redefine/scale down the scope of the project and seek approval of the board of school estimate or voters, as applicable, to use the original proceeds for the redefined scope and/or new purpose. All such projects require resubmission and redetermination of final eligible costs by the Division prior to seeking board of school estimate or voter approval; or

[Ibid.]

In this case, Nutley sought voter approval to provide the funding for a large capital project, one that by its very nature was also a "school facilities project." It failed to obtain voter approval on two occasions. It was therefore left with insufficient funds to carry out the proposed "project." Obviously, it then reassessed its position. While N.J.A.C. 6A:26-4.4(a)4 does not specifically state that the redefined or scaled down "project" that it can create after it finds itself with insufficient funding is a "new" project, it is important to note that the regulations differentiate between substantial redefinition and essentially minor changes. N.J.A.C. 6A:26-4.4 (a)2 provides another option in cases of insufficient funding "If contracts were previously awarded, seek approval pursuant to N.J.A.C. 6A:26-4.9 for a change order for modifications to effect economies which would not materially impact the nature or scope of the project as approved by the Division and board of school estimate or voters, as applicable;" (emphasis added).

While a change in the exact scope of a project under this provision may readily be viewed as of such an inconsequential nature as to still leave the "project" effectively the same, in Nutley's case the Board determined to redefine the scope of its project in, to say the least, a decidedly substantial manner. Given that the "project" which was the subject of the contract of January 2001 and the referenda of 2002 was not in any sense the same project as those later offered to and approved by the voters in three subsequent referenda, most particularly so in regard to the 2003 vote, the multi-year exception for "any single project for the construction, reconstruction or rehabilitation of any public building, structure or facility, or any public works project" cannot be utilized to defend the length of the Nutley-Tri-Tech contract of January 2001. As such, the District had no effective contract with Tri-Tech after the expiration of two years following January 21, 2001. When it determined that it should offer the voters in 2003 a project encompassing only \$2,000,000 and only for work at the high school, it should have either solicited bids for the work previously contracted to Tri-Tech or, if it chose, to again contract with Tri-Tech or some other entity under the EUS exception, if it believed that provision applied to the work. It did not do so, and instead continued to treat as if the January 2001 contract was still effective. It made substantial payments to Tri-Tech under the terms of that contract after January 2003. Its failure to bid the contract, or at the very least to authorize a new contract with Tri-Tech or with some other company, utilizing the EUS exception, led it to violate the bidding statute.¹

OFAC seeks to recover \$326,004.47, the State aid portion of money expended to pay Tri-Tech after the expiration of the contract in January 2003. There appears to be no dispute about the amount of money paid after that date. In the absence of any contract awarded after the solicitation of bids pursuant to N.J.S.A. 18A:18A-4, or of any contract awarded after January 2003 under an appropriately applied EUS or other exception to the bidding requirement, these funds were paid by a district that failed to comply with the law. N.J.S.A. 18A:55-2 mandates that the Commissioner of Education "shall direct the State treasurer to withhold funds payable by the State from any district which fails to obey the law or the rules or directions of the State board or the commissioner." The recovery limitation embodied in N.J.S.A. 18A:18A-46.1a has no

¹ This is not to suggest that the invocation of the EUS provision was appropriate in regards to any of the work Tri-Tech contracted to perform for Nutley for any of these school renovations or construction work, only that if Nutley believed it proper, they should have utilized the provision in connection with a new contract with either Tri-Tech or another entity.

applicability. I **CONCLUDE** that Nutley's failure to abide by the bidding statute after January 2003 constitutes such a failure to comply with State law and I **CONCLUDE** that recoupment of the \$326,004.467 is proper. The State Treasurer should therefore be directed to withhold from Nutley \$326,004.47. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

1/13/2012
DATE

Date Received at Agency:

Date Mailed to Parties:

mjm

Jeff S. Masin
JEFF S. MASIN, ALJ

January 13, 2012

January 13, 2012

EXHIBIT LIST

FOR THE PETITIONER:

- P-1 Certification of John C. Sincaglia dated June 23, 2011, with attached Exhibits A through H
- P-2 Certification of Dennis Oblack dated June 23, 2011, with attached Exhibits A through D
- P-3 Certification of Michael DeVita dated June 23, 2011, with attached Exhibits A through F

FOR THE RESPONDENT:

- R-1 Certification of Bernard E. Piaia, Jr., Director of the Office of School Facilities, dated July 7, 2011, with attached Exhibits 1 through 12

AGENCY DKT. NO. 259-8/11

FINESIA WALKER,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION ON MOTION
ESSEX COUNTY VOCATIONAL	:	
SCHOOL DISTRICT, ESSEX	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

For Petitioner, Oxford Cohen

For Respondent, Durkin & Durkin

The following is a decision on respondent's motion to vacate a default judgment which has been entered against it, requiring respondent to restore to petitioner's sick bank all days of absence flowing from petitioner's September 18, 2006 work-related fall – up to one calendar year.

This matter was opened before the Commissioner of Education on August 25, 2011, by way of a verified petition against the respondent board of education. Petitioner alleged that sick days were improperly charged to her "sick leave bank." Upon notice by the Commissioner, petitioner submitted a copy of the workers' compensation settlement on October 27, 2011.

By notice dated October 27, 2011, the Bureau of Controversies and Disputes (the Bureau) directed respondent, via regular mail, to file an answer to the petition. On November 18, and then again on December 6, 2011, the Bureau directed respondent for a second

and a third time – via both certified and regular mail – to file an answer to the petition. The certified mail receipts were signed and returned, and the notices sent by regular mail were not returned to the Commissioner.

The first communication from the Bureau clearly provided respondent with notice that, pursuant to *N.J.A.C.* 6A:3-1.5, an individual against whom a petition is filed shall have 20 days from receipt of the petition to file an answer. The second and third notices advised that if respondent did not file an answer within ten days of its receipt of same, each count of the petition would be deemed to have been admitted and the Commissioner might decide the matter on a summary basis.

Having received no answer from respondent, the Commissioner concluded, on January 24, 2012, that petitioner's allegations could be deemed admitted, pursuant to *N.J.A.C.* 6A:3-1.5(e), and were sufficient to justify an order that respondent restore to petitioner's sick bank all days of absence flowing from petitioner's September 18, 2006 work-related fall – up to one calendar year.

To support its motion to vacate the default judgment respondent's counsel has submitted a certification alleging that an answer was not filed to the petition bearing the above-referenced docket number because said petition is duplicative of a prior petition that was filed under the docket number 248-8/11 and transmitted to the Office of Administrative Law (OAL). Respondent's counsel further certifies that a hearing regarding said petition is scheduled for May 9, 2012 in the OAL, and argues that filing responsive pleadings to the duplicative petition would have been pointless. Thus, respondent's counsel urges that the default judgment entered against respondent on January 24, 2012 be vacated.

Upon consideration of the foregoing, the Commissioner concludes that the default judgment was issued as the result of procedural errors.

Accordingly, notwithstanding respondent's failure to contact the Commissioner with an explanation for its failure to respond to any of the above-referenced notices, respondent's motion to vacate the January 24, 2012, default judgment is granted.

IT IS SO ORDERED.¹



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/29/12

Date of Mailing: 2/29/12

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*).

#76-12E

OAL DKT. NO. EDU 2576-12
AGENCY DKT. NO. 42-2/12

BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF VOORHEES,	:	
CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION ON
V.	:	APPLICATION FOR EMERGENT RELIEF
NEW JERSEY DEPARTMENT OF	:	
EDUCATION	:	
AND	:	
REGIS ACADEMY CHARTER SCHOOL,	:	
RESPONDENTS.	:	

The record of this matter, including the audio recording of the March 1, 2012 hearing at the Office of Administrative Law, and the order denying petitioner's motion for emergent relief have been reviewed. For the reasons set forth by the Administrative Law Judge as the basis of his order, the Assistant Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34 – concurs that petitioner has failed to meet the standards for emergent relief set forth in *N.J.A.C.*:6A:3-1.6(b) and *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Accordingly, the motion for emergent relief must be denied.

IT IS SO ORDERED.¹



ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 3/02/12
Date of Mailing: 3/02/12
~~xxxxx~~
Faxing _____

¹ Pursuant to *P.L.* 2008, c. 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF

OAL DKT. NO. EDU 2576-12

AGENCY DKT. NO. 42-2/12

**BOARD OF EDUCATION OF
THE TOWNSHIP OF VOORHEES,**

Petitioner,

v.

**NEW JERSEY DEPARTMENT
OF EDUCATION, AND REGIS
ACADEMY CHARTER SCHOOL,**

Respondents.

Howard S. Mendelson, Esq., for petitioner (Davis and Mendelson, LLC)

Diana Sierotowicz, Deputy Attorney General, for respondent (Jeffrey S. Chiesa,
Attorney General of New Jersey, attorney)

Regis Academy Charter School, Amir Khan, appearing pro se

BEFORE **DONALD J. STEIN, ALJ:**

STATEMENT OF THE CASE

The Township of Voorhees (petitioner) filed an application for emergent relief to stay the inclusion in its 2012-2013 budget of projection funding for the Regis Academy

Charter School (Regis) or that Regis be placed on probationary status for ninety days in accordance with N.J.A.C. 6A:11-2.4(a).

PROCEDURAL HISTORY

On February 24, 2012, petitioner filed an application for emergent relief with the New Jersey Department of Education, Office of Special Education Programs. On February 24, 2012, the matter was transmitted to the Office of Administrative Law (OAL) for oral argument on the requested emergent relief. On March 1, 2012, the emergent application was heard in the OAL, Trenton (Hamilton Township), and the record closed.

STATEMENT OF FACTS

Some of the facts are undisputed. In March 2011, Regis submitted a new charter application. On May 5, 2011, the Department of Education (DOE) wrote to the petitioner stating:

If the application receives preliminary approval in September 2011, they will receive aid projections in February 2012. Please note that the calculated aid on enclosed report is an estimate and is for planning purposes only. Potential aid is contingent upon final approval of the charter. Once final approval is granted, the district would receive a payment schedule based on the projected enrollment as of February 2012 (R-1).

On September 30, 2011, the application was approved, contingent upon receipt of additional documentation, "successful participation of the preparedness process", and compliance with applicable state and federal regulation (R-2).

Petitioner asserts that they have not been provided with enrollment numbers for Regis, and that the previously provided figures from DOE would account for 89.7% of the 2% allowed budget growth for the 2012-2013 school year. Petitioners would be left with \$83,377 for additional costs, including contractual obligations. The Board is required to submit a budget by March 5, 2012 (P-1).

Petitioner further asserts that they have not yet received any additional guidance from the DOE updating or modifying the estimates referred to in the May 5, 2011 letter (R-1). Petitioner argues that as a result, they will be left with no alternative except to eliminate programs, reduce staff and increase class size, and that the budget restrictions imposed by this aid would make it "impossible for the Board to comply with its obligation to deliver a 'thorough and efficient education'" (P-1).

On February 28, 2012, the DOE submitted two charter aid projections (P-2). One has a worst case scenario for fifty-two students, and the second has a projection for thirty students. Petitioner argues that they should not have given two projections.

CONCLUSIONS OF LAW

A party seeking emergent relief must satisfy the standards in Crowe v. DeGioia, 90 N.J. 126 (1982), which requires the movant to establish:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the Crowe test.

I **FIND** it unlikely that the petitioner would have prevailed on the merits for both forms of the proposed relief.

While petitioner contends that it should not have to include projected aid numbers in its 2012-2013 budget, N.J.A.C. 6A:23A-15.2 clearly requires petitioner to do so. According to that provision, "[t]he resident and non-resident school districts shall use projected charter school aid as established by the Commissioner in a report to be

distributed no later than February 15 of the pre budget year for budget purposes” N.J.A.C. 6A:23A-15.2(a). Moreover, “[a]nnually, on or before March 4, each district board of education shall adopt, and submit to the Executive County Superintendent for approval, together with such supporting documentation as prescribed by the Commissioner, a budget that provides for a thorough and efficient (T&E) education.” N.J.A.C. 6A:23A-8.1(a); N.J.S.A. 18A:7F-5(c). Thus, when read in conjunction, N.J.A.C. 6A:23A-15.2(a) and N.J.A.C. 6A:23A-8.1(a) require the District to submit to the county superintendent, on or before March 4, 2012, a 2012-2013 budget that includes the projected charter school aid for Regis as distributed by the Department.

It is also unlikely that the petitioner would prevail on the merits as to placing Regis on probation. Under N.J.A.C. 6A:11-2.4(a), probation is a penalty applied to charter schools that are not in compliance with their charters, or statutory or regulatory provisions. Here, there is no evidence that Regis is not in compliance with its preliminary charter, or any statute or regulation. Instead, all statutorily required documentation for final charter applications shall be submitted to the Department of Education by June 30. N.J.A.C. 6A:11-2.1(l) Thus, Regis has several months to comply with its requirements and probationary status at this juncture would be inappropriate. Therefore, there is no likelihood that the petitioner would prevail on the merits of this issue or that the petitioner has a legal right to prematurely request that the Commissioner place a charter school on probation.

Petitioner has not satisfied the requirement for irreparable harm. It is not disputed that budgeting for aid to Regis would cause some uncertainty and may cause the petitioner to make some cuts based on the projected aid for Regis, but this does not rise to irreparable harm. Every school district has to budget for charter schools in the district and deal with the possibility of cutting jobs and programs. And, at this point, the aid due to Regis is merely a projection, and the petitioner does not have to provide any payments to Regis unless and until the DOE grants final charter approval. Actual aid is annually adjusted by the Commissioner after the budgets have been set. Therefore, the petitioner will not know how much aid it actually owes until later in the year, which would still cause uncertainty in the budget.

The irreparable harm is speculative at best. The Commissioner has not granted final approval to Regis.

I **FIND** that the Board would suffer greater harm than petitioner if the requested relief was not granted.

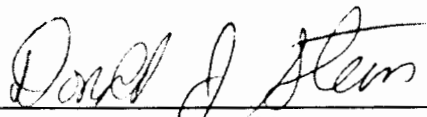
DECISION AND ORDER

Since N.J.A.C. 6A:14-2.7(m)(1) and N.J.A.C. 1:6A-12.1 are written in the conjunctive and the petitioner has failed to satisfy three requirements, I **CONCLUDE** that the petitioner has failed to establish grounds for the granting of emergency relief. Accordingly, it is **ORDERED** that the petition of the Township of Voorhees for emergent relief is **DENIED** without prejudice. Since this matter involves the submission of documents by March 5, 2012, there are no other outstanding issues to be resolved.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

March 2, 2012

DATE



DONALD J. STEIN, ALJ

cmo

APPENDIX
EXHIBITS

For Petitioner:

- P-1 Affidavit of Frank T. DeBardinis
- P-2 DOE Projections

For Respondent:

- R-1 May 5, 2011 Letter from DOE
- R-2 September 30, 2011 Letter from DOE

#80-12

DEZORAY MOORE,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF WILLINGBORO,	:	
BURLINGTON COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured assistant principal – contended that her tenure rights were violated when her annual salary was reduced in consequence of the change from a twelve-month to a ten-month position in respondent's school district following a reduction in force (RIF) which eliminated the twelve-month position of principal at Garfield East Elementary School – a position petitioner had held for eight months. Respondent Board asserted that it had acted pursuant to a RIF and in accordance with the law when it placed petitioner in a ten-month assistant principal position in an elementary setting at her base salary, pro-rated for ten months; and that this assignment had been made only after petitioner expressed dissatisfaction with the Board's intent to reassign her to a twelve-month assistant principal position at the district high school – a position that would have provided the same twelve-month work schedule and salary that petitioner had received prior to the RIF. Petitioner contends that she was reassigned from her principal position to the high school position as a result of the RIF, and that the Board then transferred her of its own volition to the elementary position, thereby illegally reducing her salary.

The ALJ found, *inter alia*, that: it is undisputed that respondent instituted a RIF in the spring of 2010 which eliminated petitioner's twelve-month principal position; the evidence as presented was clear that petitioner had initially been advised by her superintendant that she would be recommended for an assistant principal position at Memorial Upper Elementary school; the Board, however, did not act on that recommendation but instead assigned petitioner to a new position at the high school that preserved her twelve-month work schedule and salary; petitioner appeared to be disgruntled with the assignment; the Board determined from petitioner's actions that she was seeking assignment to Memorial Upper Elementary as assistant principal and therefore changed the assignment; this assignment, which petitioner seems to have wanted, resulted in a reduction in her salary due to the ten-month nature of the position; and the reduction is not a violation of her tenure rights. Accordingly, the ALJ dismissed the petition.

Upon comprehensive review of the record, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

March 5, 2012

OAL DKT. NO. EDU 12286-10
AGENCY DKT. NO. 604-10/10

DEZORAY MOORE,	:	
	:	
PETITIONER,	:	
	:	COMMISSIONER OF EDUCATION
V.	:	
	:	DECISION
BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF WILLINGBORO,	:	
BURLINGTON COUNTY,	:	
	:	
RESPONDENT.	:	

In this controversy petitioner contends that her tenure rights were violated when her annual salary was reduced in consequence of the change from a twelve-month to a ten-month position in respondent's school district. Upon review of the record,¹ Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions and respondent's replies thereto, the Commissioner adopts the Initial Decision for the reasons expressed therein.

The event that precipitated the controversy was a reduction in force (RIF) which eliminated the position of principal of respondent's Garfield East Elementary School. Petitioner had held that twelve-month position for approximately eight months when notice of the reduction in force was issued in April 2010. (Respondent's Exhibit R-1) She was advised that her tenure in the position of Assistant Principal – which tenure had previously been earned in consequence of six years of service in the ten-month position of Assistant Principal of

¹ The record does not include a transcript of the hearing, which was held in the Office of Administrative Law on November 29, 2011.

Levitt Middle School – would give her “position rights” over non-tenured assistant principals within the district or allow her to be placed in a vacant assistant principal position. (*Ibid.*)

It is undisputed that, initially, respondent voted (on June 30, 2010) to assign petitioner to respondent’s high school – in the newly created twelve-month position of Assistant Principal/Dean of Students, which position was to have the same annual remuneration as did petitioner’s position as principal of Garfield East Elementary School.² (Respondent’s Exhibits R-2 and R-3) It is also undisputed that respondent voted on July 26, 2010 to assign petitioner to Memorial Upper Elementary School (Memorial) in the ten-month position of Assistant Principal. (Respondent’s Exhibits R-9 and R-10)

Respondent contends that the latter placement of petitioner into the ten-month assistant principal position at Memorial,³ and the attendant reduction in salary, was the result of petitioner’s expression of dissatisfaction with the high school assignment. It was, thus, a reassignment in consequence of the RIF. Relying on such cases as *DiMaggio v. Board of Education of the City of Trenton, Mercer County*, Commissioner Decision No. 219-99 (July 8, 1999), respondent reasons that the decrease in petitioner’s annual salary caused by the change from the twelve-month position that she rejected to a ten-month position (at the same rate of pay) given to her in consequence of the RIF was not a violation of her tenure rights. *DiMaggio, supra*, at 20.

Petitioner does not deny that respondent’s June 30, 2010 action assigning her to the high school was in consequence of a RIF. Rather, she maintains 1) that she never objected to that assignment, 2) that respondent’s July 26, 2010 placement of her into the position at Memorial was at its own initiative and should be deemed independent of the RIF, and 3) that the

² The record suggests that all other assistant principal positions in respondent’s district were ten-month positions.

³ Petitioner ultimately served in that position for the 2010-11 school year.

reduction in salary caused by her 'transfer' from the high school position to the assistant principal position at Memorial must be regarded as a violation of her tenure rights.

The resolution of this controversy boils down to an evaluation of the facts and the credibility of the respective parties and/or their representatives regarding their communications in June and July of 2010. Those communications included, *inter alia*, a July 1, 2010 letter from petitioner questioning her appointment to the high school position, a July 15, 2010 meeting – precipitated by petitioner's letter – attended by petitioner, respondent's Interim Superintendent David Hespe, respondent's Human Resources Director Terrell Everett and others, and correspondence subsequently sent to petitioner referencing the July 15 meeting. *See, e.g.*, Respondent's Exhibits R-4, R-6, R-7, and R-8.

It is important to recognize at the outset that the Commissioner must accept the Administrative Law Judge's (ALJ) credibility determinations unless the record blatantly contradicts same, *see, e.g., N.J.S.A. 52:14B-10(c); D.L. and Z.Y. on behalf of minor children, T.L. and K.L. v. Board of Education of the Princeton Regional School District, 366 N.J. Super. 269, 273 (App. Div. 2004)*. Here, the ALJ found respondent's witnesses to be credible as regards respondent's reason for changing petitioner's placement from the high school to Memorial. The ALJ accepted Hespe's testimony that 1) once the RIF was instituted it was Hespe's and petitioner's original expectation – before the first of respondent's board meetings – that petitioner would be given the assistant principal position at Memorial, 2) he interpreted petitioner's July 1, 2010 letter to be a complaint about the assignment in the high school and scheduled the July 15, 2010 meeting to address petitioner's concerns, 3) as a result of communications during the July 15 meeting, he understood petitioner to want the assistant principal position at Memorial, and 4) in the hope of appeasing a displeased employee, he

proposed to the respondent board that it give petitioner the assistant principal position at Memorial – which it did.

On the other hand, the ALJ was not persuaded by petitioner's testimony. He found:

that Ms. Moore, despite her more recent attempt to make it appear as if she accepted the High School position and only wanted a better understanding of it, actually was very unhappy with the assignment and actively sought to both express her disagreement with her having been assigned to a job she had not sought (or even been aware of) and also directly sought to have that assignment changed to the one she had expected following her pre-June 29 meeting with Hespe, one that she had not made any protestation of public or private disagreement with prior to the Board's June 29 meeting. (Initial Decision at 8)

In addition to assessing petitioner's testimony, the ALJ noted that there was no indication in the record that petitioner – prior to respondent's July 26, 2010 board action – ever communicated to Hespe or the respondent Board any objections about the reassignment to Memorial – a change about which she had been alerted by Everett's letters of July 15 and July 22 and the Rice Notice of dated July 22, 2010. The ALJ concluded from this that during that time period petitioner was satisfied with the change to a ten-month position, notwithstanding that she would earn less over a calendar year in her more desired position at Memorial.⁴ (Initial Decision at 9)

The Commissioner has discerned nothing in the record that would lead him to believe that the ALJ's factual findings and credibility determinations are baseless or contraindicated. To the contrary, the Commissioner finds that the record supports only one non-

⁴ The ALJ's account of petitioner's testimony also included the statement that any concerns petitioner may have had about being the only RIF'd administrator to be subject to a salary reduction were not communicated to Hespe or Everett or brought before the respondent Board. Rather, they were "later expressed to Mr. Nash [petitioner's counsel]." Initial Decision at 6.

speculative explanation for the reassignment of petitioner, and that is respondent's belief that the reassignment was what petitioner wanted.

Petitioner's suggestion, in her exceptions, that her placement in the Memorial assistant principal position should be seen as an action that was independent of the RIF is therefore rejected. The Commissioner concludes that petitioner's reassignment from a twelve-month to a ten-month position was in consequence of the RIF that was announced by respondent in April of 2010. Under those circumstances, the prorating of her salary did not violate petitioner's tenure rights. The petition is accordingly dismissed.

IT IS SO ORDERED.⁵



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/05/12

Date of Mailing: 3/06/12

⁵ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12286-10S

AGENCY DKT. NO. 604-10/10

DEZORAY MOORE,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF WILLINGBORO,
BURLINGTON COUNTY,**

Respondent.

Wayne J. Oppito, Esq., for petitioner (New Jersey Principals and Supervisors Association)

Diana G. Caiafa, Esq., for respondent (Cooper Levinson, attorneys)

Record Closed: December 20, 2011

Decided: January 18, 2012

BEFORE **JEFF S. MASIN, ALJ:**

Dezoray Moore, a tenured employee of the Willingboro Board of Education ("Willingboro" or "Board") filed a petition with the Commissioner of the Department of Education asserting that the Board had violated her tenure rights, in defiance of N.J.S.A. 18A:28-5, because it had illegally reduced her salary. The Board denied that claim, noting that while Ms. Moore's salary had not been reduced, it had been prorated to reflect that her assignment had been changed following a reduction in force (RIF)

from a twelve-month to a ten-month position, thus resulting in a reduction of her annual earnings that was fully justified and in no way in derogation of her tenure rights. The Commissioner forwarded the contested case to the Office of Administrative Law for hearing, pursuant to N.J.S.A. 52:14B-1 to- 15 and N.J.S.A. 52:14F-1 to -13. A motion for summary decision on behalf of the Board of Education was denied by letter order dated August 3, 2011, and a hearing was conducted on November 29, 2011. Pre-and post-trial briefs were filed and the record closed on December 20, 2011.

There is no dispute that a RIF was instituted by the Board in the Spring of 2010. Prior to the RIF, Dezoray Moore was the Principal of the Garfield East School, a twelve-month position in which she earned \$99,275 (plus \$200 longevity). She had been promoted to this position from an assistant principalship at the Levitt Middle School, where she was assigned in the previous years 2003-2004 through 2008-2009. Moore did not have tenure in her position as principal at Garfield East. However, she did have tenure in the assistant principal position. She received notice of the RIF and resultant reassignment by letter dated April 28, 2010. This notice advised of the abolition of her position as Elementary Principal at Garfield East, effective June 30, 2010, subject to Board approval. The letter also noted that as a tenured staff member, she had position, or as it is often called "bumping", rights over other non-tenured staff and that the Interim Superintendent of Schools, David C. Hespe, would be recommending to the Board her reassignment to a position within her previous tenure. Dr. Hespe testified that his recommendation to the Board, presented during a multi-day Board meeting that commenced on June 29, 2010, was that Ms. Moore be reassigned to a ten-month position as an assistant principal at the Memorial Upper Elementary School, carrying a salary of approximately \$82,000. However, the Board did not agree to Hespe's recommendation and instead determined that Ms. Moore should be assigned to the Willingboro High School in a position as Assistant Principal/Dean of Students, a twelve-month position that paid \$99,275. The Board approved this appointment and notified Ms. Moore by letter dated July 1, 2010. In response, Ms. Moore wrote to Hespe on July 1. She noted that this appointment had been made despite the fact that she had been "unaware of such position and did not see a posting for the position, apply for the position, interview for the position, or know the job description of the position." She

then essentially quotes from the description contained in the RIF letter of April 28, 2010, as to what might possibly happen regarding her position in the district given her tenure rights vis a vis non-tenured employees. She then notes that there have "been some discrepancies on a few occasions as it relates to me regarding hiring practices-job posting, applications, interviewing, and appointments." She then addresses an issue regarding the "Twilight Program" and a grievance she had filed. She asserts that the "unfair practices must end at the Willingboro Public School District in order for the district to become productive." She concludes,

I hope the Central Administration and the Board of Education begin to change the practice of favoring particular staff employees over other staff employees that have proven to have more qualification and/or experience.

Thank you for your attention to this matter.

[Exhibit R-4.]

On July 12, 2010, in a letter to Dr. Hespe, Ms. Moore requested a sabbatical from July 13, 2010 until August 31, 2010, for the expressed purpose of "further studies in pursuance of professional growth." She copied the Director of Human Resources, Terrell Everett, on this request.

On July 15, 2010, Mr. Everett wrote Moore to "memorialize our conversation today." He wrote that she had "indicated that it is your belief that you should be placed in a 10-month Assistant Principal position. We have asked you for a letter indicating that you are requesting a transfer from a 12-month position you were appointed to on June 30th to a 10-month Assistant Principal position." He noted that the administration wanted to bring this issue up to the Board at its meeting on July 26 and requested that she respond to his office in writing by July 20, 2010, a request for a response that was emphasized in the letter by bold type. On July 22, Everett wrote again, referencing the July 15 letter and "later attempts to contact you via phone and e-mail correspondence for a response." He advised that she was being transferred from the twelve-month Assistant Principal/Dean of Students position to a ten-month Assistant Principal at Memorial Upper Elementary School, at a salary of \$82,729.16 for the "10-month

Assistant Principal" position. On July 22, a Rice Notice was sent to Moore, advising that the Board might be discussing the transfer outlined in the July 15 and, more explicitly, in the July 22 letters, at its meeting of July 26, 2010. It outlined her choice regarding having the discussion take place in Executive session or in Public session and requested her decision as to that question. According to both sides of this dispute, she did not respond to either the letters or the Rice Notice. The Board took up and approved the transfer from the twelve- to the ten-month position at that July meeting and approved the same.

It is undisputed that after her assignment to the High School and before her assignment to Memorial Upper Elementary, that Ms. Moore received two paychecks that were the result of her assignment as a twelve-month employee receiving a salary of \$99, 275.

David Hespe, now the Chief of Staff at the State Department of Education and formerly the State Commissioner of Education, served as the Interim Superintendent of the Willingboro School District for approximately thirteen months. He recalled that after the RIF was announced he met with Ms. Moore and discussed his recommendation that she be assigned to the ten-month position as Assistant Principal at Memorial Upper Elementary. Moore questioned why she could not simply return to Levitt, but he explained that he thought she best fit at Memorial. When the Board decided at its meeting, held over several days beginning June 29, that it felt she would be more appropriately assigned to the High School, the decision to assign her there was made without further discussion with Moore. After he received her letter of July 1, a meeting was held with Moore and Everett on July 15. Hespe, who had received her letter on July 2, understood that she was upset regarding the appointment to the High School. He understood her to argue that it was an illegal and inappropriate action and that she wanted action to be taken to undo that appointment. He told her that he would see what he could do. He contended that at the meeting he asked her what she wanted to happen and she wanted the Memorial Upper Elementary position. She presented as a "very unhappy employee" unhappy with the RIF, the reduction back to an assistant principalship, and her not being assigned to Levitt. After that meeting, all attempts to

reach her were to no avail. She did not respond to letters or report to the High School. He did receive a letter about a sabbatical, a topic that she had not brought up in the July 15 meeting. This request "confused things." There was a process in place in the contract to make such a request and she did not follow that process, which, additionally, no one could recall ever having been used. The request came from "out of the blue," there was not time to consider it, the information supporting it was insufficient, and it was never approved.

Hespe offered that the recommendation to the Board to place Ms. Moore at Memorial Upper Elementary instead of the previously approved placement at the High School was precipitated by Moore's request at the July 15 meeting. He specifically denied that the decision to recommend her assignment to Memorial Upper was in any way a result of his determining that her assignment to the High School as Assistant Principal/Dean of Students was inappropriate or illegal.

Dezoray Moore, now assistant principal at Hawthorne Park Elementary School in Willingboro, testified that she was advised that as a result of a RIF she would no longer be a principal. There were at the time prior to the RIF eight or nine assistant principals in Willingboro and none was in a twelve-month position. When she met with Hespe and Everett and was told that she was being recommended for an assistant principal position at Memorial Upper Elementary, there was no discussion of the salary. The Dean of Students position at the High School had not previously existed. Assistant Principals at the High School had been ten-month employees.

Moore testified that after she learned of the appointment to the High School position instead of the Memorial Upper assignment, she wanted "clarification" concerning the new assignment, for which there was no existing job description. She did meet with Hespe and Everett. She also met with Everett on July 12 concerning her request for a leave of absence. He told her to put this request in writing. She asked for sabbatical to allow her to finish some course work and did not seek to be paid for the time off. As for her meeting on July 15 with Hespe and Everett, she did not ask for a move to a different assignment. She merely sought to clarify the assistant

principal/Dean of Students position. As for the letter sent to her on July 22, she did not respond to it as a result of advice she had received by that date from David Nash, Esq., an attorney she had consulted regarding the legality of the appointment process. She does not recall if she responded to the Rice Notice. On September 1, she reported to Memorial and served there for the 2010-2011 school year.

Ms. Moore acknowledged that she was aware of the salary for the assistant principalship at Memorial Upper Elementary that was listed on the agenda for the June 29 meeting. That was the first time that she was aware of the salary, which she understood was based on the ten-month nature of that position, which itself was an understanding of the length of her year based upon what Hespe told her when they met in June. She did not express any concerns about this salary at the Board meeting. Later concerns that she claimed she had about being the only administrator whose salary was reduced were not brought up to the Board, Hespe or Everett but were later expressed to Mr. Nash.

Discussion

Ms. Moore asserts that the Willingboro School District violated her tenure rights when it placed her in the position of assistant principal at the Memorial Upper Elementary School after it had first placed her at the High School as an Assistant principal/Dean of Students following a RIF that had caused her to lose her position as a non-tenured principal. The most practical impact of this change from the High School assignment to the Elementary School position was that the latter was a ten-month position. The High School assignment was for a twelve-month period. The resulting yearly pay differential, based on the difference in months for the assignment, was approximately \$17,000, based on pro-rating the twelve-month to a ten-month salary, and these salaries were also subject to the changes that might occur as a result of negotiations with the bargaining unit. A tenured school employee "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause" N.J.S.A. 18A:28-5.

The parties have clashed over precisely the reason for the change of assignment from the High School to Memorial Upper. The Board insists that it acted pursuant to a RIF and that as such, since it followed the law in moving Moore from her principal's position to first the High School and then the elementary school, it simply carried out both reassignments as part of the RIF and in accordance with the law. More importantly perhaps, it contends that the reason for the second reassignment was not due to its own desire to either transfer Moore from the High School or to reduce her to a ten-month employee, with a concomitant salary adjustment to reflect that shorter work year, but was instead simply its effectuation of the change to satisfy an employee who had clearly expressed her unhappiness with the High School assignment and had questioned its legality. Moore argues that the reassignment from her principal position to the High School effectuated the RIF. The Board then transferred her of its own volition and in doing so illegally reduced her salary.

It is clear from the evidence that prior to the Board's approval of the assignment to the High School, Dr. Hespe had advised Ms. Moore that he had recommended that she be assigned to Memorial Upper Elementary as a ten-month employee earning \$82,700. This was what she understood and this was the recommendation that she expected the Board to consider at the June 29 meeting. She did not express any alarm at this prospect, at least not to Hespe, Everett or the Board. To her surprise, the Board did not do as its Interim Superintendent had recommended. Instead, no doubt to her surprise, Moore found herself assigned to the High School as an assistant principal/Dean of Students, a position that as she noted in her letter of July 1, she neither sought, applied for, had seen posted or had even known existed. This new assignment carried with it two things at least: twelve-months service and a salary of \$99,275, the very same salary she received in the position of principal she had held before the RIF. Ms. Moore's reaction to the news of this assignment is at the crux of the matter.

Ms. Moore's July 1 letter appears to assert that the Board has not followed allowable procedures in regard to hiring practices, while at the same time noting that in

regard to her own situation, Moore has found that she has been appointed to a position she did not know about, was not alerted to by posting and did not apply for. She then notes her rights in regard to the RIF as set out in the RIF letter. Nowhere in the letter does she explicitly say that she wants or insists upon a change in the assignment to the High School, yet she does seem, by the words and the tone of the letter, to be complaining about what the Board has done.

The key to understanding the difference between the Board's view of the events of July and that of Ms. Moore's appears to be the difference in their understandings as to the significance of the July 15 meeting. Hesper testified that at that meeting Moore expressed her desire to be assigned to the elementary school position. He then set out to effectuate this and succeeded. She contends that she did not ask for any change at this meeting, only a clarification of her new position at the High School. Here, the difference in testimony must be reconciled by an assessment of the credibility of the witnesses. On this, I am persuaded that Ms. Moore, despite her more recent attempt to make it appear as if she accepted the High School position and only wanted a better understanding of it, actually was very unhappy with the assignment and actively sought to both express her disagreement with her having been assigned to a job she had not sought (or even been aware of) and also directly sought to have that assignment changed to the one she had expected following her pre-June 29 meeting with Hesper, one that she had not made any protestation of public or private disagreement with prior to the Board's June 29 meeting. Exactly why she did not want the High School assignment is not to be determined from this record, but I am convinced she was satisfied, in the face of the reality of a RIF, with the elementary school assistant principalship. But she did receive checks for the two pay periods in July as a twelve-month employee, reflective of the High School assignment.

The Board has contended that its actions here all relate to and flow from the RIF and as such, as the reduction from her principal position and salary adjustment are the result of the RIF, it has acted legally. I am persuaded that it changed the assignment from that approved by the Board to that which accorded with Dr. Hesper's original recommendation due to Hesper's intervention on behalf of his disgruntled employee.

The change reflected that Ms. Moore was unhappy with the Board's initial action in regards her tenure rights following the RIF and was, in essence, merely the Board placing her in position after the RIF more comfortable to her than that which it had first given her, a position that was also within those to which she could be assigned in conformity with those tenure rights. The fact that she received a salary for work in July was the result of the Board's initial step, which she did not see as proper or comfortable. That she now complains that her calendar year salary ended up lower, due to its pro-rated nature, is unfortunate. And her tenure right had been protected by the High School assignment and was similarly protected by the assignment to the elementary position, which assignment, it is noted, has not been attacked on the ground that it would have been legally inappropriate had it occurred as Hespe originally recommended. And I am convinced that the fact that she never objected to Hespe or the Board about the change to which she was clearly alerted by the letters of July 15 from Everett and July 22 from Everett and the Rice Notice of this latter date reflects that she was satisfied with the change, although no doubt she did not appreciate that she would earn less over a calendar year despite receiving the same monthly rate of compensation in her more desired position at Memorial Upper Elementary.

The Board essentially acquiesced to Ms. Moore's preference as to her assignment. That it resulted in a reduction in her salary due to the ten-month nature of the position is not a violation of her tenure rights. The rate of pay was maintained, only the total yearly salary was reduced due to the shorter work year. DiMaggio v. Bd. of Educ. Of the City of Trenton, EDU 6389-97, Initial Decision, (May 24, 1999), rejected, Comm'r. (July 8, 1999) p.20 <<http://lawlibrary.rutgers.edu/oal/search.html>>.

I **CONCLUDE** that the Board of Education did not act in contravention of Ms. Moore's tenure rights. Her appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

1/18/12

Date Received at Agency:

Date Mailed to Parties:

mjm

Jeff S. Masin
JEFF S. MASIN, ALJ

January 15, 2012
January 18, 2012

WITNESSES

FOR THE PETITIONER:

Dezoray Moore

FOR THE RESPONDENT:

David Hespe

Terrell Everett

EXHIBIT LISTS

FOR THE PETITIONER:

FOR THE RESPONDENT:

- R-1 Reduction-in-Force (Reassignment) letter dated April 28, 2010 from David Hespe to petitioner
- R-2 Superintendent's Report dated June 28, 2010
- R-3 Reappointment letter dated July 1, 2010, from Terrell Everett to petitioner
- R-4 Letter from Petitioner to David Hespe dated July 1, 2010
- R-5 Request for sabbatical dated July 12, 2010, from petitioner to David Hespe
- R-6 Letter from Terrell Everett to petitioner dated July 15, 2010
- R-7 Letter from Terrell Everett to petitioner dated July 22, 2010
- R-8 Letter from Terrell Everett to petitioner dated July 22, 2010
- R-9 Superintendent's Report dated July 26, 2010
- R-10 Letter from Terrell Everett to petitioner dated July 27, 2010
- R-11 Letter from Terrell Everett to petitioner dated August 25, 2010
- R-12 Respondent's Request for Admissions with attachments A-F, dated March 10, 2011
- R-13 Letter from David Nash, Esq., to Diana G. Caiafa dated April 4, 2011, with attachments

#81-12

DARREN PALMER,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
CITY OF PLEASANTVILLE,	:	
ATLANTIC COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured assistant principal, who had been employed by the Board as Assistant Principal at the district middle school – filed a petition contending that respondent violated his seniority rights when it failed to rehire him to his former position following a reduction in force (RIF). Petitioner asserts that respondent instead offered the position to another former vice principal who lacked seniority in this position at the middle school. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: it is undisputed that petitioner was a tenured administrator in respondent's district; the person hired to replace petitioner after the RIF had a greater number of years of service in the district, but no seniority as a vice principal in the middle school; petitioner had over three and one-half years seniority as the middle school principal; *N.J.A.C. 6A:32-5.1(b)* mandates that seniority in the specific category of employment – not total length of service in the district – controls the recall process; petitioner had predominant seniority rights in the middle school vice principal position, and should have been recalled. Accordingly, the ALJ ordered petitioner reinstated to his former position effective October 8, 2010, with back pay and seniority

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and granted petitioner's cross motion for summary decision. The petitioner was reinstated to the position of middle school principal, together with back pay and benefits.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

March 5, 2012

OAL DKT. NO. EDU 1988-11
AGENCY DKT. NO. 719-12/10

DARREN PALMER,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
CITY OF PLEASANTVILLE,	:	
ATLANTIC COUNTY,	:	
	:	
RESPONDENT.	:	

Petitioner achieved tenure as an Assistant Principal at the middle school in respondent's district, but was terminated when the position was abolished in the Spring of 2010. In October 2010 respondent reactivated the Assistant Principal position at the middle school but filled it with a different employee. Petitioner appealed that action.

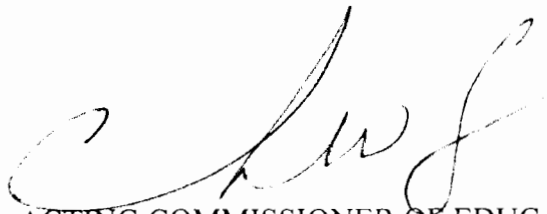
Upon review of the record, the Initial Decision of the Office of Administrative Law (OAL), and respondent's exception thereto, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner was entitled to the restored Assistant Principal position. While both petitioner and his fellow employee had served for over three years as assistant principals in respondent's district,¹ petitioner had served in the category of "Junior high school vice principal or assistant principal," *see*, N.J.A.C. 6A:32-5.1(l)(14), while the other employee had served primarily in the category of "High school vice principal or assistant principal," *see* N.J.A.C. 6A:32-5.1(l)(11). As seniority rights are organized according to

¹ The other employee had served as an assistant principal for two months longer than petitioner.

categories, *N.J.S.A.* 18A:28-13, it was petitioner who had the seniority in the appropriate category for the position of Assistant Principal of respondent's middle school.

Accordingly, petitioner's cross motion for summary disposition is granted, respondent's cross motion for summary disposition is denied, and petitioner is herewith reinstated to the position of middle school assistant principal, together with back pay and benefits.

IT IS SO ORDERED.²



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/05/12

Date of Mailing: 3/06/12

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36. (*N.J.S.A.* 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

(On Cross-Motions for Summary
Decision)

OAL DKT. NO. EDU 1988-11

AGENCY DKT. NO. 719-12/10

DARREN PALMER,

Petitioner,

v.

**BOARD OF EDUCATION OF
THE CITY OF PLEASANTVILLE,
ATLANTIC COUNTY,**

Respondent.

Robert M. Schwartz, Esq., for petitioner

Adam S. Weiss, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: January 3, 2012

Decided: January 18, 2012

BEFORE **BRUCE M. GORMAN, ALJ:**

STATEMENT OF THE CASE

Petitioner appealed respondent's failure to reinstate him in a position of Middle School Principal in violation of his seniority rights.

PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was filed at the OAL on February 22, 2011, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to

15 and 14F-1 to 13. The parties filed cross-motions for summary decision and the record closed on January 3, 2012.

JOINT STIPULATION OF FACTS

The parties agreed upon the following Joint Stipulation of Facts.

1. Petitioner, Darren Palmer, began employment as an Asssitant Principal with respondent Pleasantville Board of Education on October 6, 2006.

2. In October 2006, the New Jersey Department of Education, State Board of Examiners issued a Standard Certificate with a Principal/Supervisor endorsement to petitioner Palmer.

3. Under cover of letter dated April 8, 2010, former Superintendent Gloria Grantham advised petitioner Palmer of the Board's intent to abolish his position pursuant to N.J.S.A. 18A:28-9, et seq. due to a reduction in State aid.

4. Under cover of letter dated April 30, 2010, former Superintendent Gloria Grantham advised petitioner Palmer that the Board abolished the Assistant Principal position at its April 27, 2010, meeting and that his last day of employment would be June 30, 2010.

5. Under cover of letter dated May 6, 2010, former Superintendent Gloria Grantham rescinded her letter to petitioner Palmer dated April 8, 2010, further advised him that the Board abolished the Assistant Principal position at its April 27, 2010, meeting and that his last day of employment would be June 30, 2010.

6. Under cover of letter dated June 24, 2010, and in response to the May 6, 2010, letter from former Superintendent Gloria Grantham, petitioner Palmer wrote that he was "obliged to concur with the terms of the [sic] your HR letter, dated May 6, 2010."

7. On or about October 8, 2010, petitioner Palmer addressed the Pleasantville Board of Education during the public portion of its Board meeting and indicated his belief that he has seniority over other administrators in the District and is "fully qualified" to hold the positions of Principal, Vice Principal and Supervisor.

8. At its October 8, 2010, meeting, the Pleasantville Board of Education approved the hiring of the following individuals for the following positions:

- a. Teresa McGaney-Guy, Assistant Principal, South Main Street School
- b. Andrea Atkins-Turner, Assistant Principal, Leeds Avenue School
- c. Felicia Hyman-Medley, Assistant Principal, Middle School
- d. Cynthia Ruiz-Cooper, Assistant Principal, Pleasantville High School
- e. Kelvin Cherry, Assistant Principal, Alternative High School
- f. Nanette Stuart-Pitts, Assistant Principal, Pleasantville High School
- g. Carol Reynolds, Principal, Washington Avenue School.

9. Prior to meeting of the Pleasantville Board of Education on October 8, 2010, Felicia Hyman-Medley was not employed by Pleasantville Public Schools in the position of Assistant Principal, Middle School.

The parties supplemented the Stipulation of Facts with the following additional stipulations:

1. On what date was Ms. [Felicia] Hyman-Medley employed by the Pleasantville Board of Education?

ANSWER: Ms. [Felicia] Hyman-Medley has been employed by the Pleasantville Board of Education from 2001 to present.¹

2. Was Ms. [Felicia] Hyman-Medley subjected to a RIF?

ANSWER: Yes.

¹The month Ms. Hyman-Medley became employed by the Pleasantville Board of Education was unknown by counsel at the time of the response; however, in a supplemental submission, this answer was amended to indicate that Ms. Hyman-Medley began her employment with the District on September 1, 2011, as a teacher at the Leeds Avenue Elementary School.

3. If so, on what date?

ANSWER: April 27, 2010

4. Was the action of October 8, 2010, an attempt to recall Ms. [Felicia] Hyman-Medley or was she already re-employed?

ANSWER: The action of October 8, 2010 was an attempt to recall Ms. [Felicia] Hyman-Medley and other former Assistant Principals subsequent to the April 27, 2010 reduction in force. Petitioner was not recalled and the District's decision to employ the individuals was based upon length of service in the District and not length of service in a particular school.

5. What positions did Ms. Hyman-Medley hold at the Pleasantville Board of Education, and during what time periods?

ANSWER: 2001-2006
Elementary school teacher 2001-2006

August 2, 2006 – June 30, 2010
Assistant Principal of Pleasantville High School

April 29, 2010 – June 30, 2010
Assistant Principal of Leeds Avenue
Elementary School

October 8, 2010
Appointed Ass.t Principal of Middle School

LEGAL DISCUSSION

This case turns on the issue of seniority. It is undisputed that petitioner was a tenured administrator with the Pleasantville School District. He held the position of Assistant Principal at the Pleasantville Middle School commencing October 6, 2006, and ending June 30, 2010, a period of time that afforded him tenure. He was rified effective June 30, 2010.

Felicia Hyman-Medley was initially employed at Pleasantville as an elementary school teacher commencing with the 2001-2002 school year and ending with the 2005-2006 school year. On August 2, 2006, Hyman-Medley was appointed Assistant Principal of Pleasantville High School. Like petitioner, she was rified effective June 30, 2010.

On October 8, 2010, the Pleasantville Board of Education re-filled the position of Middle School Assistant Principal. But instead of recalling petitioner, it appointed Hyman-Medley, who had no seniority as a Middle School Principal. The question before me is, does petitioner's greater period of seniority entitle him to the position?

An analysis of re-employment rights must begin with the provision of N.J.S.A. 18A:28-12. The relevant portion of that statute states:

If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service,...

N.J.A.C. 6A:32-5.1(b) provides, in pertinent part:

(b) Seniority, pursuant to N.J.S.A. 18A:29-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided.

Finally, N.J.A.C. 6A:32-5.1(i) states, in pertinent part:

(i) Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority.

Both petitioner and Hyman-Medley held tenure in the District. Hyman-Medley had a greater time in service in the District generally. However, petitioner had a greater time in service as Middle School Principal.

In this case, the necessary result is clear. Petitioner had over three and one-half years seniority as Middle School Principal. Hyman-Medley had no seniority as Middle School Principal.

The language of N.J.A.C. 6A:32-5.1(b) mandates that seniority in the specific position and not length of service in the district generally controls the recall process. Since petitioner has predominant seniority rights in the position of Middle School Principal, and the Board of Education was required to recall him to that position. The action of the Board of Education must be **REVERSED**.

ORDER

I **ORDER** that petitioner be reinstated to the position of Middle School Principal, effective October 8, 2010, with back pay, seniority, and any other emoluments to which he would otherwise have been entitled. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned or that could have been earned by petitioner during this period. Proof of income shall be submitted by or on behalf of petitioner to the Board of Education within thirty days of issuance of this decision. Pursuant to N.J.A.C. 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the petitioner's reinstatement be delayed pending resolution of any potential back pay.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

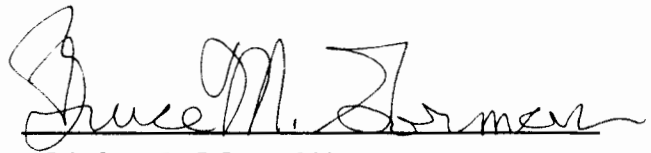
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 18, 2012

DATE


BRUCE M. GORMAN, ALJ

Date Received at Agency:

1-18-12

Date Mailed to Parties:

1-18-12

/sd

#82-12

OAL DKT. NO. EDU 11013-11
 AGENCY DKT. NO. 262-9/11

IN THE MATTER OF THE TENURE	:	COMMISSIONER OF EDUCATION
HEARING OF JENNIFER SOWA.		
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF MONTVILLE, MORRIS COUNTY		

The record of this matter, the proposed "Stipulation of Settlement and Release" (Settlement), and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed and found in compliance with *N.J.A.C.* 6A:3-5.6, which reiterates the standards for settlement of tenure cases set forth in *In re Cardonick*, 1990 *S.L.D.* 842 (1990).

The Commissioner approves the settlement terms with the following observation. Sections 2 and 4 of the Settlement reference actions that may have already taken place, and have therefore preceded consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Thus, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have either successfully implemented the settlement terms, or have agreed upon mutually satisfactory alternate dates for the effectuation of same. Assuming

the foregoing, the matter is hereby dismissed, subject to compliance with the terms of the Settlement.¹

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/05/12

Date of Mailing: 3/06/12

¹ A copy of this decision shall be forwarded to the New Jersey Board of Examiners for action as it deems appropriate.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11013-11

AGENCY DKT. NO. 262-9/11

**IN THE MATTER OF THE TENURE
HEARING OF JENNIFER SOWA, BOARD OF
EDUCATION OF THE TOWNSHIP OF MONTVILLE,
MORRIS COUNTY.**

John G. Geppert, Jr, Esq., for petitioner (Schwartz Simon Edelstein & Celso, LLC, attorneys)

Wayne Oppito, Esq., for respondent (NJ Principals & Supervisors Association, attorneys)

Record Closed: January 12, 2012

Decided: January 12, 2012

BEFORE **Carol I. Cohen, ALJ:**

On August 30, 2011, the Montville Township Board of Education ("the Board") certified tenure charges against the respondent, Jennifer Sowa, a tenured Supervisor of Special Education employed by the district. Sowa filed an answer denying the charges and on September 16, 2011, the New Jersey Department of Education transmitted the charges to the Office of Administrative Law ("OAL") having deemed the charges sufficient, if true, to warrant dismissal or reduction in salary.

The Board filed charges of unbecoming conduct and other just causes against Sowa involving the accessing and distribution of certain e-mails.

Prior to the commencement of the hearing scheduled for December 19, 2011, the parties engaged in settlement discussions and reached an agreement which was filed with me on January 11, 2012, at which time the record closed. The Board approved the settlement terms at its meeting of December 20, 2011, as evidenced by the attached certified Board resolution. Based upon a review of the attached settlement agreement, I **FIND** as follows:

1. The nature of the charges has been documented by the submission of a Statement of Charges and Certificate of Determination to the Commissioner of Education.
2. Pursuant to the settlement agreement, Sowa will resign from his position of employment effective December 31, 2011.
3. It is in the best interests of the parties and the public to resolve this matter without risking an uncertain conclusion after protracted and costly litigation. The settlement is financially prudent. Although Sowa will receive compensation for this school year through the end of December 31, 2011, a final decision in this matter would not have been reached for several months because of an extended hearing schedule. Sowa had been suspended effective August 30, 2011. In accordance with law, she would have resumed a fully paid status after 120 days of suspension.
4. The proposed settlement agreement is with the consent of all parties.
5. By the terms of the proposed settlement agreement, Sowa has entered into this agreement with a full understanding of her rights.

6. Furthermore, the agreement stipulates that Sowa is fully cognizant of the Commissioner of Education's obligation to refer this matter to the State Board of Examiners for review and possible action to revoke her certificate. Accordingly, Sowa's fitness to act as a Supervisor of Special Services will remain the subject of scrutiny by the Board of Examiners, which will have the opportunity to take whatever action it deems to be in the public interest.
7. The agreement does not contain any provisions which restrict public access to information about its terms.

I therefore **CONCLUDE** that this settlement agreement meets the requirements of N.J.A.C. 6A:3-5.6 and that approval of this settlement is in the public interest.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

1/12/12
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency:

Date Mailed to Parties:

JAN 17 2012

1-17-12
John Borders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

SCHWARTZ SIMON
EDELSTEIN & CELSO LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
(973) 301-0001; FAX (973) 993-3152
Attorneys for Montville Township
Board of Education

IN THE MATTER OF THE TENURE
CHARGES AGAINST JENNIFER
SOWA,

BY THE MONTVILLE TOWNSHIP
BOARD OF EDUCATION, MORRIS
COUNTY, NEW JERSEY

: BEFORE THE COMMISSIONER OF
: EDUCATION OF NEW JERSEY
: AGENCY DOCKET NO: 262-9/11
: OAL DOCKET NO. EDU 11013-11

: ADMINISTRATIVE ACTION

: STIPULATION OF SETTLEMENT
: AND RELEASE
:
:
:
:
:

WHEREAS, the Board of Education of Montville Township ("the Board") is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, which is entrusted with maintaining and conducting the public schools of the Montville Township School District; and

WHEREAS, Jennifer Sowa ("Respondent") commenced employment with the Board in or about April 2000; and

WHEREAS, on July 7, 2011, Mr. Paul Fried, Superintendent of Schools, filed sworn tenure charges of unbecoming conduct and/or other just cause against Respondent, together with a sworn statement of evidence in support of the charges, with James Tevis, Board Secretary; and

WHEREAS, on August 30, 2011, after considering the sworn tenure charges and sworn statement of evidence against Respondent, together with the submission filed on her behalf, the Board determined to certify the charges to the Commissioner of Education for a hearing, pursuant to N.J.S.A. 18A:6-10 *et seq.*; and

WHEREAS, on or about September 12, 2011, the sworn tenure charges, together with a certificate of determination and certificate of service, were filed by the Board with the Commissioner of Education, and Respondent was simultaneously served with the sworn tenure charges, sworn statement of evidence, certificate of determination and certificate of service, pursuant to N.J.A.C. 6A:3-5.1 *et seq.*; and

WHEREAS, on or about September 16, 2011, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case, where it was assigned to Administrative Law Judge Carol I. Cohen; and

WHEREAS, the parties, wishing to resolve the within matter amicably without the need for further, protracted litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by the Court and the Commissioner of Education;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. Tenure Charges to be Moot/No Further Board Action

Subject to approval of the within Stipulation of Settlement and Release by the Commissioner, the subject tenure charges have been withdrawn by the Board and no further action shall be initiated by the Board regarding the underlying charges. However, both parties agree that in the event that this agreement is not approved by the Commissioner of Education that they fully reserve their rights to proceed with this litigation and/or any other cause of action that they might have against one another and that their obligations under this agreement shall be null and void.

2. Resignation

Respondent has tendered her irrevocable resignation (copy annexed hereto as Ex. A) from all employment with the Montville Township Board of Education, subject to fulfillment of the terms and conditions set forth in this Stipulation of Settlement and Release ("this Agreement" or "this Settlement"), said resignation to be effective as of December 31, 2011. Subject to approval of the within Stipulation of Settlement and Release by the Commissioner, the Board has accepted the resignation.

3. Payment

In full and final satisfaction of all claims by Respondent, as more fully detailed below, the Board shall pay Respondent as follows:

A. Salary, less all normal payroll deductions (including but not necessarily limited to pension deductions), in lump sum fashion for the period of unpaid suspension imposed by the Board at the time of the certification of the subject tenure charges to the Commissioner of Education, from September 1, 2011 to December 31, 2011, in the amount of \$36,967.60 to be paid within the first payroll period following receipt of the Commissioner's approval of this settlement.

4. No Further Compensation/Benefits

Respondent shall be entitled to no further compensation, emolument of employment or fringe benefit of any kind and specifically waives her right to same, including but not necessarily limited to payment for all unused vacation, sick and personal days and health insurance benefits, with the exception that her health benefits shall be continued for sixty days after December 31, 2011.

5. Superior Court Litigation

The Board of Education agrees to withdraw its application to join Respondent as a Third Party, and further agrees to dismiss any claims against her, in the Superior Court case entitled Ofira Bondorowsky v. Montville Township Board of Education et al., Docket No. MRS-L-482-10.

6. Unemployment Benefits

The Board of Education agrees not to contest Respondent's application for unemployment benefits with respect to her separation from the Board.

7. Releases

By Respondent

In exchange for the above consideration, Respondent, and her heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any claims or rights, whether known or unknown, which they have or may have against the Board, arising out of or in any way resulting from the instant action, personally and officially, individually and collectively; its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns, including, but not limited to any claims for attorneys fees, back pay or front pay, any claims for emotional distress or pain and suffering, any claims involving tax liability emanating from this settlement, and any claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retaining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the

New Jersey Workers' Compensation Law, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any other claims for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims arising under the Workers' Compensation Act, *N.J.S.A. 34:15-1 et seq.*, and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA"), provided that Respondent is not entitled to have the District pay any amounts for her or her dependents' health insurance coverage under COBRA.

By the Board

The Board hereby irrevocably and unconditionally waives, releases and forever discharges any claims or rights, whether known or unknown, which it has or may have against Respondent arising out of or in any way resulting from the instant action.

8. Referral to State Board of Examiners

Respondent acknowledges that it has been apprised of the Commissioner's duty to refer tenure matters, pursuant to N.J.A.C. 6A:3-5.6(a)(6), to the State Board of Examiners for possible suspension or revocation of his certificate.

9. No Admissions

Nothing contained in this Agreement shall be deemed to constitute an admission of wrongdoing or liability by either party.

10. Non-Disparagement

A. Respondent agrees not to disparage the Board, its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns nor to make or solicit any comments, statements, or the like to the media or to others that may be considered to be derogatory or detrimental in nature. The Board agrees to the same terms regarding respondent.

B. The Board agrees to provide to prospective employers and the public, unless otherwise requested by respondent, directory type information concerning employment history, such as: dates of employment, positions held, salary history, and reason for separation—i.e., voluntary separation. Nothing contained herein, however, shall be construed to require the parties or its agents to make any untruthful statements regarding respondent.

11. Surrender of Board Property

Respondent shall forthwith surrender all school keys and property in his possession to the below named legal counsel who, in turn shall forward same to the Board's counsel.

12. Public Interest

To date, several hearing days are scheduled. The proposed settlement of this tenure dispute will serve the public interest in that a lengthy and expensive tenure dismissal which now is scheduled to continue through the summer of 2012 will be avoided.

13. Board Approval

The Board President has been duly authorized by the Board to execute this Agreement on behalf of the Board of Education.

14. Assent to Terms

Respondent hereby acknowledges that she enters into this Agreement with a full understanding of her rights and that she was fully informed of the implications of this Agreement by her legal counsel. Respondent also enters into same without duress and of her own free will and volition.

Respondent acknowledges that she was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and seven (7) days from the execution of this document to revoke this Agreement by delivering written notification to Stephen Edelstein Esq., 100 South Jefferson Road, Suite 200, Whippany, New Jersey 07981. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Respondent will be entitled to none of the consideration described herein.

15. Entire Agreement

This Agreement represents the entire understanding of the parties and may be modified only in a subsequent written instrument, duly executed by the parties. No other representations of any kind shall be binding upon the parties.

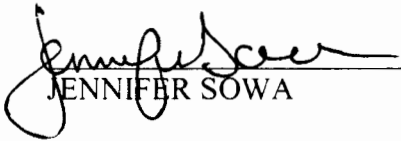
16. Severability

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of the Agreement shall remain in full force and effect.

17. Governing Law

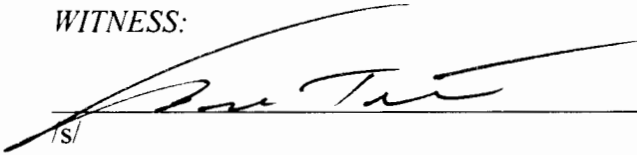
This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:


JENNIFER SOWA

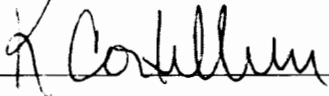
Date: 1/10/2012

WITNESS:


/s/

Date: 01/10/2012

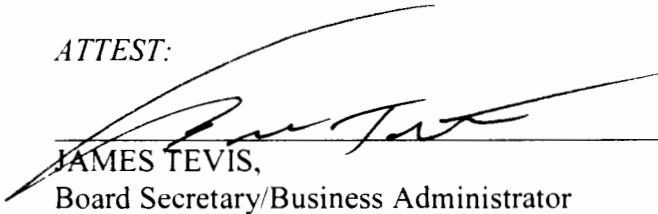
FOR THE MONTVILLE TOWNSHIP BOARD OF EDUCATION:



Date: 1/10/2012

Board President

ATTEST:


JAMES TEVIS,
Board Secretary/Business Administrator

Date: 01/10/2012

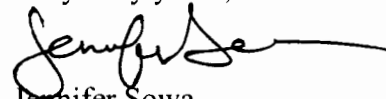
Exhibit A

Montville Township Board of Education
86 River Road
Montville, New Jersey 07045

Dear Ladies and Gentlemen:

Subject to the terms and conditions of our Stipulation of Settlement and Release, dated December __, 2011, and approval of same by the Commissioner of Education, I hereby tender my irrevocable resignation from all employment with the Montville Township Board of Education, effective on December 31, 2011.

Very truly yours,

 1/10/2012
Jennifer Sowa

EXTRACT FROM THE MINUTES OF THE MEETING OF THE BOARD OF EDUCATION
OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY, NEW JERSEY AS
RECORDED IN THE OFFICIAL MINUTE BOOK:

The board of education of the Township of Montville in the County of Morris, New Jersey, convened in regular session on December 20, 2011 at 8:04 p.m. in the cafeteria of the Montville Township High School, Montville, NJ.

The following members of the Board of Education were present:

Karen Cortellino, President

Jon Alin, Frank Cooney, John Morella, Carmela Novi, Michael Palma and Jackie Ritschel.

The following members of the Board of Education were absent:

Matthew Kayne and Charlie Grau.

The following resolution was offered by Member Morella and seconded by Member Ritschel and adopted by the board of education by the following roll call vote:

Tenure Charge Dismissal – Employee # 5315

RESOLVED, that the Montville Township Board of Education approve the withdrawal of the charges in the matter entitled Montville Township Board of Education v. J.S., OAL Docket No. EDU 11013-11; and

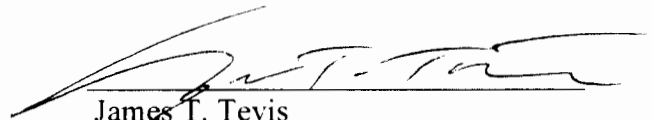
BE IT FURTHER RESOLVED, that the Montville Board of Education accepts the irrevocable resignation of J.S., effective December 31, 2011, subject to the terms of a Settlement Agreement, the substance of which has been discussed by the Board, in a form of satisfactory to Board Counsel.

ROLL CALL AYES: 7 NOES: 0

STATE OF NEW JERSEY
COUNTY OF MORRIS

I James Tevis, Secretary of the Board of Education of the Township of Montville in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district, duly called and held on December 20, 2011 has been compared by me with the original minutes as officially recorded in my office in the minute book of said Montville Township Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract. In witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 3rd day of January, 2012.

Board Seal


James T. Tevis
Board Secretary

#83-12

V.A. AND J.A. ON BEHALF OF THEIR :
MINOR CHILDREN :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
TOWNSHIP OF SOUTH HACKENSACK, :
BERGEN COUNTY, :

DECISION

RESPONDENT. :
_____ :

SYNOPSIS

Petitioners – who admit to being domiciled in Hackensack – appealed the determination of the respondent Board that their minor children are not entitled to a free public education in the South Hackensack school district. Petitioners contended that – in addition to the Hackensack house they currently reside in – they own a property that straddles the border between Hackensack and South Hackensack, pay taxes to both municipalities, and should be allowed to have their children educated in South Hackensack schools. The respondent Board filed a motion for summary decision.

The ALJ found that: there are no material facts in dispute, and the matter is ripe for summary decision; petitioners are domiciled in Hackensack, not South Hackensack – even if they eventually intend to live in their South Hackensack house; petitioners' children have never attended school in respondent's district; and petitioners' children are not entitled to a free public education in South Hackensack schools pursuant to *N.J.S.A. 18A:38-1*. Accordingly, the ALJ concluded that South Hackensack is not obligated to educate petitioners' children, and granted respondent's motion for summary decision.

Upon a full and independent review, the Commissioner concurred with the findings and conclusion of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this case, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
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March 5, 2012

OAL DKT. NO. EDU 12511-11
AGENCY DKT. NO. 276-9/11

V.A. AND J.A. ON BEHALF OF THEIR
MINOR CHILDREN

PETITIONER,

V.

BOARD OF EDUCATION OF THE
TOWNSHIP OF SOUTH HACKENSACK,
BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

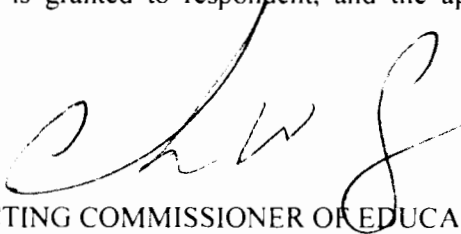
DECISION

The Commissioner has reviewed the record of this matter and the Initial Decision of the Office of Administrative Law (OAL) on the Board's motion for summary decision. No exceptions were filed by either party as provided by *N.J.A.C. 1:1-18.4*.

Upon his considered review of the record, the Commissioner concurs with the Administrative Law Judge (ALJ) that this matter is ripe for summary decision as there are no genuine issues of material fact to resolve. For the reasons convincingly presented in the ALJ's decision, the Commissioner agrees that petitioners are not domiciled in South Hackensack simply because they pay taxes there. Instead, the record clearly shows that the petitioners actually reside in the City of Hackensack and are also domiciled there. As such, their children are entitled to a free public education within the Hackensack school district, pursuant to *N.J.S.A. 18A:38-1*, until such time as the family may move to the other property in South Hackensack, as their plan for the future seems to indicate.

Accordingly, summary disposition is granted to respondent, and the appeal of petitioner is hereby dismissed.

IT IS SO ORDERED.¹


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/05/12

Date of Mailing: 3/06/12

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 12511-11

AGENCY DKT. NO. 276-9/11

**V.A. AND J.A. ON BEHALF OF THEIR
MINOR CHILDREN,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF SOUTH HACKENSACK, BERGEN COUNTY,**
Respondent.

V.A. and J.A. on behalf of their minor children, pro se

Ralph J. Padavano, Esq., for respondent (Beattie Padavano, attorneys)

Record Closed: December 22, 2011

Decided: January 23, 2012

BEFORE **EVELYN J. MAROSE, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners V.A. and J.A., who reside in Hackensack and own a property which straddles the border of South Hackensack, seek to enroll their children in the school

district of respondent, South Hackensack. The South Hackensack School District opposes the request for enrollment pursuant to N.J.S.A. 18A:38-1.

On September 20, 2011, petitioners filed a complaint with the Commissioner of Education. Petitioners received notice that their matter would not proceed until proof was filed with the Bureau of Controversies and Disputes that the respondent had been served. On September 28, 2011, the Department of Education issued an Amended Acknowledgment, after petitioners provided proof of service upon respondent. Respondent filed an Answer dated October 5, 2011, which was received by the Bureau of Controversies and Disputes on October 11, 2011. The matter was transmitted to the Office of Administrative Law (OAL), where, on October 19, 2011, it was filed for hearing and determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Respondent filed a Motion for Summary Decision on November 3, 2011. Petitioners filed opposition on December 14, 2011.¹ Respondent submitted a reply brief on December 22, 2011.

STANDARD FOR SUMMARY DECISION

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). In Brill, the Court looked at the precedents established in Matsushita Electrical Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), wherein the Supreme Court adopted a standard that "requires the motion judge to engage in an

¹ Petitioners did not submit a Certification with the letter brief that they filed in opposition to respondent's Motion for Summary Decision. However, since the facts argued in their opposition do not conflict with the facts that petitioners' swore to be true in their filed Petition, they will not be required to submit a Certification for the argument contained in their opposition brief to be considered.

analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, supra, 142 N.J. at 533 (quoting Liberty Lobby, Inc., supra, 477 U.S. at 251-52, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214). The Court stated that under the new standard,

a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

[Id. at 540 (quoting Liberty Lobby, Inc., supra, 477 U.S. at 249, 106 S. Ct. at 2511, 91 L. Ed. 2d at 212).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose.'" Id. at 541.

In addressing whether the Brill standard has been met in this case, further guidance is found in R. 4:46-2(c):

An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

STATEMENT OF FACTS

The following **FACTS** are not in dispute:

V.A. and J.A. reside with their three minor children at 170 Louis Street, Hackensack. V.A. and J.A. own a second house, whose street address is 409 Taylor Avenue, Hackensack. The second house is located on a piece of property partially in Hackensack and partially in South Hackensack. While both municipalities issue annual tax bills, the tax bill issued by South Hackensack is larger.

Petitioners assert three reasons why their children should be allowed to attend school in South Hackensack, though the family resides in Hackensack: (1) they pay property taxes to South Hackensack; (2) they resided in the past at 409 Taylor Avenue, Hackensack, and intend to someday reside again at that property²; and (3) the New Jersey education system should be reformed to allow those who own multiple properties in multiple school districts to send their children to school in any district where they pay taxes.

LEGAL ARGUMENT

Public school shall be free to persons over five and under twenty years of age who are domiciled within a school district. N.J.S.A. 18A:38-1. An individual may have several residences, but can have only one domicile. Miller v. U.S. Fidel. & Guar. Co., 127 N.J. Super. 37, 42 (App. Div. 1974). A domicile once established continues until it is superseded by a new one. Bd. of Educ. of Twp. of Middle v. K.K. and P.K., 1992 N.J. AGEN LEXIS 5259. The domicile of an unemancipated child is the domicile of the parents. P.B.K. v. Bd. of Educ. of Tenafly, 343 N.J. Super. 419 (App. Div. 2001).

Following the Brill standard, I **CONCLUDE** that, even after giving all favorable inferences to the evidence presented by the non-moving party, the evidence does not present a sufficient disagreement to require submission to a fact-finder in a plenary

² At one time, they planned to rebuild 409 Taylor Avenue. However, "due to changes of the real estate market crash," they put the project on hold and have no specific date when they will be moving back.

proceeding. In addition, the decision must be determined with consideration of the law as it presently exists, and not in accordance with any suggested reformation of the law.

Although petitioners might someday move, perhaps back to 409 Taylor Avenue in Hackensack or some other place, they presently reside at 170 Louis Street, Hackensack. Because petitioners currently reside in Hackensack, I **CONCLUDE** that petitioners are domiciled in Hackensack.

N.J.S.A. 18A:38-1 provides that children are entitled to receive a free public education from the school district within which they are domiciled. The right to a free public education is not based upon the payment of taxes in a school district or based upon the ownership of property in a school district. While petitioners own another house or property partially in South Hackensack and while petitioners pay property taxes to South Hackensack, they are domiciled in Hackensack. I **CONCLUDE** that South Hackensack is not obligated to provide petitioners with a free public education.

ORDER

It is hereby **ORDERED** that respondent's motion for summary decision is **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

1/23/12
DATE

Evelyn J. Marose
EVELYN J. MAROSE, ALJ

Date Received at Agency:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:
sej

JAN 25 2012

#84-12

DIANE BACHER,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF MANSFIELD,	:	
BURLINGTON COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, the Superintendent of Schools in Mansfield Township, sought a determination that she was reappointed by operation of law to the position of Superintendent for the period from July 1, 2011 to July 1, 2015 at her current salary of \$146,192, as a consequence of the respondent Board's failure to provide her with one year's notice of non-renewal pursuant to *N.J.S.A. 18A:17-20.1*. Respondent contends that petitioner's salary as of July 1, 2011 was correctly adjusted pursuant to revised regulations that became effective in February 2011 which limit the maximum salary for superintendents in public districts according to the number of students enrolled in the school district. Both parties filed motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts in dispute, and the matter is ripe for summary decision; the salary cap regulations in effect since February 2011 were within the Commissioner's authority to adopt; the petitioner was employed pursuant to a four-year contract that commenced July 1, 2007, and was set to expire on June 30, 2011; the terms of the initial contract required the Board to provide petitioner with written notice no later than one year in advance of the termination date if it elected not to re-appoint her; as no notice was provided, petitioner was deemed reappointed for another four-year term on July 1, 2011; the Board's reduction of petitioner's salary beginning July 1, 2011 was not in violation of her tenure rights, as – pursuant to *N.J.A.C. 6A:23A-3.1(c)* and *N.J.S.A. 18A:7-8(j)* – her reappointment contract was not enforceable until the Board submitted the contract for review and approval by the Executive County Superintendent (ECS); in March 2011, the ECS instructed the Board to reduce petitioner's salary from \$146,192 to \$135,000 for the 2011-2012 school year pursuant to the revised regulations, and the Board so notified petitioner of the forthcoming change in May 2011; and, pursuant to *N.J.A.C. 6A:23A-1.2*, the applicable maximum salary for petitioner during the 2011-2012 school year is \$135,000. Accordingly, the ALJ granted the respondent Board's cross motion for summary decision, and ordered the parties to draft a contract with a maximum salary of \$135,000 for the current school year, with the maximum rising to \$145,000 for the year beginning July 1, 2012, based on applicable enrollment numbers.

Upon careful and independent review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter for the reasons stated therein.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

March 5, 2012

OAL DKT. NO. EDU 7777-11
AGENCY DKT. NO. 155-6/11

DIANE BACHER,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF MANSFIELD,	:	
BURLINGTON COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto – submitted in accordance with the provisions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in making his determination herein.

Petitioner's exceptions in essence recast and reiterate her arguments advanced before the Administrative Law Judge (ALJ) below. As it is determined that such arguments were considered and addressed by the in ALJ in her Initial Decision, further elaboration on them here is unnecessary.

Upon full review and consideration, the Commissioner agrees that summary decision is appropriately granted to the Board as he concurs with the ALJ – for the reasons detailed in her decision – that: 1) the Commissioner had the authority to place a cap on Superintendents' salaries (Initial Decision p. 6-8); 2) the Board did not violate petitioner's contractual tenure rights by reducing her salary effective July 1, 2011 (Initial Decision p. 8-11;

and 3) petitioner's applicable maximum salary as of July 1, 2011 was \$135,000 and for the fiscal year beginning July 1, 2012 her applicable maximum salary will be \$145,000.¹

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons well stated therein. It is hereby ORDERED that the parties draft a contract for petitioner with a maximum salary of \$135,000 for the July 1, 2011 to June 30, 2012 fiscal year and a maximum salary of \$145,000 for the period July 1, 2012 to June 30, 2015, and submit it for review and approval by the Executive County Superintendent in compliance with *N.J.A.C. 6A:23A-3.1*.

IT IS SO ORDERED.²



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/05/12

Date of Mailing: 3/06/12

¹ Student enrollment in the District as of May 10, 2011 was 719 students. As of October 15, 2011 the District's student enrollment was 760 students. (See *N.J.A.C. 6A:23A-1.2*, "Maximum salary amount")

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7777-11

AGENCY DKT. NO. 155-6/11

DIANE BACHER,

Petitioner,

v.

**MANSFIELD TOWNSHIP
BOARD OF EDUCATION,
BURLINGTON COUNTY,**

Respondent.

Andrew Babiak, Esq., for petitioner

Frank P. Cavallo, Jr., Esq., for respondent (Parker, McCay, P.A., attorneys)

Record Closed: November 7, 2011

Decided: January 20, 2012

BEFORE **LISA JAMES-BEAVERS, ALJ:**

STATEMENT OF THE CASE

Petitioner Diane Bacher seeks a declaratory ruling that she was reappointed as Superintendent by operation of law, to the position of Superintendent for the period of July 1, 2011 through June 1, 2015 at her current salary of \$146,192, as a consequence of the respondent Board of Education of the Township of Mansfield's (Board's) failure to

give her one year's notice of non-renewal pursuant to N.J.S.A. 18A:17-20.1.

PROCEDURAL HISTORY

Ms. Bacher filed a petition for declaratory relief with the Commissioner of Education, Bureau of Controversies and Disputes on June 16, 2011. On July 1, 2011, respondent filed a brief and certification in answer to the petition. On July 6, 2011, the Bureau transmitted to and filed the case with the Office of Administrative Law (OAL) for hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties set forth a briefing schedule having determined that there were no material facts in dispute and that the case could be decided on cross motions for summary decision. The parties agreed to file cross motions by October 28, 2011 and reply briefs by November 7, 2011. After receipt of all reply briefs, I closed the record.

STIPULATION OF FACTS

The parties have stipulated to the following undisputed material facts, which I **FIND as FACT.**

1. On or about June 11, 2007, petitioner, Diane J. Bacher, (hereinafter "petitioner"), was appointed by the respondent, Board of Education of the Township of Mansfield (hereinafter the "Board") as Superintendent of Schools under an Employment Contract with a term beginning July 1, 2007, and ending June 30, 2011. (Exhibit A).
2. Since July 1, 2007, petitioner has served (and continues to serve) as the Board's Superintendent of Schools.
3. Paragraph 18 of the parties' Employment Contract states:

It is understood that the BOARD shall be required to give written notice to the SUPERINTENDENT by no later than

one (1) year in advance of the termination date in the event it elects not to re-appoint or renew the SUPERINTENDENT'S contract as SUPERINTENDENT in accordance with N.J.S.A. 18A:17-20.1. (Exhibit B).

4. At no time prior to June 30, 2010, did the Board give written notice to petitioner that it would not reappoint her as Superintendent of Schools.
5. At no time prior to June 30, 2010, did the parties enter into another written employment contract.
6. At no time since June 30, 2010, have the parties entered into another written employment contract.
7. Petitioner's salary as Superintendent of Schools for the 2010-2011 school year was \$146,192.
8. On or about August 27, 2010, Rochelle Hendricks was appointed by Governor Chris Christie as Acting Commissioner of Education.
9. On or about November 1, 2010, Acting Commissioner Hendricks proposed regulations to amend N.J.A.C. 6A:23A-1.2 and -3.1 and establish a range of maximum salaries for superintendents in public school districts in New Jersey depending primarily on the number of students enrolled the school district (hereinafter referred to as the "Salary Cap Regulations").
10. In November 2010, Dr. Lester Richens was the Executive County Superintendent for Burlington County (hereinafter "Dr. Richens").
11. The parties engaged in extensive negotiations for a successor employment contract to replace the June 13, 2007 Employment Contract.

12. By email dated November 8, 2010, petitioner forwarded a proposed employment contract to Dr. Richens for his review and approval. (Exhibit C).
13. By email dated November 18, 2010, Dr. Richens informed petitioner that "contracts expiring subsequent to February 7, 2011, should not be renegotiated or extended prior to the effective date of the new regulations." He said, "Therefore, I will not be further reviewing the contract that you submitted that was to be effective December 15, 2010, that was replacing the contract that would have expired on July 1, 2011."
14. The Salary Cap Regulations became effective on or about February 7, 2011.
15. As of March 2011, Margaret J. Nicolosi succeeded Dr. Richens as the Executive County Superintendent for Burlington County (hereinafter "Ms. Nicolosi").
16. By letter dated March 21, 2011, Ms. Nicolosi informed petitioner that her base salary had to be reduced from \$146,192 to \$135,000. Ms. Nicolosi set forth, "This reduction is necessary to conform with the Superintendent Salary Guidelines as outlined in the Accountability Regulations, N.J.A.C. 6A:23A-3.1. (Exhibit E).
17. As of May 10, 2011, the Board had 719 students enrolled in the school district.
18. By letter dated May 10, 2011, from the Board's Business Administrator, petitioner was informed that beginning July 1, 2011, her salary would be reduced from \$146,192 to \$135,000. (Exhibit F).

19. As of October 4, 2011, 760 students were enrolled in the Mansfield School District.
20. The Board reported 760 students enrolled in the District in its Application for State School Aid on October 15, 2011.
21. According to the Salary Cap Regulations and based on the level of student enrollment in the Board's school district as of October 4, 2011, the maximum annual salary for a superintendent in the district is \$145,000.
22. Beginning July 1, 2011, the Board reduced petitioner's annual salary to \$135,000.

CONCLUSIONS OF LAW

The rules governing motions for summary decision in an OAL matter are set forth at N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 and the Supreme Court's decision in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, *i.e.*, the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Supreme Court in Brill v. Guardian Life Insurance Co. of American, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party... are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

If both parties agree that only a legal dispute is presented and wish the matter to be resolved by summary decision, cross motions for summary decision must be made. 37 New Jersey Practice, Administrative Law and Practice, §5.18 at 258 (LeFelt, Miragliotta and Prunty) (rev. 2d ed. 2000). The administrative regulation is essentially the same as the New Jersey Court Rule that provides for summary judgment; hence, precedent relating to summary judgment is sufficiently analogous to apply to administrative proceedings.

In the present case, the parties filed cross-motions for summary decision and submitted a stipulation of facts on which their briefs rely. It is undisputed that petitioner was bound by a four-year employment contract that began on July 1, 2007, and was set to expire on June 30, 2011. Likewise, the parties agree that petitioner was deemed reappointed by operation of statute for another four-year term beginning July 1, 2011. Petitioner contends that respondent's decision to reduce her salary from \$146,192 to \$135,000 effective July 1, 2011, was a violation of her tenure rights because the terms of her initial contract had automatically renewed pursuant to N.J.S.A. 18A:17-20.1. Respondent argues, however, that the terms of the renewed contract are subject to approval of the Executive County Superintendent (ECS) in accordance with the salary cap amendments, effective February 07, 2011. Petitioner further argues that the Commissioner was without authority to adopt regulations limiting salaries.

For reasons discussed herein, I **CONCLUDE** that there are no material facts in dispute and the only issues for decision are questions of law. Therefore, this matter is ripe for summary decision.

I. **Does the Commissioner of Education Have the Authority to Place a Cap on Superintendents' Salaries?**

On or about November 1, 2010, Acting Commissioner Hendricks proposed regulations to amend N.J.A.C. 6A:23A-1.2 and -3.1 and establish a range of maximum salaries for superintendents in public school districts depending primarily on the number of students enrolled in the school district. Petitioner contends that the salary cap

regulations that became effective on February 07, 2011, are inconsistent with the legislatively delegated authority conferred to the Commissioner of Education.

The Legislature expressly authorized the Commissioner of Education to adopt standards by which an ECS will review and approve a superintendent's contract. N.J.S.A. 18A:7-8(j) (Each ECS shall "review and approve, according to the standards adopted by the commissioner, all employment contracts for superintendents[.]"); N.J.S.A. 18A:7-16; 43 N.J.R. 284(a)(comment 11); N.J. Ass'n of Sch. Adm'rs v. Comm'r of Educ., 414 N.J. Super. 530, 559 (App. Div. 2010), certif. granted, 2011 N.J. Lexis 526 (2011). The Legislature delegated this power to the Commissioner to curb excessive administrative costs, preserve public funds for thorough and efficient education, and in response to concerns that school districts throughout the state were "incapable of effectively negotiating superintendent contracts on behalf of their constituents in a fiscally responsible manner." 43 N.J.R. 284(a)(comment 1); See also N.J. Ass'n of Sch. Bus. Officials v. Davy, 409 N.J. Super. 467, 490 (App. Div. 2009) (in order to preserve public funds for thorough and efficient education by limiting excessive administrative costs, the Legislature has authorized the Commissioner to adopt standards prospectively limiting the award of excessive benefits to school administrators).

A regulation will be set aside only if it is arbitrary, capricious, transgresses the statute it purports to effectuate, or frustrates the policy embodied in it. N.J. Ass'n v. Comm'r., supra, at 546. The party challenging the rulemaking has the burden of proof. Ibid. In N.J. Ass'n v. Comm'r., the New Jersey Association of School Administrators (NJASA) challenged regulations adopted by the Commissioner in 2008. Particularly, NJASA challenged the addition of N.J.A.C. 6A:23A-3.1(e)(1),(3),(4),(5),(6),(7),(8),(9), and (11).¹ Petitioners argued that the Commissioner was without authority to promulgate the challenged regulations. The Appellate Division disagreed and unanimously held that the regulations at issue were promulgated in accordance with the Commissioner's authority. The Appellate Division found that "[t]he Legislature

¹ On February 07, 2011, these regulations were recodified as N.J.A.C. 6A:23A-3.1 (e)(1), (4), (5), (6), (7), (8), (9), (10), and (13).

specifically authorized the Commissioner, through the office of the executive county superintendent, to review contracts under the school laws The regulations at issue were promulgated in response to that statutory authorization.” N.J. Ass’n v. Comm’r, supra, at 559. This included N.J.A.C. 6A:23A-3.1(e)(1), which required that a superintendent’s contract was comparable in salary, benefits, and other emoluments to contracts of similarly credentialed superintendents in the region. N.J.A.C. 6A:23A-3.1(e)(1).

N.J.A.C. 6A:23A-3.1(e)(1) limits a board’s discretion in salary negotiations, curb administrative costs, and gives the ECS authority, similarly to N.J.A.C. 6A:23A-3.1(e)(2), to deny a contract based on an excessive annual salary. Although N.J. Ass’n v. Comm’r, supra, is currently pending before the Supreme Court, there is currently no authority to the contrary. According to the court, this regulation was rationally related to a legitimate state interest in reducing the level at which spending has increased. N.J. Ass’n v. Comm’r, supra, at 556. Therefore, the salary cap regulations were within the Commissioner’s authority to adopt.

II. Was the Board’s Decision to Reduce Petitioner’s Salary a Violation of Her Contractual Tenure Rights?

Our Legislature has set forth that unless a board of education provides timely notice of non-renewal, a superintendent will be automatically reappointed “at the conclusion of the term of the initial contract[.]” N.J.S.A. 18A:17-20.1. The statute goes on to provide that the length of term will be equal to the initial contract, unless the board expressly reappoints the superintendent, by contract, to a different term. Ibid.

In the present case, petitioner was employed pursuant to a four-year contract that commenced on July 1, 2007, and was set to expire on June 30, 2011 (Exhibit B to Stipulated Facts). The negotiated terms of the initial contract required the Board to provide petitioner with written notice at least one year prior to June 30, 2011, if it wished to separate her from service in accordance with N.J.S.A. 18A:17-20.1. It is stipulated that the Board neither provided petitioner with written notice, nor reappointed her, by contract, to a different term before the expiration of the initial contract. Accordingly,

petitioner by operation of statute was deemed reappointed for another four-year term commencing on July 1, 2011, and ending on June 30, 2015 (Reappointment).

Petitioner next contends that by operation of statute, the terms of the initial contract, including the \$146,192 annual salary, "[were] carried forward and applicable" through the period of her reappointment. In support, petitioner cites two cases: Howard Jr. v. East Orange Bd. of Educ., EDU 7553-00 & EDU 9906-00 (Consolidated), Initial Decision, (April 04, 2001), aff'd, Comm'r (June 05, 2001), aff'd, State Bd. (November 07, 2001) <<http://lawlibrary.rutgers.edu/oal/search.html>>, aff'd, A-1699-01T1 (App. Div. October 11, 2002); and Solomon v. Passaic County Educ. Servs. Comm'n, EDU 9721-02, Initial Decision, (July 15, 2005), aff'd with modifications, Comm'r (August 22, 2005), aff'd, State Bd. (January 06, 2006) <<http://lawlibrary.rutgers.edu/oal/search.html>>. Petitioner is correct that the cases support the proposition that the terms of an initial contract are carried over, by operation of statute, into the succeeding term. In Howard, a board of education failed to provide the superintendent with notice of non-renewal in a timely manner. After finding that petitioner was reappointed by operation of statute, the Commissioner added that "the provisions of the [initial contract] renewed by operation of statute, including the 5% salary increases specified in the contract[.]" Howard, supra, at Comm'r 22. In Solomon, the board of education likewise failed to provide notice of non-renewal in a timely manner. The Commissioner affirmed the ALJ's conclusion that the petitioner must be reappointed to a new contract "pursuant to the same terms and conditions as contained in the previous contract." Solomon, supra, at Initial Decision. For purposes of binding a board of education, Howard and Solomon stand for the proposition that where the board, by its own doing, fails to provide timely notice of non-renewal, (and where the terms of reappointment are not renegotiated prior to the expiration of the initial contract), the terms of the initial contract, including the annual salary, will roll-over by operation of statute.

Further, petitioner contends that once the terms of the initial contract renewed by operation of statute, the Board was precluded from reducing her salary from \$146,192 to \$135,000, effective July 1, 2011, unless they certified tenure charges. The law

provides that a board, "during the term of any employment contract," may not reduce a superintendent's compensation except for inefficiency, incapacity, conduct unbecoming, or other just cause. N.J.S.A. 18A:17-20.2.

The Board contends in its brief in support of the Motion for Summary Decision that the Howard and Solomon decisions pre-dated the enactment of the salary cap regulations and, "most importantly, did not require renewal of a contract containing terms and conditions that [were] inconsistent with New Jersey law." (Respondent's brief at 6). The Board further argues that the language in the tenure statute must be read in pari materia with N.J.S.A. 18A:7-8(j) and N.J.A.C. 6A:23A-3.1(a). The Board contends that petitioner's tenure argument fails to account for the fact that contracts are not enforceable, and therefore contractual tenure will not attach, until the contract is reviewed and approved by the ECS. See N.J.A.C. 6A:23A-3.1(c); N.J.S.A. 18A:7-8(j). This includes contracts for "superintendents reappointed pursuant to N.J.S.A. 18A:17-20.1." N.J.A.C. 6A:23A-3.1(a).

Petitioner points out in her reply to respondent's cross-motion that the above quoted language was added as part of the February 7, 2011, salary cap regulations. To that end, petitioner urges this tribunal to find that the ECS was without authority to review these types of contracts prior to February. Petitioner's argument, however, is without merit. Pursuant to enabling Legislation, the ECS is required to review and approve, according to the standards adopted by the Commissioner, all employment contracts for superintendents of schools. N.J.S.A. 18A:7-8(j). Further, 42 N.J.R. 2524(a), which accompanied the salary cap regulations, explains that the Commissioner amended N.J.A.C. 6A:23A-3.1(a) "to clarify that the Executive County Superintendents shall review the contract of any superintendent that has been reappointed when a district board of education has not given the requisite notice of intent to a superintendent pursuant to N.J.S.A. 18A:17-20.1." 42 N.J.R. 2524(a). To that end, the enforceability of petitioner's contract has always been subject to the review and approval of the ECS.

Petitioner argues in the alternative that she was not reappointed on July 1, 2011, but on the day the Board failed to take action to provide her with timely notice of non-renewal. Thus, she argues, effective the close of the day on June 30, 2010, she was reappointed to another contracted term of four years beginning July 1, 2011, and expiring July 1, 2015. Petitioner's theory, however, does not comport with the law or regulations. N.J.S.A. 18A:17-20.1 is clear that a superintendent is deemed reappointed "at the conclusion of the term of the initial contract," not any time prior. N.J.S.A. 18A:17-20.1. The June 2010 date was the date by which petitioner was assured of reappointment, but not the date the reappointment actually took effect. Thus, for purpose of determining petitioner's tenure rights, petitioner was reappointed on July 1, 2011, after the salary cap regulations became effective.

A "contract is unenforceable until the board of education submits the contract for review and receives approval from the ECS." N.J.A.C. 6A:23A-3.1(c); N.J.S.A. 18A:7-8(j). This, of course, includes contracts that were automatically renewed by operation of N.J.S.A. 18A:17-20.1. N.J.A.C. 6A:23A-3.1(a). It is undisputed that the terms of the four (4) year roll-over contract, effective July 1, 2011, were never approved by the ECS. To the contrary, on March 21, 2011, before petitioner's original contract expired, ECS Margaret J. Nicolosi instructed respondent to reduce petitioner's salary from \$146,192 to \$135,000 for the 2011-2012 school year. This directive was in compliance with N.J.A.C. 6A:23A-3.1, which required all contracts of superintendents, including those "reappointed pursuant to N.J.S.A. 18A:17-20.1" to not exceed the maximum salary guidelines set forth in N.J.A.C. 6A:23A-1.2. On May 10, 2011, respondent notified petitioner that effective July 1, 2011, the date of her reappointment, her salary would be reduced to \$135,000. Petitioner contends that this reduction in compensation flies in the face of her contractual tenure rights. Tenure protections, however, only attach to enforceable contracts. Petitioner's contract was not enforceable. Consequently, I **CONCLUDE** that the reduction in petitioner's salary was not in violation of her tenure rights.

III. What is the Applicable Maximum Salary?

Because I have concluded that the Commission had the authority to cap superintendent salaries and it was not a violation of petitioner's tenure rights to reduce petitioner's salary in line with the salary cap regulations, the question becomes what was her appropriate salary under the regulations. The parties stipulated that the enrollment figures changed from May 2010 to October 2011. According to N.J.A.C. 6A:23A-1.2, the maximum salary corresponds with the enrollment figures provided by the district in the Application for School State Aid (ASSA) on the prior October 15. N.J.A.C. 6A:23A-1.2 (emphasis added). The regulation allows for a maximum salary of \$135,000 for districts with student enrollment between 251-750 and a maximum salary of \$145,000 for districts with student enrollment between 751-1500. On May 10, 2011, the Board notified petitioner that her salary would be reduced to \$135,000 effective July 1, 2011, because as of May 10, 2011, "current enrollment" was 719 students. (Exhibit F, attached to the Stipulation of Facts). Notably, the stipulated facts do not support a finding that the Board relied on student enrollment provided in their October 15, 2010, ASSA as instructed by N.J.A.C. 6A:23A-1.2. Consequently, petitioner should be awarded back pay if more than 750 students were reported in respondent's October 15, 2010 ASSA. Such a circumstance is unlikely, however, and petitioner has not argued it. Rather, petitioner argues that she is entitled, at a minimum, to \$145,000 effective July 1, 2011, because 760 students were enrolled as of October 15, 2011. This proclamation would be a misreading of the regulation. The relevant date for purposes of determining petitioner's annual salary effective July 1, 2011, is October 15, 2010, not October 15, 2011. However, there is nothing preventing the Board from granting her the maximum salary of \$145,000 for the year beginning July 1, 2012, based on the October 2011 figure.

Therefore, I **CONCLUDE** that the applicable maximum salary for petitioner as of July 1, 2011, was \$135,000. I further **CONCLUDE** that the applicable maximum salary for the year beginning July 1, 2012 will be \$145,000.

ORDER

As set forth above, I **CONCLUDE** the Commissioner had the authority to impose regulations imposing caps on superintendent's salaries; the Board did not violate petitioner's tenure rights by reducing her salary effective July 1, 2011; and petitioner's applicable maximum salary for the year beginning July 1, 2011 was \$135,000, although the maximum rises to \$145,000 for the year beginning July 1, 2012. For the foregoing reasons, it is hereby **ORDERED** that petitioner's cross motion for summary decision be **DENIED** and respondent's cross motion for summary decision be **GRANTED**. It is further **ORDERED** that the parties draft a contract with a maximum salary of \$135,000 for the fiscal year from July 1, 2011 to June 30, 2012, and a maximum salary of \$145,000 from July 1, 2012 to June 30, 2015, and submit it for approval by the ECS in compliance with the salary cap regulations, N.J.A.C. 6A:23A-3.1.

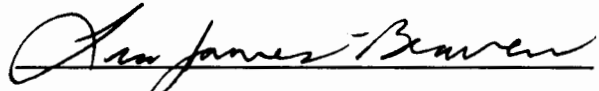
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 20, 2012

DATE


LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

1/20/12

Date Mailed to Parties:

1/20/12

cmo

OAL DKT. NO. EDU 10983-11
AGENCY DKT. NO. 221-8/11

MARIO RIVERA,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP
OF SADDLE BROOK, BERGEN COUNTY,
BOARD OF EDUCATION OF THE BOROUGH
OF LODI, BERGEN COUNTY, AND BOARD
OF EDUCATION OF THE CITY OF PASSAIC,
PASSAIC COUNTY,

RESPONDENTS.

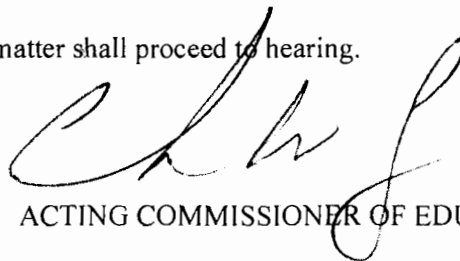
COMMISSIONER OF EDUCATION

DECISION

Examination of the record of this matter, the Initial Decision and the "Stipulation of Settlement" (Agreement), failed to reveal copies of Board resolutions approving the settlement and bestowing authority on specific individuals to bind – by way of their signatures on the Agreement – the respective respondents to the settlement. Nor, in the alternative, is the Agreement signed by the attorneys for the respective Boards, which attorneys are the Boards' duly authorized representatives in litigation.

Consequently, the Commissioner cannot approve the within settlement and hereby remands this matter to the OAL for revision of the Agreement to either be executed by the respective Board attorneys or to include as exhibits the required Board resolutions approving the settlement and authorizing specific representatives to execute the Agreement. If the parties are unwilling or unable to reach accord on such a revised agreement, the matter shall proceed to hearing.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/6/12
Date of Mailing: 3/7/12

* This decision may be appealed to the Superior Court, Appellate Division pursuant to P.L. 2008, c. 36.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10983-11

AGENCY DKT. NO. 221-8/11

MARIO RIVERA,

Petitioner,

v.

SADDLE BROOK BOARD OF EDUCATION,

BERGEN COUNTY,

Respondent.

Stacey Therese Cherry, Esq., for petitioner Mario Rivera (Law Office of G. Emerson Dickman, III, attorney)

Lisa S. Grosskreutz, Esq., for respondent Saddle Brook Board of Education, Bergen County (Machado Law Group, LLC, attorneys)

Record Closed: January 20, 2012

Decided: January 24, 2012

BEFORE LELAND S. MCGEE, ALJ:

This matter was transmitted to the Office of Administrative Law on September 15, 2011, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached document.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives on the attached document.
2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

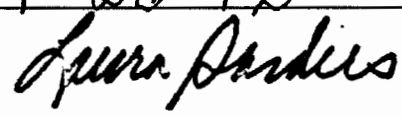
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

January 24, 2012

DATE


LELAND S. MCGEE, ALJ

Date Received at Agency:

1-26-12

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:
kep

JAN 26 2012

MARIO RIVERA,

Pro Se Petitioner,

v.

BOARD OF EDUCATION OF
SADDLE BROOK, Bergen County,
BOARD OF EDUCATION OF
LODI, Bergen County, and
BOARD OF EDUCATION OF
PASSAIC, Passaic County,

Respondents.

DEPARTMENT OF EDUCATION
Agency Dkt. No. 221-8/11

**STIPULATION OF
SETTLEMENT**

WHEREAS, Petitioner Mario Rivera ("Petitioner") filed a Pro Se Residency Appeal with the Commissioner of Education on August 4, 2011 against Respondent Saddle Brook Board of Education ("Saddle Brook"), appealing Saddle Brook's residency determination as to Petitioner and asserting various additional claims against Saddle Brook; and

WHEREAS, Petitioner filed an Amended Petition to Appeal Residency Determination with the Commissioner of Education on or about November 1, 2011, adding the Board of Education of Lodi ("Lodi") and the Board of Education of Passaic ("Passaic") as Respondents in this matter, and alleging that Lodi and/or Passaic were responsible to provide Petitioner a free public education from January 1, 2011 until Petitioner established a new residency pursuant to N.J.A.C. 6A:17-2.4c; and

WHEREAS, Petitioner established a new residency on or about October 25, 2011 at 1438 Herbert Terrace, Teaneck, New Jersey 07666, and Petitioner completed his enrollment in the Teaneck School District on or about November 1, 2011; and

WHEREAS, Saddle Brook paid a total of \$11,028.00 for Petitioner's tuition at Bergen County Technical School for the period from April 14, 2011 through October 31, 2011; and

WHEREAS, the Parties desire to settle the within matter in an amicable fashion, they hereby agree as follows:

1. Lodi agrees to reimburse Saddle Brook in the amount of \$850.00, which amount reflects Petitioner's tuition at Bergen County Technical School for the period from April 14, 2011 through April 30, 2011; and
2. Passaic agrees to reimburse Saddle Brook in the amount of \$5,089.00 toward the total tuition of \$10,178.00 paid by Saddle Brook for Petitioner's tuition for the period from May 1, 2011 through October 31, 2011; and
3. The parties have reached this compromise to avoid the expense and inconvenience of a hearing with regard to Petitioner's Pro Se Residency Appeal and his Amended Petition to Appeal Residency Determination. Respondents make no admission of liability with regard to Petitioner's claims. Petitioner's compromise of this matter in no way reflects his beliefs as the merits of his claims.
4. In consideration of the settlement of the captioned matter, the parties shall release each other from any and all claims, rights and liability, including but not limited to any and all claims for attorney's fees, fees for the non-attorney representatives, money damages, civil liability, or any other equitable or legal relief sought through the date of the execution of this Stipulation of Settlement.
5. This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final Agreement on any and all claims raised in Petitioner's Pro Se Residency Appeal and his Amended Petition to Appeal Residency Determination.
6. This Agreement shall be governed by the laws of the State of New Jersey.
7. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.
8. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. The parties acknowledge that they had the

opportunity to consult with legal counsel or a representative of their choice and that they reviewed the Agreement in detail with their counsel or representative and fully understand its requirements and limitations.

9. This Agreement shall remain confidential to the extent permitted by Federal and State law, and Petitioner shall not disclose its form or contents to third parties.
10. This Agreement may not be altered, amended or modified except by a writing signed and duly authorized by all parties.
11. Petitioner has dismissed his Pro Se Residency Appeal and his Amended Petition to Appeal Residency Determination with prejudice.

PETITIONER MARIO RIVERA

Mario Rivera

Dated: 12/30/11

**ON BEHALF OF THE SADDLE BROOK
BOARD OF EDUCATION**

Robert Naegely
President

Dated: _____

opportunity to consult with legal counsel or a representative of their choice and that they reviewed the Agreement in detail with their counsel or representative and fully understand its requirements and limitations.

9. This Agreement shall remain confidential to the extent permitted by Federal and State law, and Petitioner shall not disclose its form or contents to third parties.

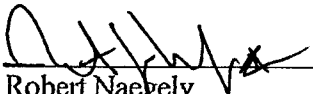
10. This Agreement may not be altered, amended or modified except by a writing signed and duly authorized by all parties.

11. Petitioner has dismissed his Pro Se Residency Appeal and his Amended Petition to Appeal Residency Determination with prejudice.

PETITIONER MARIO RIVERA

Dated: _____

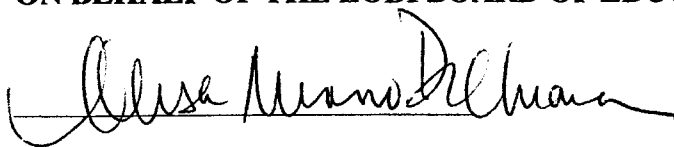
**ON BEHALF OF THE SADDLE BROOK
BOARD OF EDUCATION**



Robert Naegely
President

Dated: 1/11/12

ON BEHALF OF THE LODI BOARD OF EDUCATION



Dated: 12-22-11

ON BEHALF OF THE PASSAIC BOARD OF EDUCATION

Dated: _____

ON BEHALF OF THE LODI BOARD OF EDUCATION

Dated: _____

ON BEHALF OF THE PASSAIC BOARD OF EDUCATION

Manfred S.

Dated: 1/4/12

#89-12

J.A.E., on behalf of minor child, K.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP	:	DECISION
OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her daughter, K.H., is not eligible for a free public education in the West Orange school district during the 2011-2012 school year. Petitioner contended that she and her daughter are domiciled in West Orange and produced documentation including a driver's license and a PSE&G bill which both bore a West Orange address. The Board asserted that petitioner was not domiciled in West Orange, but failed to produce documentation that petitioner was living anywhere else.

The ALJ found that: based on the testimony and documentation, petitioner and her daughter live in an apartment in West Orange with petitioner's spouse, W.S.; the lease for the apartment is in W.S.'s name; no evidence was presented to show that J.A.E., K.H., or W.S. reside or have resided elsewhere during the 2011-2012 school year; and J.A.E. and W.S. presented credible testimony in this matter. Accordingly, the ALJ concluded that the petitioner has met her burden of proof that she, her spouse and her daughter reside in West Orange and therefore K.H. is entitled to a free public education in West Orange schools. Further, the ALJ concluded that there are no grounds for a counterclaim for reimbursement of tuition. The ALJ ordered respondent to re-enroll K.H. in its schools.

Upon a full and independent review, the Commissioner concurred with the findings and conclusion of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this case.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
--

March 12, 2012

OAL DKT. NO. EDU 13716-11
AGENCY DKT. NO. 290-9/11

J.A.E., on behalf of minor child, K.H.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	DECISION
OF WEST ORANGE, ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon full review and consideration, the Commissioner concurs with the Administrative Law Judge that petitioner has met her burden of establishing that she and minor child K.H. are domiciliaries of West Orange, thereby entitling K.H. to a free public education in that District's schools.

Accordingly, the recommended decision of the OAL is adopted for the reasons expressed therein. The Board is hereby ordered to continue K.H.'s enrollment in its school system, free of charge, as long as there is no change in circumstances that would alter her entitlement.

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/12/12

Date of Mailing: 3/12/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 13716-11

AGENCY DKT. NO. 290-9/11

J.A.E., ON BEHALF OF K.H.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF EDUCATION OF THE TOWNSHIP OF WEST
ORANGE, ESSEX COUNTY.**

Respondent.

J.A.E., pro se, on behalf of K.H., minor, petitioners

Stephen J. Christiano, Esq., for respondent West Orange Board of Education

Record Closed: January 10, 2012

Decided: January 30, 2012

BEFORE JAMES J. GERAGHTY, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner J.A.E., on behalf of minor child K.H., challenges the Respondent, West Orange Board of Education's September 20, 2011 declination of enrollment of K.H. without further proof of residency in West Orange. R-2. In addition, the notice

stated that if she challenges the decision, fails to sustain her burden of proof, or if the matter is dismissed for any other reason, she may be assessed tuition for the period of ineligible attendance. R-2. She requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on November 15, 2011. Respondent answered R-4. The hearing was held January 10, 2012 and the record closed that day.

STATEMENT OF THE ISSUE

The issue is whether petitioner has established by a preponderance of the credible evidence that her daughter K.H. resides with her on Northfield Avenue in West Orange, New Jersey.

FACTUAL BACKGROUND

Petitioner J.A.E. testified that she moved into an apartment on Northfield Avenue in West Orange, New Jersey with her spouse (unmarried) W.S. who is the lessee. She attempted to register her daughter K.H. in the West Orange School system for the 2009-2010 school year. The School Board requested information and she failed to submit the documents. However, the child was not dis-enrolled.

On September 27, 2011 petitioner attempted again to enroll her daughter K.H. P-2. The Board requested documents substantiating residency including "statement of the landlord." Previously the petitioner submitted a "statement of the landlord" signed by W.S. He is not the owner of the property nor an agent of the landlord. R-3.

The school district registrar Gregory Brennan testified that his staff investigated K.H.'s residency. R-1. The investigator Mike Zarro visited the subject property on November 1, 2010, December 2, 2010, and February 1, 2011. On the first occasion, J.A.E. answered the door and stated that her daughter was at her grandmother's because J.A.E.'s car was disabled and she was unable to drive her niece to school. She had to take two buses to get to work. On the second occasion, there was simply

no response at 7:15 a.m. J.A.E. later called the registrar's office and explained that she was at the doctors. She also stated that since her daughter was not attending the school, there was no need for her and her daughter to be at the residence. On the third visit, there was simply no response. Mr. Brennan's testimony confirmed the report that he submitted to the Superintendent. R-1. There was no surveillance for the current school year.

A "notice of rent increase effective September 1, 2010" addressed to W.S. by the 97 Northfield Avenue Partners, LLC included a "renewal of apartment lease" which stated that the rent was increasing \$25 a month for a new rent of \$875 per month. This renewal would expire August 31, 2011. P-1. W.S. was the only party named on the notice. Petitioner said the landlord was someone named Lazar and that he refused to sign a statement identifying the parties occupying the premises. No evidence was presented regarding any other residence for J.A.E. or K.H. Petitioner testified that K.H.'s natural father has not been involved in her life for several years and pays no child support. However, she refused to answer respondent's counsel's inquiries about him.

Petitioner submitted a Comcast bill for W.S. at the West Orange address P-3, a copy of her drivers' license with the West Orange address P-4, and an August 2011 PSE&G bill, addressed to petitioner at the West Orange address. P-5.

No evidence was submitted by the Board that petitioner and/or her daughter lived elsewhere than at the West Orange address.

FINDINGS OF FACT

Based on the testimony and documents of record, I **FIND**:

1. P.M., W.S. and K.H. reside in an apartment in West Orange, New Jersey.

2. There is no evidence that any of the parties identified in paragraph one reside or have resided elsewhere during the 2011-2012 school year.
3. W.S. and J.A.E. testified credibly.

LEGAL AUTHORITY

Persons over five and under twenty years of age are entitled to attend public schools without charge if they are domiciled within the school district in which the school is located. N.J.S.A. 18A:38-1. A student is domiciled within a school district:

1. . . . when he or she is living with a parent or legal guardian whose permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.

4. A student is domiciled in the school district when his or her parent or legal guardian resides within the district on an all-year-round basis for one year or more, notwithstanding the existence of a domicile elsewhere.

N.J.A.C. 6A:22-3.1(a)1,4.

There is a substantial body of precedent on domicile. Our Appellant Division has explained:

Domicile is the relation which the law creates between an individual and a particular locality or country. In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning, and from which he has no present intention of moving . . . it is the place with which he has a settled connection for certain legal purposes, either because his home is there or because that place is assigned to him by the law And every person, in all circumstances and conditions, is deemed to have a domicile somewhere;

and, in general, a domicile once established continues until superseded by a new domicile, and the old domicile is not lost until a new one is acquired . . .

A person may have several residences or places of abode but he can have only one domicile at a time. Domicile of choice is essentially a question of residence and intention - of factum and animus. It involves an exercise of volition And he may have his residence in one place, while his domicile is in another There are certain legal rights and privileges which pertain to "residence" rather than to "domicile." One's "home" may be relinquished and abandoned, while one's "domicile" upon which may depend certain civil rights and duties, may in legal contemplation remain." Kurilla v. Roth, 132 N.J.L., 213, 215 (Sup. Ct. 1944) and authorities there cited.

To effect a change of domicile there must be a voluntary change of residence; the residence at the place chosen for the domicile must be actual; to the factum of residence there must be added animus manendi; and that place is the domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless, or until something uncertain or unexpected shall happen to induce him to adopt some other place as his permanent home. Harral v. Harral, 39 N.J. Eq. 279 (E & A 1884).

A change of residence for a special purpose such as taxation benefits, or a period of seasonal residence and obedience to the demands of health, does not necessarily amount to a change of domicile. The burden of proof to establish that a change of domicile has occurred rests upon the party asserting it. In re Michelsohn's Will, 136 N.J. Eq. 387 (Prerog. 1944).

Domicile is factual, and each case must be evaluated and determined by its own facts and circumstances.

Cromwell v. Neeld, 15 N.J. Super. 296 (App. Div. 1951).

The courts have established criteria to determine which residence constitutes a person's domicile, to wit: (1) physical characteristics of each residence, (2) the time spent and things done in each residence, (3) other persons found in each residence, (4) the person's mental attitude about each residence, and (5) whether, when absent, the person has the intention to return. Mercadante v. City of Paterson, 111 N.J. Super. 35 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). Thus, the courts seek evidence of a person's

intent by reference to "indicia of domicile." F.P. o/b/o N.P. and S.P., Petitioner v. Board of Education of Point Pleasant Beach, Ocean County, Respondent, OAL Docket No. EDU 6951-98 (Commissioner of Education April 13, 1999) citing Matter of Unanue, 225 N.J. Super. 326 (Law Div. 1991).

A school board may recover tuition from the parents of child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(6)(2). The tuition is 1/180th of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance. Ibid.

ANALYSIS

Petitioner adduced evidence that her and her daughter's domicile is the West Orange apartment. Both she and her spouse testified consistently that they moved into the apartment together, had not resided elsewhere, that petitioner's daughter was part of their household, that she did not have another residence, and that the child visited her grandmother occasionally on weekends.

Petitioner also adduced her driver's license, and Comcast and PSE&G bills issued to either petitioner or her spouse showing the West Orange address. There is no evidence that any of the family unit members resided in another county even temporarily. Petitioner did not produce a letter from the actual landlord, a corporation, confirming the residents of the apartment in question. Also, the Board's surveillance on three occasions in 2010 and 2011 during which the minor was not seen leaving or entering the abode militated against petitioner. However, the Board never averred or produced evidence that petitioner and her daughter lived outside of West Orange. Accordingly, the preponderance of the credible evidence weighs in favor of the petitioner. Any gaps could be rectified by interviewing the landlord's representative.

CONCLUSION

Based on the foregoing findings of fact and legal authority, I **CONCLUDE** that petitioner has met her burden of proof that she, her spouse, and her daughter reside at the subject West Orange apartment and are therefore in the West Orange School District. I further **CONCLUDE** that there are no grounds for a tuition counterclaim for reimbursement. This ID is based on the assumption that were the Board to interview a landlord representative, that person would not contradict any of the involved findings.

DISPOSITION AND ORDER

Based on the foregoing findings of fact and conclusion of law, I decide this matter in favor of the petitioner, grant her petition, deny the Board's counterclaim for tuition reimbursement, and **ORDER** the subject minor re-enrolled in the West Orange Schools.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

1/30/12
DATE

James A. Geraghty
JAMES A. GERAGHTY, ALJ

Date Received at Agency:

January 30, 2012 (db)
Lucia P. Sanders

Date Mailed to Parties:
db

JAN 31 2012

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Petitioner

J.A.E., pro se

W.S., spouse

For Respondent

Gregory Brennan, school district registrar

EXHIBITS

For Petitioner

- P-1 Renewal Lease
- P-2 Registration Form 2011
- P-3 Comcast bill
- P-4 Copy of Drivers' License
- P-5 PSE&G bill

For Respondent

- R-1 Letter dated January 9, 2012 from Investigator, Mike Zarro
- R-2 Letter dated September 20, 2011 from the West Orange Public Schools
- R-3 "Statement of Landlord"
- R-4 Respondent's Answer

90-12

ARCHWAY PROGRAMS, INC.

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT
OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

INITIAL DECISION

SYNOPSIS

The controversy herein involves five audits conducted by the respondent Department on Archway's accounts for the school years from 1994-95 through 1998-99, in which the Department disallowed approximately \$9 million in non-allowable costs and expenses and ordered these tuition overcharges returned to the sending districts. Archway appealed this conclusion.

The Office of Administrative Law (OAL) has to date issued three Initial Decisions in this case. In September 2008, the ALJ made recommendations regarding resolution of legal issues in connection with the five audits, but sent the case back to the Commissioner for computation and presentation of final calculations as to the disallowances; the Commissioner adopted the ALJ's recommendations regarding resolution of legal issues, but remanded the case back to the OAL with a directive for the ALJ to make the necessary calculations. On remand, the ALJ determined that it was appropriate to initially resolve only the first audit year as it will have a carryover effect on the remaining audits, and issued a Partial Initial Decision ordering Archway to reimburse the sending districts the amount of their overpayments for the 1994-95 school year. The Commissioner adopted the decision, ordered Archway to return a total of \$2,315,855.51 to the sending districts, and returned the matter to the OAL in order to make the requisite calculations and recommended determination of monies due and owing for the remaining audit years. Archway appealed this decision to the Appellate Division of the Superior Court, which determined that – as all claims as to all parties in this consolidated action had yet to be resolved – Archway's appeal as a final agency determination was premature. In February 2011, the ALJ issued a second Partial Initial Decision, which addresses the amount of monies due and owing by Archway for the 1995-96, 1996-97 and 1997-98 school years, but left unresolved the amount due and owing for the 1998-99 school year. The Commissioner declined to review the second Partial Initial Decision, returned the matter to the OAL for resolution of the issues surrounding the last remaining audit year and for issuance of a final decision, and requested that the ALJ clearly present, in the final Initial Decision, the exact calculated monetary figure due and owing by Archway for each of the five audit years. The ALJ transmitted her proposed final decision in this matter on December 15, 2011, which did not include the aforementioned calculations for the five audit years.

The Commissioner determined that he must reject the ALJ's proposed final decision and remand the matter once again to the OAL for revision commensurate with his prior requests for the initial decision to include clear final monetary figures due and owing by Archway for each of the five audit years. In so determining, the Commissioner noted that the Administrative Procedures Act requires that a recommended decision be filed "in such form that it may be adopted as the decision in the case." *N.J.S.A. 52:14B-10(c)*.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

March 14, 2012

OAL DKT. NO. EDU 10474-08
(OAL DKT. NOS. EDU 6956-00, EDU 8646-00, EDU 4834-01, AND EDU 4607-03)
(ON REMAND)
AGENCY DKT. NOS. 271-7/00, 381-10/00, 227-8/99, AND 392-12/02
(CONSOLIDATED)

ARCHWAY PROGRAMS, INC.	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE DEPARTMENT	:	INITIAL DECISION
OF EDUCATION,	:	
	:	
RESPONDENT.	:	
_____	:	

The petitioner, Archway Programs (Archway), is a non-profit corporation which operates a private school for the handicapped (PSH) authorized to educate handicapped public school students pursuant to *N.J.S.A.* 18A:46-14(g), and receives tuition from sending districts commensurate with its actual cost per pupil as determined by a certified audit. Pursuant to governing regulations, certain specified items may not be included in the computation of a tuition rate chargeable to the sending districts. The controversy herein involves five audits conducted by the respondent Department of Education (DOE) on Archway's accounts for the school years from 1994-95 through 1998-99, in which the DOE disallowed approximately \$9 million in non-allowable costs and expenses and ordered these tuition overcharges returned to the sending districts. Archway appealed this conclusion. In September 2008, the Administrative Law Judge (ALJ) issued an Initial Decision recommending resolution of a myriad of legal issues concerning methodologies and allowable costs to be utilized in connection with the five contested audits, and further recommended that the Commissioner calculate and present

final mathematical calculations as to disallowances based upon these resolutions. In a final decision dated December 5, 2008, the Commissioner adopted the ALJ's recommendations regarding resolution of the legal issues and methodologies, but rejected the proposal regarding computation and presentation of final mathematical calculations. The Commissioner remanded the matter to the Office of Administrative Law (OAL) for such further proceedings as were necessary to allow the ALJ to conclude these consolidated cases by making the requisite calculations and recommended determination of monies due and owing.

On remand, the ALJ found that it was appropriate to initially resolve only the audit for the 1994-95 school year – and to reserve recommendation on the remaining years – as resolution of this particular audit would have a carryover effect on the remaining later audits, and ordered that the DOE prepare a new audit of the 1994-95 school year. Based on that audit, and the fact that Archway indicated no objections to the mathematical calculations contained therein, the ALJ determined that the revised DOE audit dated June 25, 2010 includes the amount that petitioner is obligated to return to the sending districts, and she issued a Partial Initial Decision ordering Archway to reimburse these districts the amount of their overpayments for the 1994-95 school year.

By decision dated October 28, 2010 (Commissioner Decision #453-10R), the Commissioner adopted the Partial Initial Decision of the OAL as the final decision as to the 1994-95 school year, and ordered Archway to return – within 60 days of that decision – a total of \$2,315,855.51 to the districts which sent students to its PSH during the 1994-95 school year. The matter was returned to the OAL for further action deemed necessary by the ALJ in order to make the requisite calculations and recommended determination of monies due and owing for the remaining audit years. Archway appealed the Commissioner's October 28, 2010 decision to

the Appellate Division of the Superior Court, which determined that – as all claims as to all parties in this consolidated action had yet to be resolved below – Archway's appeal as a final agency determination was premature.

On February 10, 2011, the Agency received a second Partial Initial Decision from the OAL which purported to resolve the amounts of monies due and owing by Archway for the 1995-96, 1996-97 and 1997-98 school years, leaving yet unresolved monies due and owing for the 1998-99 school year. Exceptions and reply exceptions to that decision were duly filed by Archway and the Department, respectively.

The Commissioner upon review – pursuant to the authority granted him under *N.J.A.C. 1:1-12.5(e)* – declined to review the second Partial Initial Decision of the OAL as he found that immediate review of this decision – which purportedly resolved final calculations for only three of the four remaining audit years, and in light of the prior decision of the Appellate Division – would not serve to avoid unnecessary litigation or expense. The Commissioner, therefore, returned this matter to the OAL for resolution of the issues surrounding the last remaining audit year in this contested case and for issuance of a final Initial Decision in this consolidated matter, reserving review of the ALJ's February 10, 2011 decision until the end of the contested case. The Commissioner, additionally, again requested that the ALJ's final Initial Decision in this matter clearly present the exact calculated monetary figure due and owing by Archway for each of the five audit years at issue.

On December 15, 2011, the ALJ transmitted to the Commissioner what she proposes is her final decision in this matter. The Commissioner is constrained to reject this decision without review and to remand this matter to the OAL for revision commensurate with

his prior requests in this regard.¹ Throughout the protracted proceedings in this consolidated matter – starting with the Commissioner’s first decision on December 4, 2008 – the Commissioner has made it abundantly clear that he was requesting the ALJ to make the requisite calculations of monies due and owing to its sending districts by Archway for each of the audit years at issue. Notwithstanding that the ALJ elected to complete this task by a series of decisions covering individual audit years, it has always been contemplated that her final decision in this case would tie such various partial decisions together in a comprehensive decision which conclusively presented the necessary totals for each of the audit years, along with a final total of all monies due. The Commissioner finds that – given the nature of Archway’s petitions of appeal in this matter, and the dictates of the Administrative Procedure Act which require that a recommended decision shall be filed “in such form that it may be adopted as the decision in the case” (*N.J.S.A. 52:14B-10(c)*) – the final decision of the OAL in this regard should result in recommendations which resolve the entire contested case, *i.e.*, the adjudication of the involved rights, entitlements *and obligations* of Archway. Therefore, the Commissioner requests that the ALJ’s final decision in this matter contain in the body of her decision – by presentation, not by way of incorporation through the attachment of charts prepared by others – her recommendation as to the appropriate disallowances to all of the schedules and other adjustments for each of the five audit years at issue; additionally, the Commissioner requests a recommended finding as to the amount of money to be returned by Archway to the sending public school districts for each audit year, along with the recommended final total amount of money due and owing by Archway.

¹ In light of the Commissioner’s determination here, review of petitioner’s exceptions to the December 15, 2011 decision and respondent’s reply thereto will be deferred until the end of the contested case.

Accordingly, the recommended decision of the OAL is rejected and this matter is hereby remanded to the OAL for revision as indicated in this decision.

IT IS SO ORDERED.²



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 03/14/12

Date of Mailing: 03/14/12

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10474-08

AGENCY DKT. NO. 271-7/00,

381-10/00, etc.

ARCHWAY PROGRAMS, INC.,

Petitioner,

v.

NEW JERSEY STATE

DEPARTMENT OF EDUCATION,

Respondent.

Steven D. Weinstein, Esq., for petitioner (Florio, Perrucci, Steinhardt & Fader,
attorneys)

Caroline Jones, Deputy Attorney General, for respondent (Paula T. Dow,
Attorney General of New Jersey, attorney)

Record Closed: November 25, 2011

Decided: December 15, 2011

BEFORE **BEATRICE S. TYLUTKI**, ALJ t/a:

This matter concerns the December 5, 2008 remand by the Commissioner of Education (Commissioner) to the Office of Administrative Law (OAL) of that portion of the consolidated case (OAL Dkt. Nos. 6956-00, 8646-00, 4834-01, 4607-03, 4608-03 and 427-06), which deals with the audits by the New Jersey State Department of

Education (DOE) of the records of Archway Programs, Inc. (Archway) for its private school for the handicapped (PSH) for the 1994-95, 1995-96, 1996-97, 1997-98 and 1998-99 school years (audits in issue).

The total initial decision for this matter, EDU 10474-08, consists of two partial initial decisions issued on September 15, 2010 and February 7, 2011, and this decision.

Archway is a non-profit human services organization that provides various educational, social, psychological and residential services for developmentally disabled and mentally and physically challenged adults and children. It has both PSH programs and non-PSH programs. The PSH programs provide special education services to public school children, ages 3 to 21, with special needs. The number of school districts and the number of students sent to Archway varies from year to year. Archway's PSH programs are subject to state audits.

Archway's PSH programs are operated at two locations, a campus in Atco, Camden County and another campus in Washington Township, Gloucester County.

It was agreed at the hearing in the consolidated case that the former regulations that determined tuition rates for PSHs that were in effect during the years covered by the audits in issue were applicable in the consolidated case. These regulations were previously codified at N.J.A.C. 6:20-4.1 et seq. and were introduced into evidence in the consolidated case as J-1 and R-8. These regulations are also applicable in this matter.

In the final decision as to the consolidated case, the Commissioner adopted the conclusions in my September 2, 2008 initial decision as to the various schedules contained in the five audits in issue, but rejected my recommendation that the Commissioner calculate the final amounts that Archway must return to the sending school districts for the five school years. The Commissioner required that there be a procedure in the OAL to compute the revised audits for the five school years consistent with my initial decision and the Commissioner's final decision.

The remanded matter was transmitted to the OAL on December 5, 2008 for disposition pursuant to N.J.S.A. 52:14B-1 to -15. I was assigned to the case.

I had a conference with the parties on January 7, 2009 regarding the remand. During the conference, I established a schedule whereby the DOE was to submit a recalculation of the 5 audits to determine the exact amounts that Archway had to return to the sending school districts. Archway would have the opportunity to review these recalculations and submit its objections, if any. Based on the filings by the parties, I would then decide if a hearing was necessary or that I could make a determination as to the amounts that Archway had to return to the sending school districts based on the written submissions.

I received the DOE's revised audits on January 23, 2009. Archway filed a response dated April 23, 2009 and listed 21 objections to the DOE's revised audits. I had a telephone conference with the parties on May 7, 2009, and I gave the DOE the opportunity to file a response as to these objections, which I received on June 24, 2009. Also, I gave Archway the opportunity to file a reply, which it did on August 7, 2009.

I held settlement conferences with the parties, and we were able to resolve 19 of the objections raised by Archway. The unresolved objections were number 7, which applies to the 1994-95 school year audit, and number 19, which refers to the 1998-99 school year audit.

By letter dated September 1, 2009, I told the parties that I wanted them to submit briefs as to only Archway's Objection Number 7, and that initially I wanted only to resolve the 1994-95 audit. It was not disputed that the resolution of the 1994-95 school year audit will have a carryover effect on the later audits.

After receipt of briefs from the parties, I issued an Order on May 6, 2010, in which I reached a conclusion as to Objection Number 7. I ordered the DOE to prepare a new audit of the 1994-95 school year using the May 6, 2010 order and the settlements as to the other objections raised by Archway which relate to this audit. Archway would

then have the opportunity to review the audit and could submit a response as to the mathematical calculations only.

I received a revised audit from the DOE on June 25, 2010. This audit includes the amounts that Archway is obligated to return to the school districts who sent students to Archway's PSH during the 1994-95 school year. By letter dated August 24, 2010, Archway indicated no objections to the mathematical calculations in this audit. I issued a partial initial decision as to this audit on September 15, 2010.

The Commissioner adopted my September 15, 2010 partial initial decision by a final decision dated October 28, 2010. Archway filed an appeal with the Appellate Division of the New Jersey Superior Court. On February 4, 2011, the Appellate Division decided that since all audits in issue had not been resolved, that the appeal was premature.

I ordered that the DOE prepare new audits as to the 1995-96, 1996-97 and 1997-98 school years consistent with my May 6, 2010 order and the settlements as to the other objections originally raised by Archway. Archway would then have the opportunity to review the audits and could submit a response as to the mathematical calculations only. Once this was resolved, I indicated I would issue another partial initial decision as to these audits.

I received the new audits for the 1995-96, 1996-97 and 1997-98 school years from the DOE, which include the amounts that Archway is obligated to return to the school districts who sent students to Archway's PSH during these school years. By letter dated January 24, 2011, Archway indicated no objections to the mathematical calculations in these audits. I issued a partial initial decision as to these audits on February 7, 2011.

The Commissioner on March 18, 2011 decided that a review of my February 7, 2011 partial initial decision would be nonproductive at that time and reserved the review until after there was an initial decision as to the fifth and final audit.

Thereafter, I told the parties that I wanted them to submit briefs as to Archway's Objection Number 19 which refers to the 1998-99 school year audit. After receipt of briefs from the parties, including a revised audit by the DOE, I issued an Order on July 18, 2011, in which I reached a conclusion as to Objection Number 19. I ordered that the DOE prepare a revision of its revised audit for the 1998-99 school year consistent with my July 18, 2011 order.

I had a telephone conference with the parties on October 28, 2011, at which time we reached an agreement as to certain captions to be used in the revised audit for the 1998-99 school year. On November 7, 2011, I received a new revised audit from the DOE for the 1998-99 school year, which includes the amounts that Archway is obligated to return to the school districts who sent students to Archway's PSH during the 1998-99 school year (Attachment A which is attached and incorporated herein).

By letter received on November 25, 2011, Archway indicated no objections to the mathematical calculations in the revised 1998-99 school year audit (Attachment B which is attached and incorporated herein).

I **ORDER** that Archway reimburse the sending school districts the amount of their overpayments for the 1994-95, 1995-96, 1996-97, 1997-98 and 1998-99 school years within sixty (60) days after the final decision in this matter.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended initial decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make final decisions in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this initial decision within forty-five days and unless such time limit is otherwise extended, this recommended initial decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended initial decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 15, 2011
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ t/a

Date Received at Agency:

12/15/11

Date Mailed to Parties:

12/16/11

/cad

ATTACHMENTS

- A. Revised audit for the 1998-99 school year received by OAL on November 7, 2011
- B. Letter from Archway dated November 21, 2011 and received by OAL on November 25, 2011

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent
New Jersey Department of Education
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112

Attachment A

By: Caroline Jones
Deputy Attorney General
(609) 633 8397

ARCHWAY PROGRAMS INC., Petitioner, v. NEW JERSEY DEPARTMENT OF
EDUCATION, Respondent.

OAL Docket No. EDU 10474-08S

REVISED REPORT
FYE 1999

Archway Programs, Inc. - Camden and Gloucester Counties
Fiscal Monitoring Report: July 1, 1998 - June 30, 1999

This report includes the following information:

The recap of the exhibit and schedules from the original fiscal monitoring report, showing a listing of the disallowed costs.

Adjustments made to the exhibit and schedules as a result of the Administrative Law Judge's decision mailed to the parties on September 3, 2008.

Revisions to exhibit and schedules based on Blank Rome, Counselors at Law, LLP review of revised report.

Adjustments made to the exhibit and schedules as a result of the administrative law judge's Orders.

Adjustments made to the exhibit and schedules adjusting for the fringe benefit rate of 22.51%, as cited in Steven D. Weinstein, Esq. letter dated April 11, 2011.

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Review Report: July 1, 1998 - June 30, 1999

Exhibit 1 - OAL Order 5-6-2010

Summary of amounts refundable to school districts

		DOE Amount	OAL Order - 5/6/2010
Non-allowable Expenses:			
1. Salaries	(Schedule A)	\$ 348,898.11	\$ 297,086.82
2. Salaries	(Schedule B)	34,057.89	34,057.89
Subtotal		382,956.00	331,144.71
3. Non-salary expenses	(Schedule C)	19,323.58	19,323.58
4. Maintenance and Transportation Expenses	(Schedule D)	196,727.70	192,583.88
5. Salaries	(Schedule E)	55,819.39	0.00
6. Non-allowable fringe benefit costs	(Schedule F)	165,685.54	98,110.71
7. Non-allowable organizational overhead costs	(Schedule J)	359,561.55	342,887.50
Total non-allowable expenses		1,180,073.76	984,050.38
Other Adjustments:			
8. Working capital adjustment	(Schedule L)	(76,704.00)	(81,533.00)
Total tuition rate refunds		1,103,369.76	902,517.38
9. Additional allowable costs - tuition waivers	(Schedule N)	(7,781.44)	(13,641.27)
Total amount refundable to sending school districts		<u>\$ 1,095,588.32</u>	<u>\$ 888,876.11</u>

Archway Programs, Inc.-Camden and Gloucester Counties
Fiscal Review Report: July 1, 1998 - June 30, 1999

Schedule A - Revised OAL orders

Salaries of employees functioning in a certified position who did not possess proper certification

<u>Name</u>	<u>DOE Amount</u>	<u>Revised OAL orders</u>
Bates, Scott	\$ 54,999.90	\$ 54,999.90
Cobb, Eunice T.	2,695.08	0.00
Cromwell (Miller), Lisa A.	1,292.31	1,292.31
Leonardi, Alan J.	1,153.85	0.00
Regan, Donna M.	12,992.35	12,992.35
Stein, Lori H.	12,761.57	12,761.57
Turkot, Theresa	600.00	600.00
Williams, Monica C.	2,307.70	0.00
Wilson, Frederick	1,923.08	0.00
Donley, William C.	20,275.45	20,275.45
Gormley, Paula	21,860.29	21,860.29
DePaul, Thomas A.	18,583.89	18,583.89
Black, Sharon K.	3,000.00	0.00
Byrd, Sharon	3,786.58	3,786.58
Delmar, Laurel	17,787.00	17,787.00
DePaul, Thomas A.	9,291.97	9,291.97
DiCriscio, Jennifer	1,213.00	1,213.00
Dluoik, Cheryl L.	31,979.28	31,979.28
Gupta (Foster), Michelle	36,346.96	0.00
Gonnella, Renee K.	2,307.70	0.00
Landgraf, Keith S.	16,800.00	16,800.00
Laniti, Michele B.	16,866.65	16,866.65
McCouch, Pamela E.	7,161.54	7,161.54
Raymond, Diane M.	5,365.37	5,365.37
Stinson, Coleen E.	25,700.52	25,700.52
Trefz, Greg F.	17,769.15	17,769.15
Wittman, Edward	2,076.92	0.00
Total	\$ 348,898.11	\$ 297,086.82

Archway Programs,. Inc.-Camden and Gloucester Counties
Fiscal Review Report: July 1, 1998 - June 30, 1999

Schedule B - OAL Order 5-6-2010

Salaries of employees charged directly to PSD schools, while performing services for other programs

<u>Name</u>	<u>DOE Amount</u>	<u>OAL Order - 5/6/2010</u>
Brown, Gale	\$ 6,215.40	\$ 6,215.40
Campbell, John P.	4,615.40	4,615.40
Creedon, Patrick	6,089.68	6,089.68
Hummell, David	5,324.62	5,324.62
Small, Thomas L.	4,615.40	4,615.40
Afflerbach, Fredricka G.	2,030.76	2,030.76
Cambron, Frank	1,474.31	1,474.31
Byrd, Sharon	3,692.32	3,692.32
Total	\$ 34,057.89	\$ 34,057.89

Archway Programs,. Inc.-Camden and Gloucester Counties
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Schedule C - OAL Order 5-6-2010

**Non-salary expenses charged directly to PSD schools which are non-allowable in accordance
with N.J.A.C. 6:20-4.4(a)**

<u>Name</u>	<u>DOE Amount</u>	<u>OAL Order - 5/6/2010</u>
ASAH	\$ 150.00	\$ 150.00
ASAH	150.00	150.00
Anne Klein & Associates	14,384.23	14,384.23
Summit Bank / Master Charge	78.47	78.47
Summit Bank / Master Charge	22.55	22.55
Summit Bank / Master Charge	75.06	75.06
Summit Bank / Master Charge	55.05	55.05
Summit Bank / Master Charge	54.80	54.80
Summit Bank / Master Charge	117.06	117.06
Summit Bank / Master Charge	11.36	11.36
Douglas W. Otto	4,225.00	4,225.00
Total	\$ 19,323.58	\$ 19,323.58

Schedule D - OAL Order 5-6-2010

Maintenance and transportation employee expenses

<u>Employees</u>	<u>DOE Amount</u>	<u>OAL Order - 5/6/2010</u>
Ahye, Philip D.	\$ 7,980.00	\$ 7,980.00
Barnhardt, Isaac M.	30,370.74	30,370.74
Berry, Bryant D.	15,626.94	15,626.94
Boone, Michael M.	8,012.17	8,012.17
Bruder, Russell R.	14,085.88	14,085.88
Bryson, Mark A.	1,322.75	1,322.75
Carhart, Ewing	26,408.14	26,408.14
Collins, Jody L.	4,188.24	4,188.24
Dean, Theodore	19,006.86	19,006.86
Dickson, Michael F.	5,568.76	5,568.76
Douglas, Derrick B.	22,006.20	22,006.20
Dunn, Dorothy D.	12,303.75	12,303.75
Dunn, Eugene	9,268.00	9,268.00
Fisher, Carl	4,480.73	4,480.73
Fulcher, Robert	4,868.50	4,868.50
Heim, Susan V.	10,397.06	10,397.06
Howe, Leah	25,499.90	25,499.90
Iannaco, Marlene	42,417.96	42,417.96
Judge, Francisco	7,892.50	7,892.50
Kelly, Donald P.	4,882.50	4,882.50
Matlack, Thomas K.	31,062.66	31,062.66
Matousch, Dennis J.	2,296.00	2,296.00
Mc Veigh, Joseph	16,007.18	16,007.18
Montanti, Mark	449.75	449.75
Muller, John L.	9,647.25	9,647.25
Newman, Sharon L.	11,294.00	11,294.00
Ottinger, Anna Marie	14,684.09	14,684.09
Pacione, Rosemarie	3,864.00	3,864.00
Palumbo, Joseph	2,821.00	2,821.00
Peloso, Richard P.	3,248.00	3,248.00
Phy, Sr., Edward E.	18,305.22	18,305.22
Reitenouer, Steven J.	353.50	353.50
Subtotal	\$ 390,620.23	\$ 390,620.23

Schedule D (Continued) - OAL Order 5-6-2010

Maintenance and transportation employee expenses

<u>Employees</u>	DOE Amount	OAL Order - 5/6/2010
Saunders, Betty	\$ 21,734.80	\$ 21,734.80
Schleinkofer, Gary E.	12,994.20	12,994.20
Schleinkofer, Amanda K.	12,438.25	12,438.25
Schmidheiser, Brian M.	2,884.00	2,884.00
Surowiec, Marie C.	22,889.03	22,889.03
Tiedman, Daniel L.	3,542.00	3,542.00
Tolbert, Clifford G.	288.00	288.00
VanArtsdalen, Bruce W.	15,128.12	15,128.12
Wampole, Dena	39,387.05	39,387.05
Williams, James	23,333.13	23,333.13
Total Employees' Salary	545,238.81	545,238.81
Allocation percentage	38.19%	38.95%
Amount allocated to PSD program	208,226.70	212,370.52
Charged to PSD	404,954.40	404,954.40
Total	\$ 196,727.70	\$ 192,583.88

<u>Allocation percentage</u>	PSD Schools	Total Archway Programs, Inc.
Revenues - per CPA audit report	\$ 7,427,879	\$ 17,677,296
Less: Required billing adjustment (Schedule O)	888,876	888,876
Revenues after adjustment	\$ 6,539,003	\$ 16,788,420
Allocation percentage		38.95%

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Schedule E - OAL Order 5-6-2010

Salary expenses charged to PSD schools in excess of allowable amounts for that position

<u>Name:</u>	<u>DOE Amount</u>	<u>OAL Order - 5/6/2010</u>
Hughey, John D.	\$ 27,682.65	\$ 0.00
Matousch, Dennis M.	28,136.74	0.00
Total	\$ 55,819.39	\$ 0.00

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Schedule F - Revised OAL orders

Non-allowable fringe benefit costs applicable to non-allowable salary costs charged directly to PSD

	DOE Amount	Revised OAL orders
Employee fringe benefits charged to PSD-per general ledger	\$ 820,056.88	\$ 820,056.88
Less: Employee fringe benefits allocated to tuition waivers (Schedule N)	88,666.00	88,666.00
Employee fringe benefits charged to PSD program	731,390.88	731,390.88
Employees salaries charged to PSD-per general ledger (a)	3,643,682.77	3,643,682.77
Adjustments:		
Schedule A	348,898.11	297,086.82
Schedule B	34,057.89	34,057.89
Schedule D	196,727.70	192,583.88
Schedule E	55,819.39	0.00
Schedule K	306,626.00	306,626.00
Total adjustments	942,129.09	830,354.59
	2,701,553.68	2,813,328.18
Fringe benefit rate (b) & (c)	20.94%	22.51%
Allowable Fringe Benefit Costs	565,705.34	633,280.17
Non-allowable Fringe Benefit Costs	<u>\$ 165,685.54</u>	<u>\$ 98,110.71</u>

(a) This amount excludes salary costs for food services.

(b) Fringe benefit rate computation:

Total fringe benefits - per Archway's analysis	\$ 2,270,157.13
Total salaries - per Archway's analysis	10,842,843.41
Fringe benefit rate	<u>20.94%</u>

(c) Per Steven D. Weinstein, Esq.'s letter dated April 11, 2011

22.51%

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Schedule G-1 - OAL Order 5-6-2010

Non-allowable salary costs charged to organizational overhead expenses

<u>Name</u>	<u>DOE Amount</u>	<u>OAL Order - 5/6/2010</u>
Hill, Barbara	\$ 19,657.50	\$ 19,657.50
DeMesquita, Carol	81,536.08	81,536.08
Anderson, Eric	3,096.00	3,096.00
Hatoff, Mark	29,793.97	29,793.97
Mason, Sydelle	105,323.16	105,323.16
Rosen, Steve	50,393.04	50,393.04
Total	\$ 289,799.75	\$ 289,799.75

Schedule G-2 - OAL Order 5-6-2010

Non-allowable costs charged to organizational overhead expenses

<u>Name</u>	<u>DOE Amount</u>	<u>OAL Order - 5/6/2010</u>
Bey, Elaine	\$ 1,000.00	\$ 1,000.00
Bey, Elaine	1,000.00	1,000.00
Bey, Elaine	1,000.00	1,000.00
Bey, Elaine	7,000.00	7,000.00
Bey, Elaine	500.00	500.00
Bey, Elaine	500.00	500.00
Bey, Elaine	500.00	500.00
Bey, Haqqiulah	1,000.00	1,000.00
Bey, Haqqiulah	1,000.00	1,000.00
Bey, Haqqiulah	1,000.00	1,000.00
Bey, Haqqiulah	1,000.00	1,000.00
Bey, Haqqiulah	1,000.00	1,000.00
Bey, Haqqiulah	1,000.00	1,000.00
Faber, Gerald	1,000.00	1,000.00
Faber, Gerald	1,000.00	1,000.00
Faber, Gerald	1,000.00	1,000.00
Faber, Gerald	1,000.00	1,000.00
Faber, Gerald	1,500.00	1,500.00
Faber, Gerald	1,500.00	1,500.00
Faber, Gerald	1,500.00	1,500.00
Faber, Gerald	1,000.00	1,000.00
Faber, Gerald	1,000.00	1,000.00
Faber, Gerald	1,000.00	1,000.00
Faber, Gerald	1,000.00	1,000.00
Faber, Gerald	1,000.00	1,000.00
Faber, Gerald	1,000.00	1,000.00
Faber, Gerald	1,000.00	1,000.00
Faber, Gerald	1,000.00	1,000.00
Patricia Sperduto	1,450.00	1,450.00
Patricia Sperduto	1,225.00	1,225.00
C E I Printing	2,282.50	2,282.50
C E I Printing	1,185.00	1,185.00
Subtotal	\$ 40,142.50	\$ 40,142.50

Schedule G-2 (Continued) - OAL Order 5-6-2010

Non-allowable costs charged to organizational overhead expenses

<u>Name</u>	<u>DOE Amount</u>	<u>OAL Decision - 9/3/2008</u>
The News Journal	\$ 55.44	\$ 55.44
The News Journal	45.78	45.78
Summit Bank/Master Card	145.00	145.00
Summit Bank/Master Card	454.00	454.00
Summit Bank/Master Card	36.00	36.00
Summit Bank/Master Card	132.00	132.00
Summit Bank/Master Card	180.00	180.00
Summit Bank/Master Card	332.00	332.00
Total	<u>\$ 41,522.72</u>	<u>\$ 41,522.72</u>

**Non-allowable expenditures incurred by Drs. James I. & Sydelle H. Mason charged to
organizational overhead**

<u>Vendor</u>	DOE Amount	OAL Order - 5/6/2010
Summit Bank/Master Card	\$ 27.15	\$ 27.15
Summit Bank/Master Card	35.51	35.51
Summit Bank/Master Card	35.51	35.51
Dr. James I. Mason	330.80	330.80
Summit Bank/Master Card	250.00	250.00
Summit Bank/Master Card	22.00	22.00
Dr. James I. Mason	250.16	250.16
Summit Bank/Master Card	78.00	78.00
Summit Bank/Master Card	2,641.52	2,641.52
Summit Bank/Master Card	35.51	35.51
Summit Bank/Master Card	43.88	43.88
Summit Bank/Master Card	642.51	642.51
Dr. James I. Mason	300.00	300.00
Summit Bank/Master Card	985.40	985.40
Summit Bank/Master Card	48.07	48.07
Dr. James I. Mason	291.05	291.05
Dr. James I. Mason	498.88	498.88
Summit Bank/Master Card	498.12	498.12
Dr. James I. Mason	119.16	119.16
Dr. James I. Mason	121.30	121.30
Summit Bank/Master Card	39.16	39.16
Summit Bank/Master Card	83.53	83.53
Dr. James I. Mason	114.75	114.75
Dr. James I. Mason	77.22	77.22
Summit Bank/Master Card	30.22	30.22
Dr. James I. Mason	58.40	58.40
Dr. James I. Mason	49.01	49.01
Summit Bank/Master Card	89.05	89.05
Summit Bank/Master Card	36.04	36.04
Dr. James I. Mason	72.50	72.50
Dr. James I. Mason	72.84	72.84
Dr. James I. Mason	66.55	66.55
Subtotal	<u>\$ 8,043.80</u>	<u>\$ 8,043.80</u>

Schedule H (Continued) - OAL Order 5-6-2010

**Non-allowable expenditures incurred by Drs. James I. & Sydelle H. Mason charged to
organizational overhead**

<u>Vendor</u>	<u>DOE Amount</u>	<u>OAL Decision - 9/3/2008</u>
Dr. James I. Mason	\$ 74.94	\$ 74.94
Summit Bank/Master Card	73.67	73.67
Summit Bank/Master Card	228.41	228.41
Summit Bank/Master Card	35.51	35.51
Dr. James I. Mason	116.43	116.43
Summit Bank/Master Card	35.51	35.51
Dr. James I. Mason	402.34	402.34
Dr. James I. Mason	32.97	32.97
Dr. James I. Mason	153.23	153.23
Dr. James I. Mason	60.55	60.55
Summit Bank/Master Card	55.49	55.49
Summit Bank/Master Card	30.80	30.80
Summit Bank/Master Card	255.68	255.68
Dr. James I. Mason	37.10	37.10
Dr. James I. Mason	160.00	160.00
Dr. James I. Mason	150.00	150.00
Dr. James I. Mason	226.46	226.46
Dr. James I. Mason	206.47	206.47
Summit Bank/Master Card	28.00	28.00
Summit Bank/Master Card	38.10	38.10
Dr. James I. Mason	200.00	200.00
Summit Bank/Master Card	350.00	350.00
Dr. James I. Mason	89.45	89.45
Summit Bank/Master Card	47.68	47.68
Summit Bank/Master Card	507.18	507.18
Dr. James I. Mason	210.80	210.80
Dr. James I. Mason	377.58	377.58
Summit Bank/Master Card	56.25	56.25
Dr. James I. Mason	77.85	77.85
Summit Bank/Master Card	35.51	35.51
Summit Bank/Master Card	28.00	28.00
Dr. James I. Mason	75.35	75.35
Subtotal	<u>\$ 12,501.11</u>	<u>\$ 12,501.11</u>

Schedule H (Continued) - OAL Order 5-6-2010

**Non-allowable expenditures incurred by Drs. James I. & Sydelle H. Mason charged to
organizational overhead**

<u>Vendor</u>	DOE Amount	OAL Decision - 9/3/2008
Dr. James I. Mason	\$ 54.90	\$ 54.90
Summit Bank/Master Card	30.12	30.12
Dr. James I. Mason	91.59	91.59
Summit Bank/Master Card	45.54	45.54
Summit Bank/Master Card	36.52	36.52
Summit Bank/Master Card	35.51	35.51
Summit Bank/Master Card	45.00	45.00
Summit Bank/Master Card	33.98	33.98
Summit Bank/Master Card	353.00	353.00
Summit Bank/Master Card	32.71	32.71
Dr. James I. Mason	56.54	56.54
Dr. James I. Mason	70.40	70.40
Dr. James I. Mason	33.24	33.24
Dr. James I. Mason	129.75	129.75
Summit Bank/Master Card	39.99	39.99
Summit Bank/Master Card	303.80	303.80
Dr. James I. Mason	301.04	301.04
Summit Bank/Master Card	53.25	53.25
Dr. James I. Mason	55.43	55.43
Summit Bank/Master Card	35.51	35.51
Summit Bank/Master Card	29.85	29.85
Dr. James I. Mason	67.35	67.35
Summit Bank/Master Card	25.47	25.47
Summit Bank/Master Card	42.82	42.82
Summit Bank/Master Card	90.22	90.22
Summit Bank/Master Card	35.51	35.51
Dr. James I. Mason	228.55	228.55
Dr. James I. Mason	201.80	201.80
Dr. James I. Mason	87.28	87.28
Summit Bank/Master Card	20.85	20.85
Summit Bank/Master Card	166.00	166.00
Summit Bank/Master Card	37.95	37.95
Subtotal	<u>\$ 15,372.58</u>	<u>\$ 15,372.58</u>

**Non-allowable expenditures incurred by Drs. James I. & Sydelle H. Mason charged to
organizational overhead**

<u>Vendor</u>	<u>DOE Amount</u>	<u>OAL Decision - 9/3/2008</u>
Summit Bank/Master Card	\$ 189.46	\$ 189.46
Dr. James I. Mason	111.06	111.06
Summit Bank/Master Card	233.25	233.25
Summit Bank/Master Card	567.13	567.13
Dr. James I. Mason	126.12	126.12
Summit Bank/Master Card	31.65	31.65
Summit Bank/Master Card	1,084.50	1,084.50
Summit Bank/Master Card	40.49	40.49
Summit Bank/Master Card	237.95	237.95
Summit Bank/Master Card	190.95	190.95
Summit Bank/Master Card	33.70	33.70
Summit Bank/Master Card	154.48	154.48
Summit Bank/Master Card	34.30	34.30
Summit Bank/Master Card	644.34	644.34
Summit Bank/Master Card	57.95	57.95
Dr. James I. Mason	187.20	187.20
Summit Bank/Master Card	39.80	39.80
Dr. James I. Mason	33.99	33.99
Dr. James I. Mason	123.85	123.85
Summit Bank/Master Card	57.05	57.05
Dr. James I. Mason	200.16	200.16
Dr. James I. Mason	34.30	34.30
Dr. James I. Mason	34.68	34.68
Summit Bank/Master Card	28.85	28.85
Dr. James I. Mason	78.97	78.97
Dr. James I. Mason	134.39	134.39
Summit Bank/Master Card	32.26	32.26
Dr. James I. Mason	210.35	210.35
Summit Bank/Master Card	105.00	105.00
Summit Bank/Master Card	61.19	61.19
Dr. James I. Mason	135.74	135.74
Summit Bank/Master Card	35.51	35.51
Subtotal	\$ 20,643.20	\$ 20,643.20

Schedule H (Continued) - OAL Order 5-6-2010

**Non-allowable expenditures incurred by Drs. James I. & Sydelle H. Mason charged to
organizational overhead**

<u>Vendor</u>	<u>DOE Amount</u>	<u>OAL Decision - 9/3/2008</u>
Summit Bank/Master Card	\$ 27.74	\$ 27.74
Summit Bank/Master Card	41.66	41.66
Dr. James I. Mason	143.22	143.22
Dr. James I. Mason	56.62	56.62
Summit Bank/Master Card	35.30	35.30
Dr. James I. Mason	219.85	219.85
Summit Bank/Master Card	40.49	40.49
Summit Bank/Master Card	60.44	60.44
Dr. James I. Mason	35.83	35.83
Summit Bank/Master Card	35.83	35.83
Summit Bank/Master Card	76.41	76.41
Total	\$ 21,416.59	\$ 21,416.59

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Schedule I - Revised OAL orders

**Non-allowable fringe benefit costs applicable to non-allowable salary costs charged to
organizational overhead**

	DOE Amount	Revised OAL orders
Total employee fringe benefits charged to organizational overhead	\$ 283,330.47	\$ 283,330.47
Organizational overhead salaries-per general ledger	1,317,541.79	1,317,541.79
Deduct: Salary separately allocated (Schedule J1)	(596,234.29)	(596,234.29)
Deduct: Non-allowable salary costs (Schedule G1)	(289,799.75)	(289,799.75)
Adjusted salary total	431,507.75	431,507.75
Fringe benefit rate as computed by Archway (a) and (b)	20.94%	22.51%
Allowable fringe benefit costs	90,357.72	97,132.39
Non-allowable fringe benefit costs	<u>\$ 192,972.75</u>	<u>\$ 186,198.08</u>
(a) Fringe benefit rate computation:		
Total fringe benefits - per Archway's analysis	\$ 2,270,157.13	
Total salaries - per Archway's analysis	10,842,843.41	
Fringe benefit rate	<u>20.94%</u>	
(c) Per Steven D. Weinstein, Esq.'s letter dated April 11, 2011		<u>22.51%</u>

Schedule J - OAL Order 5-6-2010

Summary of allowable organizational overhead expenses

	DOE Amount	OAL Order - 5/6/2010
Archway programs organizational overhead charges - per general ledger	\$ 2,167,111.54	\$ 2,167,111.54
Deduct:		
1. Non-allowable salary costs (Schedule G1)	289,799.75	289,799.75
2. Non-allowable costs (Schedule G2)	41,522.72	41,522.72
3. Non-allowable fringe benefit costs (Schedule I)	192,972.75	186,198.08
Total non-allowable organizational overhead costs	524,295.22	517,520.55
Total allowable organizational overhead costs	<u>\$ 1,642,816.32</u>	<u>\$ 1,649,590.99</u>

Non-allowable organizational overhead costs

	DOE Amount	OAL Order - 5/6/2010
Organizational overhead charged in CPA audit report	\$ 835,306.00	\$ 835,306.00
Less: Allowable organizational overhead costs (Schedule J- page 2)	475,744.45	492,418.50
Total Non-allowable organizational overhead costs	<u>\$ 359,561.55</u>	<u>\$ 342,887.50</u>

Allocation of organizational overhead costs to PSD programs

	DOE Amount		OAL Order - 5/6/2010		
Totals	\$ 475,744.45		\$ 492,418.50		
	Organizational Overhead	Amount to be allocated	Allocation Percentage (a)	Overhead Allocated	
Expenditures allocated separately due to limitations:					
Salaries and fringe benefits (Schedule J1)	\$ 730,446.63				
Camden Co. (Schedule J1)		\$ 541,081.12	25.99%	\$ 140,626.98	
Gloucester Co. (Schedule J1)		540,085.34	8.17%	44,124.97	
Meals and other expenses					
Meals and other expenses (Schedule H)	21,416.59)				
Meals (Schedule J2)	1,455.68)			1,500.00	
Allowable organizational overhead not separately allocated	896,272.09	896,272.09	34.16%	306,166.55	
Total	\$ 1,649,590.99			\$ 492,418.50	
Allocation percentage (a)	Atco	Challenge	Camden Co.	Gloucester Co.	Total
Total direct costs-PSD (Schedule J1, page 3)	\$ 3,062,593	\$ 1,227,760	\$ 4,290,353	\$ 1,348,180	\$ 5,638,533
Total direct costs-all Archway programs	\$ 16,506,219	\$ 16,506,219	\$ 16,506,219	\$ 16,506,219	\$ 16,506,219
Percentage of direct costs of PSD schools to total direct costs of all Archway programs	18.55%	7.44%	25.99%	8.17%	34.16%
Total expenses-per CPA audit report					\$ 18,673,331
Less: Organizational overhead expenses-per general ledger					2,167,112
Total direct costs-all Archway programs					\$ 16,506,219

Archway Programs, Inc.-Camden and Gloucester Counties

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Schedule J (Continued) - OAL Order 5-6-2010

Summary of total direct costs-PSD

		DOE Amount	OAL Order - 5/6/2010
Ten month and extended school year programs:			
Direct and general and administrative charges			
to PSD schools- per general ledger		\$ 6,655,343.00	\$ 6,655,343.00
Deduct Non-allowable Expenses:			
1. Salaries	(Schedule A)	348,898.11	297,086.82
2. Salaries	(Schedule B)	34,057.89	34,057.89
3. Non-salary	(Schedule C)	19,323.58	19,323.58
4. Maintenance and Transportation	(Schedule D)	196,727.70	192,583.88
5. Salaries	(Schedule E)	55,819.39	0.00
6. Non-allowable fringe benefit costs	(Schedule F)	165,685.54	98,110.71
7. Expenses regarding			
one-on-one aides	(Schedule K)	370,833.48	375,647.51
Total non-allowable direct and			
general and administrative costs		1,191,345.69	1,016,810.39
Total direct costs-PSD		<u>\$ 5,463,997.31</u>	<u>\$ 5,638,532.61</u>

Salary expenses in excess of allowable amounts for that position charged to organizational overhead

		DOE Amount		OAL Order - 5/6/2010	
Camden Co.		\$ 534,147.01		\$ 541,081.12	
Gloucester Co.		\$ 533,163.99		\$ 540,085.34	

	<u>Title</u>	General and Administrative Salary	Maximum Allowable Camden Co.	Allowable Camden Co.	Maximum Allowable Gloucester Co.	Allowable Gloucester Co.
Mason, James	President and chairman of the board	\$ 220,000.06				
Scanlon, Robert G.	Chief executive officer	65,384.55				
		285,384.61	\$ 139,050.00	\$ 139,050.00	\$ 159,366.00	\$ 159,366.00
Poznek, Robert C.	Chief financial officer	111,999.90	122,151.00	111,999.90	104,520.00	104,520.00
Conrad, Dawn	Director of human resources	70,000.72	64,501.00	64,501.00	58,988.00	58,988.00
Smith, Joseph	MIS director	61,610.92	64,501.00	61,610.92	58,988.00	58,988.00
Wiegand, Elizabeth	Payroll manager	67,238.14	64,501.00	64,501.00	58,988.00	58,988.00
Total compensation		596,234.29		441,662.82		440,850.00
Fringe benefits rate (a)	22.51%					
Allowable fringe benefits		134,212.34		99,418.30		99,235.34
Total		\$ 730,446.63		\$ 541,081.12		\$ 540,085.34

(a) Per Steven D. Weinstein, Esq.'s letter dated April 11, 2011

Schedule J2 - OAL Order 5-6-2010

Entertainment expenses charged directly to organizational overhead in excess of maximum allowable amount

	DOE Amount	OAL Order - 5/6/2010
Totals	<u>\$ 1,500.00</u>	<u>\$ 1,500.00</u>

Each program (Atco, Challenge and Washington) is allowed to expend \$500.00 for entertainment. The organizational overhead expenditures of \$1,455.68 (Schedule J2, page 7) and \$21,416.59 (Schedule H) are allocated to the programs as follows:

	Entertainment Expenses	Allocation Percentage J-1, page 2	Allocation	School Limit	Organizational Overhead Allowable
Atco	\$ 22,872.27	18.55%	\$ 4,242.81	\$ 500.00	\$ 500.00
Challenge	22,872.27	7.44%	1,701.70	500.00	500.00
Washington	22,872.27	8.17%	1,868.66	500.00	500.00
Total		34.16%	\$ 7,813.17	\$ 1,500.00	\$ 1,500.00

Schedule J2 (Continued) - OAL Order 5-6-2010

Entertainment expenses charged directly to organizational overhead

<u>Expenditure</u>	<u>DOE Amount</u>	<u>OAL Order - 5/6/2010</u>
Summit Bank/Master Card	\$ 24.56	\$ 24.56
Summit Bank/Master Card	29.30	29.30
Summit Bank/Master Card	73.22	73.22
Summit Bank/Master Card	65.38	65.38
Summit Bank/Master Card	53.15	53.15
Summit Bank/Master Card	103.15	103.15
Summit Bank/Master Card	97.92	97.92
Summit Bank/Master Card	37.90	37.90
Summit Bank/Master Card	22.23	22.23
Summit Bank/Master Card	19.64	19.64
Summit Bank/Master Card	36.42	36.42
Summit Bank/Master Card	50.40	50.40
Summit Bank/Master Card	23.98	23.98
Summit Bank/Master Card	37.80	37.80
Summit Bank/Master Card	29.01	29.01
Summit Bank/Master Card	100.00	100.00
Rabil & Associates	35.79	35.79
Rabil & Associates	41.09	41.09
Rabil & Associates	104.94	104.94
Summit Bank/Master Card	104.46	104.46
Rabil & Associates	184.44	184.44
Rabil & Associates	57.87	57.87
Summit Bank/Master Card	44.20	44.20
Rabil & Associates	78.83	78.83
Total	\$ 1,455.68	\$ 1,455.68

Archway Programs,. Inc.-Camden and Gloucester Counties
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Schedule K - Revised OAL orders

**Expenses regarding one on one aides, which are paid by the applicable sending districts,
but were charged directly to PSD schools-reclassified to tuition waivers**

	DOE Amount	Revised OAL orders
Reclassifications of salaries of special class aides - per CPA audit report	\$ 306,626.00	\$ 306,626.00
Fringe benefit rate (a) and (b)	20.94%	22.51%
Fringe benefits	64,207.48	69,021.51
Total	\$ 370,833.48	\$ 375,647.51

(a) Fringe benefit rate computation:

Total fringe benefits - per Archway's analysis	\$ 2,270,157.13
Total salaries - per Archway's analysis	10,842,843.41
Fringe benefit rate	20.94%

(b) Per Steven D. Weinstein, Esq.'s letter dated April 11, 2011

22.51%

Schedule L - OAL Order 5-6-2010

Working Capital Fund Computation

Working capital B
Working capital B -Tuition waivers

DOE Amount	OAL Order - 5/6/2010
<u>\$ (76,704)</u>	<u>\$ (81,533)</u>
<u>\$ -</u>	<u>\$ 945</u>

		Atco School			Challenge School			Washington School		
	Total	Ten month school year	Extended school year	Extraordinary Services	Ten month school year	Extended school year	Extraordinary Services	Ten month school year	Extended school year	Extraordinary Services
Total public school placement expenditures-per CPA audit report	\$7,490,649	\$ 3,888,524	\$554,650	\$ 342,938	\$ 665,848	\$ 76,580	\$ 15,273	\$1,671,309	\$ 238,447	\$ 37,080
Deduct: Non-allowable costs (Below)	971,357	539,297	76,924	(11,013)	92,346	10,621	(490)	231,793	33,069	(1,190)
Adjusted public school placement expenditures	6,519,292	3,349,227	477,726	353,951	573,502	65,959	15,763	1,439,516	205,378	38,270
Times: Working capital fund percentage (N.J.A.C. 6:20-4.6)		0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15	0.15
Working capital A	977,894	502,384	71,659	53,093	86,025	9,894	2,364	215,927	30,807	5,741
Less: Prior year working capital fund balance -per Department of Education Limited Review report (a)	958,183	484,393	72,287	39,350	79,662	10,026	11,919	223,410	28,152	8,984
Working capital B (Schedule M)	<u>\$18,766.00</u>	<u>\$ 17,991</u>	<u>\$ (628)</u>		<u>\$ 6,363</u>	<u>\$ (132)</u>		<u>\$ (7,483)</u>	<u>\$ 2,655</u>	
Working capital B-Tuition waivers (Schedule N)	<u>\$ 945.00</u>			<u>\$ 13,743</u>			<u>\$ (9,555)</u>			<u>\$ (3,243)</u>

Non-allowable Cost to be Excluded

Total non-allowable cost	(Exhibit 1)	\$ 984,050
Deduct: Additional costs allowable for tuition waivers (Schedule N, page 1)		(12,693)
Total non-allowable cost to be excluded from tuition calculation		<u>\$ 971,357</u>

Working Capital Adjustment-Tuition Rate

Decrease in working capital per CPA audit report	\$ (62,767)
Increase in working capital-above	18,766
Total working capital adjustment	<u>\$ (81,533)</u>

(a) Individual working capital amounts were adjusted to conform to the method of allocation used in CPA audit report.

Schedule of Tuition Rate Computation

		Atco School		Challenge School		Washington School	
	Total	Ten month school year	Extended school year	Ten month school year	Extended school year	Ten month school year	Extended school year
Total public school placement expenditures-per CPA audit report	\$ 7,095,358	\$ 3,888,524	\$ 554,650	\$ 665,848	\$ 76,580	\$ 1,671,309	\$ 238,447
Deduct: Non-allowable costs (Schedule L)	984,050	539,297	76,924	92,346	10,621	231,793	33,069
Add/(Deduct): Working capital fund (Schedule L)	18,766	17,991	(628)	6,363	(132)	(7,483)	2,655
Total public school placement expenditures and working capital fund	<u>\$ 6,130,074</u>	\$ 3,367,218	\$ 477,098	\$ 579,865	\$ 65,827	\$ 1,432,033	\$ 208,033
Divided by:							
Ten month school year - public school pupils A.D.E. - per CPA audit report		135.4221		21.2778		82.3333	
Extended school year - public school pupils total enrolled days - per CPA audit report			3,714		314		1,767
Revised actual cost per pupil		\$ 24,864.61	\$ 128.46	\$ 27,252.11	\$ 209.64	\$ 17,393.12	\$ 117.73
Actual tuition rate charged		28,570.00	149.34	30,789.00	243.89	19,905.00	134.94
Tuition rate adjustment-to be refunded to schools		<u>\$ 3,705.39</u>	<u>\$ 20.88</u>	<u>\$ 3,536.89</u>	<u>\$ 34.25</u>	<u>\$ 2,511.88</u>	<u>\$ 17.21</u>

Schedule N - OAL Order 5-6-2010

Tuition waivers

		DOE Amount	OAL Order - 5/6/2010
Tuition waivers payroll and fringe benefits	(Schedule K)	\$ 370,833.48	\$ 375,647.51
Allocation of organizational overhead costs to tuition waivers	(Schedule N- page 2)	32,239.96	32,337.76
Allowable cost for tuition waivers		403,073.44	407,985.27
Cost of tuition waivers-per CPA audit report:			
Salaries - aides		306,626.00	306,626.00
Fringe benefits		88,666.00	88,666.00
		395,292.00	395,292.00
Additional allowable costs-Tuition Waivers		<u>\$ (7,781.44)</u>	<u>\$ (12,693.27)</u>

Additional charge for tuition waivers

Allowable cost for tuition waivers		\$ 403,073.44	\$ 407,985.27
Add: Working capital fund	(Schedule L)	0.00	945.00
Total tuition waiver expenditures and working capital fund		403,073.44	408,930.27
Actual tuition waivers charged - per CPA audit report		395,289.00	395,289.00
Additional amount charged to school districts		<u>\$ (7,784.44)</u>	<u>\$ (13,641.27)</u>

Schedule N (Continued) - OAL Order 5-6-2010

Allocation of organizational overhead costs to tuition waivers

	DOE Amount	OAL Order - 5/6/2010
Totals	\$ 32,239.96	\$ 32,337.76

	Organizational Overhead	Amount to be allocated	Allocation Percentage	Organizational Overhead Allocated
Expenditures allocated separately due to limitations:				
Salaries and fringe benefits (Schedule J1)	\$ 730,446.63			
Camden Co. (Schedule J1)		\$ 541,081.12	1.98%	\$ 10,713.41
Gloucester Co. (Schedule J1)		\$ 540,085.34	0.27%	1,458.23
Meals and other expenses				
Meals and other expenses (Schedule H)	21,416.59)			
Meals (Schedule J2)	1,455.68)			0.00
Allowable organizational overhead not separately allocated	896,272.09	896,272.09	2.25%	20,166.12
Totals	\$ 1,649,590.99			\$ 32,337.76

	Camden Co.	Gloucester Co.	Total
Allowable direct expenses - Tuition Waivers (Schedule N-page 1)	\$ 325,988	\$ 44,845	\$ 370,833
Total direct expenses (Schedule J-1, page 2)	\$ 16,506,219	\$ 16,506,219	\$ 16,506,219

Percentage of tuition waiver costs to total direct costs	1.98%	0.27%	2.25%
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Schedule O - OAL Order 5-6-2010

Schedule of tuition rate refunds

	Refund			Total
	Atco	Challenge	Washington	
Audubon	\$ 143.77			\$ 143.77
Barrington Borough	435.93		\$ 7,280.28	7,716.21
Bellmawr Borough	730.90			730.90
Beverly City	2,223.23			2,223.23
Black Horse Pike	9,318.47		5,083.56	14,402.03
Brooklawn	67.62			67.62
Camden City	94,678.64	\$ 39,312.54	11,683.90	145,675.08
Cherry Hill Township	3,705.39			3,705.39
Chesilhurst	3,979.82			3,979.82
Cinnaminson	4,418.68		3,114.30	7,532.98
Clayton			9,099.64	9,099.64
Collingswood Borough	494.55	962.98	1,520.73	2,978.26
Cumberland Regional			2,604.68	2,604.68
Deerfield			2,380.17	2,380.17
Delran	730.90			730.90
Deptford Township	4,436.29		5,556.74	9,993.03
DYFS	3,800.03			3,800.03
Eastern Regional	6,691.43			6,691.43
Egg Harbor Township	4,290.51			4,290.51
Elizabeth	3,809.61			3,809.61
Elk Township			404.97	404.97
Evesham Township	11,961.33	5,619.12		17,580.45
Ewing Township	4,436.29			4,436.29
Franklin Township (Gloucester)			5,986.98	5,986.98
Gateway Regional			2,511.88	2,511.88
Gibbsboro Borough	730.90			730.90
Glassboro			5,595.61	5,595.61
Gloucester City	23,126.25		3,239.67	26,365.92
Gloucester Township	15,067.38	7,683.31	42,340.87	65,091.56
Greenwich Township			602.45	602.45
Haddon Heights	267.78			267.78
Haddon Township			1,256.44	1,256.44
Subtotal	<u>\$ 199,545.70</u>	<u>\$ 53,577.95</u>	<u>\$ 110,262.87</u>	<u>\$ 363,386.52</u>

Schedule of tuition rate refunds

	Refund			
	Atco	Challenge	Washington	Total
Hamilton Twsp.-Mercer Co.	\$ 9,890.01	\$ 753.92		\$ 10,643.93
Hopewell Township			\$ 3,114.33	3,114.33
Kingsway	2,574.01			2,574.01
Laurel Springs	730.90			730.90
Lawnside Borough	267.78		5,570.34	5,838.12
Lower Camden County Region	43,014.97	14,442.88	18,350.48	75,808.33
Lenape	13,686.99			13,686.99
Lindenwold Borough	5,042.78	3,536.89	4,005.41	12,585.08
Magnolia	3,685.63		4,349.01	8,034.64
Medford Township	350.78			350.78
Merchantville Borough	7,409.18			7,409.18
Monroe Township	59,944.02	3,280.49	14,674.31	77,898.82
Moorestown	458.88			458.88
Mount Laurel Township	8,871.58			8,871.58
Oaklyn Borough			460.84	460.84
Palmyra	5,566.67			5,566.67
Paulsboro			7,817.93	7,817.93
Pemberton Township	21,397.97	1,198.26		22,596.23
Pennsauken Township	33,748.29	1,436.85	1,565.67	36,750.81
Pennsbury	2,737.54			2,737.54
Pineland Regional	4,436.29			4,436.29
Pine Hill Borough	3,097.90		9,991.65	13,089.55
Pittsgrove	1,852.69			1,852.69
Runnemede			2,511.88	2,511.88
Southern Regional	4,436.29			4,436.29
Sterling	370.54			370.54
Stratford Borough	7,687.14		2,511.88	10,199.02
Swedesboro	1,131.38			1,131.38
Toms River	6,980.63			6,980.63
Trenton	88,661.41	7,250.51		95,911.92
Vineland City	3,078.71		3,716.78	6,795.49
Voorhees	6,588.22		3,114.33	9,702.55
Subtotal	<u>\$ 547,244.88</u>	<u>\$ 85,477.75</u>	<u>\$ 192,017.71</u>	<u>\$ 824,740.34</u>

Schedule of tuition rate refunds

	Refund			Total
	Atco	Challenge	Washington	
Washington Township	\$ 3,612.24		\$ 10,439.82	\$ 14,052.06
West Deptford			5,023.76	5,023.76
Willingboro Township	15,864.51			15,864.51
Winslow Township	728.90		14,468.49	15,197.39
Woodbury			6,015.91	6,015.91
Woodlynne Township			7,982.14	7,982.14
Total	<u>\$ 567,450.53</u>	<u>\$ 85,477.75</u>	<u>\$ 235,947.83</u>	<u>\$ 888,876.11</u>

Schedule of tuition rate refunds - Atco

	Ten month school year			Extended school year			Tuition waivers			Total Refund
	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	
Audubon	\$ 1,111	\$ 967.23	\$ 143.77							\$ 143.77
Barrington Borough	3,492	3,038.46	453.54	\$ 5,227	\$ 4,496.10	\$ 730.90	\$ 21,689	\$ 22,437.51	\$ (748.51)	435.93
Bellmawr Borough				5,227	4,496.10	730.90				730.90
Beverly City	17,142	14,918.77	2,223.23							2,223.23
Black Horse Pike	58,568	50,972.45	7,595.55	15,681	13,488.30	2,192.70	13,612	14,081.78	(469.78)	9,318.47
Brooklawn	2,698	2,347.22	350.78	2,389	2,055.36	333.64	17,856	18,472.80	(616.80)	67.62
Camden City	665,671	579,345.70	86,325.30	69,592	59,864.46	9,727.54	39,848	41,222.20	(1,374.20)	94,678.64
Cherry Hill Township	28,570	24,864.61	3,705.39							3,705.39
Chesilhurst	28,570	24,864.61	3,705.39	2,837	2,440.74	396.26	3,531	3,652.83	(121.83)	3,979.82
Cinnaminson	28,570	24,864.61	3,705.39	10,454	8,992.20	1,461.80	21,689	22,437.51	(748.51)	4,418.68
Collingswood Borough	3,809	3,314.45	494.55							494.55
Delran				5,227	4,496.10	730.90				730.90
Deptford Township	28,570	24,864.61	3,705.39	5,227	4,496.10	730.90				4,436.29
DYFS	34,125	29,698.29	4,426.71				18,158	18,784.68	(626.68)	3,800.03
Eastern Regional	34,283	29,837.53	4,445.47	15,681	13,488.30	2,192.70	(1,560)	(1,613.26)	53.26	6,691.43
Egg Harbor Township	28,570	24,864.61	3,705.39	4,182	3,596.88	585.12				4,290.51
Elizabeth City	28,570	24,864.61	3,705.39	5,227	4,496.10	730.90	18,158	18,784.68	(626.68)	3,809.61
Evesham Township	66,821	58,155.84	8,665.16	23,894	20,553.60	3,340.40	1,311	1,355.23	(44.23)	11,961.33
Ewing Township	28,570	24,864.61	3,705.39	5,227	4,496.10	730.90				4,436.29
Gibbsboro Borough				5,227	4,496.10	730.90				730.90
Gloucester City	172,687	150,291.65	22,395.35	5,227	4,496.10	730.90				23,126.25
Gloucester Township	93,645	81,501.22	12,143.78	20,908	17,984.40	2,923.60				15,067.38
Haddon Heights	2,063	1,795.22	267.78							267.78
Hamilton Twsp.-Mercer Co.	59,361	51,663.69	7,697.31	15,681	13,488.30	2,192.70				9,890.01
Kingsway Regional	19,840	17,265.99	2,574.01							2,574.01
Laurel Springs				5,227	4,496.10	730.90				730.90
Lawnside Borough	2,063	1,795.22	267.78							267.78
Lower Camden County Regional	299,980	261,078.41	38,901.59	29,420	25,306.62	4,113.38				43,014.97
Lenape Regional	83,010	72,246.61	10,763.39	20,908	17,984.40	2,923.60				13,686.99
Lindenwold Borough	38,886	33,843.22	5,042.78							5,042.78
Magnolia	28,411	24,725.37	3,685.63							3,685.63
Medford Township	2,698	2,347.22	350.78							350.78
Merchantville Borough	45,870	39,922.62	5,947.38	10,454	8,992.20	1,461.80				7,409.18
Monroe Township	435,368	378,909.31	56,458.69	36,588	31,472.70	5,115.30	47,212	48,841.97	(1,629.97)	59,944.02
Moorestown				3,285	2,826.12	458.88				458.88
Subtotal	\$ 2,371,592	\$ 2,064,033.96	\$ 307,558.04	\$ 328,997	\$ 282,999.48	\$ 45,997.52	\$ 201,504	\$ 208,457.93	\$ (6,953.93)	\$ 346,601.63

Schedule of tuition rate refunds - Atco

	Ten month school year			Extended school year			Tuition waivers			Total Refund
	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	
Mount Laurel Township	\$ 57,139	\$ 49,729.22	\$ 7,409.78	\$ 10,454	\$ 8,992.20	\$ 1,461.80				\$ 8,871.58
Palmyra	37,299	32,463.23	4,835.77	5,227	4,496.10	730.90				5,566.67
Pemberton Township	148,086	128,880.73	19,205.27	15,681	13,488.30	2,192.70				21,397.97
Pennsauken Township	210,939	183,582.88	27,356.12	51,074	43,933.32	7,140.68	\$ 21,689	\$ 22,437.51	\$ (748.51)	33,748.29
Pennsbury	21,110	18,372.46	2,737.54							2,737.54
Pineland Regional	28,570	24,864.61	3,705.39	5,227	4,496.10	730.90				4,436.29
Pine Hill Borough	18,253	15,886.00	2,367.00	5,227	4,496.10	730.90				3,097.90
Pittsgrove	14,285	12,432.31	1,852.69							1,852.69
Southern Regional	28,570	24,864.61	3,705.39	5,227	4,496.10	730.90				4,436.29
Sterling	2,857	2,486.46	370.54							370.54
Stratford Borough	53,647	46,690.76	6,956.24	5,227	4,496.10	730.90				7,687.14
Swedesboro	8,730	7,598.62	1,131.38							1,131.38
Toms River	53,965	46,966.76	6,998.24	5,227	4,496.10	730.90	21,689	22,437.51	(748.51)	6,980.63
Trenton	637,577	554,896.04	82,680.96	53,165	45,731.76	7,433.24	42,067	43,519.79	(1,452.79)	88,661.41
Vineland City	28,570	24,864.61	3,705.39				18,158	18,784.68	(626.68)	3,078.71
Voorhees	30,792	26,799.08	3,992.92	24,790	21,324.36	3,465.64	25,220	26,090.34	(870.34)	6,588.22
Washington Township	11,428	9,945.84	1,482.16	15,233	13,102.92	2,130.08				3,612.24
Willingboro Township	105,549	91,859.82	13,689.18	18,668	16,057.50	2,610.50	12,610	13,045.17	(435.17)	15,864.51
Winslow Township				5,225	4,496.10	728.90				728.90
Total	\$ 3,868,958	\$ 3,367,218.00	\$ 501,740.00	\$ 554,649	\$ 477,102.54	\$ 77,546.46	\$ 342,937	\$ 354,772.93	\$ (11,835.93)	\$ 567,450.53

Schedule of tuition rate refunds - Challenge

	Ten month school year			Extended school year			Tuition waivers			Total Refund
	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	
Camden City	\$ 296,597	\$ 262,527.80	\$ 34,069.20	\$ 37,071	\$ 31,865.32	\$ 5,205.68	\$ (1,073)	\$ (1,110.66)	\$ 37.66	\$ 39,312.54
Collingswood Borough	8,381	7,418.02	962.98							962.98
Evesham Township	48,920	43,300.88	5,619.12							5,619.12
Gloucester Township	56,446	49,961.29	6,484.71	8,536	7,337.40	1,198.60				7,683.31
Hamilton Twsp.-Mercer Co.				5,366	4,612.08	753.92				753.92
Lindenwold Borough	30,789	27,252.11	3,536.89							3,536.89
Lower Camden County Regional	120,247	106,435.84	13,811.16	8,536	7,337.40	1,198.60	16,443	17,009.88	(566.88)	14,442.88
Monroe Township	28,565	25,284.51	3,280.49							3,280.49
Pemberton Township	10,434	9,235.74	1,198.26							1,198.26
Pennsauken Township	2,053	1,817.72	235.28	8,536	7,337.40	1,198.60	(98)	(100.97)	2.97	1,436.85
Trenton	52,683	46,631.09	6,051.91	8,536	7,337.40	1,198.60				7,250.51
Total	\$ 655,115	\$ 579,865.00	\$ 75,250.00	\$ 76,581	\$ 65,827.00	\$ 10,754.00	\$ 15,272	\$ 15,798.25	\$ (526.25)	\$ 85,477.75

Schedule of tuition rate refunds - Washington

	Ten month school year			Extended school year			Tuition waivers			Total Refund
	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	CPA Adjusted Tuition billing	DOE Adjusted Tuition billing	Refund	
Barrington Borough	\$ 38,594	\$ 33,723.52	\$ 4,870.48	\$ 18,892	\$ 16,482.20	\$ 2,409.80				\$ 7,280.28
Black Horse Pike	43,902	38,362.27	5,539.73				\$ 13,215	\$ 13,671.17	\$ (456.17)	5,083.56
Camden City	78,293	68,412.36	9,880.64	14,169	12,365.74	1,803.26				11,683.90
Cinnaminson	19,905	17,393.15	2,511.85	4,723	4,120.55	602.45				3,114.30
Clayton	72,101	63,001.36	9,099.64							9,099.64
Collingswood Borough	12,054	10,533.27	1,520.73							1,520.73
Cumberland Regional	19,905	17,393.12	2,511.88	4,723	4,120.55	602.45	14,786	15,295.65	(509.65)	2,604.68
Deerfield	19,905	17,393.12	2,511.88				3,833	3,964.71	(131.71)	2,380.17
Deptford Township	39,257	34,302.71	4,954.29	4,723	4,120.55	602.45				5,556.74
Elk Township	3,207	2,802.03	404.97							404.97
Franklin Township (Gloucester)	47,440	41,453.02	5,986.98							5,986.98
Gateway Regional	19,905	17,393.12	2,511.88							2,511.88
Glassboro	44,344	38,748.39	5,595.61							5,595.61
Gloucester City	20,900	18,262.78	2,637.22	4,723	4,120.55	602.45				3,239.67
Gloucester Township	266,838	233,165.21	33,672.79	68,417	59,689.11	8,727.89	1,715	1,774.81	(59.81)	42,340.87
Greenwich Township				4,723	4,120.55	602.45				602.45
Haddon Township	9,953	8,696.56	1,256.44							1,256.44
Hopewell Township	19,905	17,393.12	2,511.88	4,723	4,120.55	602.45				3,114.33
Lawnside Borough	39,368	34,400.11	4,967.89	4,723	4,120.55	602.45				5,570.34
Lower Camden County Regional	116,776	102,040.22	14,735.78	28,338	24,723.30	3,614.70				18,350.48
Lindenwold Borough	31,737	27,731.59	4,005.41							4,005.41
Magnolia	25,877	22,611.06	3,265.94	9,446	8,241.10	1,204.90	3,531	3,652.83	(121.83)	4,349.01
Monroe Township	101,958	89,091.04	12,866.96	14,169	12,361.65	1,807.35				14,674.31
Oaklyn Borough	3,649	3,188.16	460.84							460.84
Paulsboro	57,172	49,956.52	7,215.48	4,723	4,120.55	602.45				7,817.93
Pennsauken Township	7,630	6,666.78	963.22	4,723	4,120.55	602.45				1,565.67
Pine Hill Borough	79,178	69,186.35	9,991.65							9,991.65
Runnemede	19,905	17,393.12	2,511.88							2,511.88
Stratford Borough	19,905	17,393.12	2,511.88							2,511.88
Vineland City	19,905	17,393.12	2,511.88	9,446	8,241.10	1,204.90				3,716.78
Voorhees	19,905	17,393.12	2,511.88	4,723	4,120.55	602.45				3,114.33
Washington Township	77,961	68,123.63	9,837.37	4,723	4,120.55	602.45				10,439.82
West Deptford Township	39,810	34,786.24	5,023.76							5,023.76
Winslow Township	90,789	79,331.76	11,457.24	23,614	20,602.75	3,011.25				14,468.49
Woodbury	47,662	41,646.09	6,015.91							6,015.91
Woodlynne Township	63,254	55,271.86	7,982.14							7,982.14
Total	\$ 1,638,849	\$ 1,432,033.00	\$ 206,816.00	\$ 738,444	\$ 208,033.00	\$ 30,411.00	\$ 37,080	\$ 38,359.17	\$ (1,279.17)	\$ 235,947.93

FPSF FLORIO PERRUCCI
STEINHARDT & FADER

Attorneys at Law

11C

108 EUCLID STREET, WOODBURY, NJ 08096

Steven D. Weinstein, Esq.
sweinstein@fpsflawfirm.com

Our File No.: 54318.0001

November 21, 2011

Honorable Beatrice S. Tylutki, ALJ t/a
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625

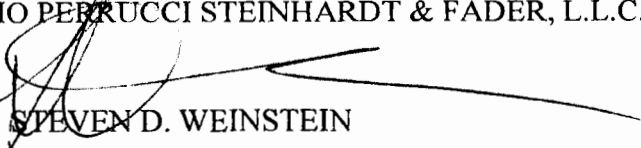
RE: Archway Programs, Inc. v. NJ Department of Education
OAL Docket No.: 10474-08
Agency Docket No.: 271-7/00, 381-10/00, etc.
1998-1999 School Year

NOV 25 12:59
OFFICE OF ADMINISTRATIVE LAW

Dear Judge Tylutki:

This letter acknowledges receipt on November 7, 2011 of the DOE's Revised Report for FYE 1999 from Deputy Attorney General Caroline Jones. This reflects the revision of certain column headings as we discussed during our recent conference call. Please be advised that Archway has no objections with respect to the mathematical calculations or the title headings on this Report. We, of course, reserve all rights as we have in the past to the substantive decisions leading to these Reports. Thank you.

Respectfully Yours,
FLORIO PERRUCCI STEINHARDT & FADER, L.L.C.

BY:  STEVEN D. WEINSTEIN

SDW:bf

cc: Caroline Jones, DAG
Daniel Martin (w/enc)
Robert Poznek (w/enc)

{00047840.DOC}

Rochelle Park Office
218 Rt. 17N, Suite 300
Rochelle Park, NJ 07662
(201) 843-5858 phone
(201) 843-5877 fax

Phillipsburg Office
235 Frost Avenue
Phillipsburg, NJ 08865
(908) 454-8300 phone
(908) 454-5827 fax

Bethlehem Office
60 W Broad St., Suite 102
Bethlehem, PA 18018
(610) 691-7900 phone
(610) 691-0841 fax

Woodbury Office
108 Euclid Street
Woodbury, NJ 08096
(856) 853-5530 phone
(856) 853-5531 fax

New York Office
80 Wall Street
Suite 815
New York, NY 10005
(212) 792-9070 phone

OAL DKT. NO. EDU 14597-11
AGENCY DKT. NO. 331-11/11

F.R., on behalf of minor child, J.R.J., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF HAMILTON, :
MERCER COUNTY, :
RESPONDENT. :
_____ :

The record of this matter, the parties' proposed Consent Agreement & Stipulation of Dismissal, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/14/12

Date of Mailing: 3/14/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 14597-11

AGENCY DKT. NO. 331-11/11

F.R. ON BEHALF OF MINOR, J.R.J.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF HAMILTON, MERCER COUNTY,**

Respondent.

F.R., petitioner, pro se

William R. Burns, Esq. for respondent (Destribats Campbell, LLC, attorneys)

Record Closed: January 26, 2012

Decided: January 27, 2012

BEFORE JOHN F. RUSSO, JR., ALJ:

This matter was transmitted to the Office of Administrative Law on December 9, 2011, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a consent agreement and stipulation of dismissal indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

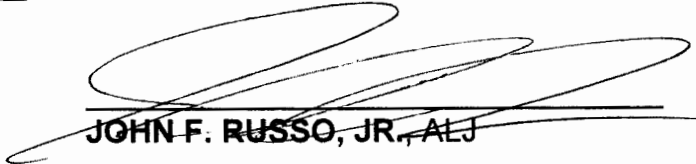
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

January 27, 2012
DATE



JOHN F. RUSSO, JR., ALJ

Date Received at Agency:

1/30/12

Date Mailed to Parties:

1/30/12

/bdt

Destribats Campbell , LLC
247 White Horse Avenue
Hamilton, New Jersey 08610
Tel: 609-585-2443
Fax:609-585-9508
Attorneys for Hamilton Township Board of Education

F.R., on behalf of minor J.R.J. Petitioner, v. Hamilton Township Board of Education, Mercer County Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL Docket Number: EDU 14597-2011S Agency Ref. No.: 331-11/1 CONSENT AGREEMENT & STIPULATION OF DISMISSAL
---	---

THIS MATTER, having been opened by Fredy Rodriguez *pro se* and the Hamilton Township Board of Education by and through their counsel William R. Burns, Esquire and the parties having reached a consent agreement.

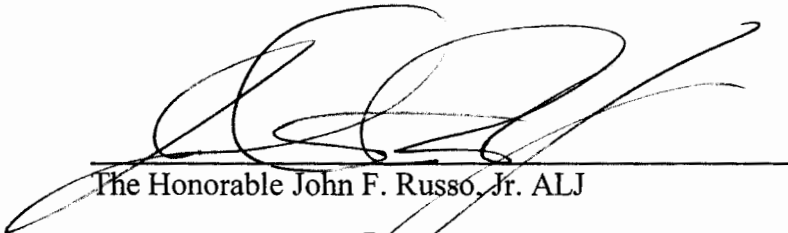
IT IS ON this the 26th day of January, 2012 AGREED as follow:

1. The parties agree that the above captioned matter is hereby dismissed.
2. The Hamilton Township Board of Education contends that J.R. was not eligible to attend Hamilton Township Board of Education schools during the period J.R.J. was enrolled as a student.
3. Fredy Rodriguez has consistently denied the allegations against him and continues to admit no fault in regard to their child's educational placement.
4. In an effort to avoid the risks and cost associated with protracted litigation, the Hamilton Township Board of Education and the Parties agree to settle this matter for \$3,827.42. Paid as follows:
 - a. \$1,000.00 immediately upon execution of this agreement.

b. \$100.00 a month due on the first of each month, beginning February 1, 2012, until the remaining balance of \$2,827.42 is satisfied.

5. If Fredy Rodriguez fails to make two consecutive payments, he agrees that a default judgment will be entered against him for the remainder of the amount due, plus attorney's fees and costs.
6. So long as timely payments are made and J.R.J. is a bona fide resident of Hamilton Township, J.R.J. shall be eligible to attend Hamilton Township Board of Education schools.

IN WITNESS WHEREOF, the parties have executed this Consent Agreement and Stipulation of Dismissal as of the date(s) indicated on the lines below.



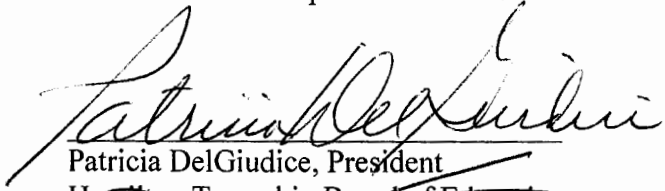
The Honorable John F. Russo, Jr. ALJ



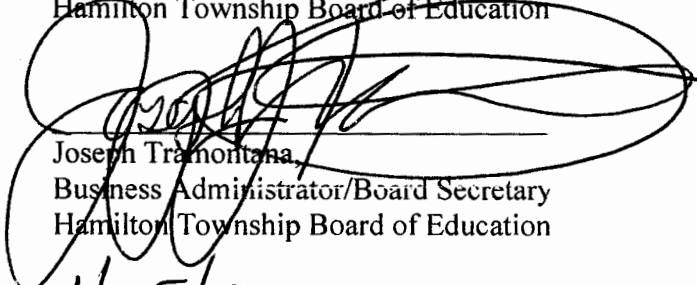
William R. Burns
Board Attorney
Hamilton Township Board of Education



Fredy Rodriguez



Patricia DelGiudice, President
Hamilton Township Board of Education



Joseph Tramontana,
Business Administrator/Board Secretary
Hamilton Township Board of Education

DATE: 1.26.12

1/25/12
DATE

FREDY RODRIGUEZ
DBA RODRIGUEZ LANDSCAPING
1560 E STATE ST. PH. 609-689-9570
HAMILTON TOWNSHIP, NJ 08609

60-7269/2313

1637

DATE 1.26.12

DELUXE WALLET OR DUPLICATE SAFETY PAPER

PAY TO THE
ORDER OF

Hamilton Twp Board of Education \$ 1,000.00
One Thousand & 00/100 DOLLARS



Security Features
Included.
Details on Back.



Sovereign Bank

MEMO

Jennifer Rodriguez-Jimenez

Fredy Rodriguez

MP

OAL DKT. NO. EDU 7275-10
 AGENCY DKT. NO. 116-6/10

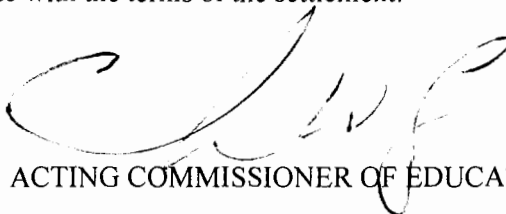
OLGA ZARETSKY,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	
OF HILLSBOROUGH, SOMERSET COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter, the proposed "Release" and the Initial Decision of the Office of Administrative Law pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

The Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following observation. Section 2 of the Release references actions that have apparently already taken place, and have therefore preceded consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have either successfully implemented the settlement terms, or have agreed upon mutually satisfactory alternate dates for the effectuation of same. Assuming the foregoing, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


 ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/14/12

Date of Mailing: 3/14/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7275-10

AGENCY DKT. NO. 116-6/10

OLGA ZARETSKY,

Petitioner,

v.

**BORAD OF EDUCATION OF
THE TOWNSHIP OF HILLSBOROUGH,
SOMERSET COUNTY,**

Respondent.

Robert M. Schwartz, Esq., for petitioner

Vittorio S. LaPira, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: January 25, 2012

Decided: January 26, 2012

BEFORE **RONALD W. REBA, ALJ:**

This matter was transmitted to the Office of Administrative Law (OAL) on July 9, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

RECEIVED
JUN DEC 21 A 11:28
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RELEASE

This Release, dated July 26, 2011 is given by the Releasor(s), **OLGA ZARESTKY-FAKELMANN**, referred to as "I," "me," or "Zarestky," to the **HILLSBOROUGH TOWNSHIP BOARD OF EDUCATION** and its members, officers, employers, administrators, agents, servants and all other persons who or which are or might be liable in the premises from any and all claims which I have or might have against them, referred to as "the Board."

1. Release. I release and give up any and all claims and rights which I may have against the Board in exchange for the payment/settlement terms described herein in Paragraph 2. This releases all claims, including those of which I am not aware and those not mentioned in this Release, and applies to claims resulting from anything which has happened up until now. More specifically, I knowingly and voluntarily release the Board from any claims asserted or that could have been asserted in the Verified Petition of Appeal filed before the Commissioner of Education styled *Olga Zarestky-Fakelmann v. Hillsborough Township Board of Education*, OAL Docket No. EDU-07275-2010, including but not limited to claims for back pay for the 2010-2011 school year.

2. Payment/Settlement. The Board has reinstated the K-12 District Supervisor of Fine and Performing Arts position, retroactive to July 1, 2011, and will appoint me to fill that position as of that date. As a result, I shall receive the benefits and salary as are due to me in accordance with the terms and conditions of the applicable collective negotiations agreement in force, with my salary fixed at \$127,870 for the 2011-2012 school year. The appointment to this position as of July 1, 2011 represents the full consideration that I have received for making this Release. I agree that I will not seek anything further, including any other payment for back pay, from the Board.

3. Who is Bound. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for the Board's benefit and all who succeed its rights and responsibilities, such as your heirs or the executor of your estate.

4. Signatures. I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.


OLGA ZARESTKY-FAKELMANN

RECEIVED
DEC 21 AM 11:28
STATE OF NEW JERSEY
OFFICE OF THE CLERK
STATE OF NEW JERSEY
OFFICE OF THE CLERK

STATE OF NEW JERSEY)

SS:

COUNTY OF)

BEFORE ME REMEMBERED that on this 26th day of July 2011, 2011, before me personally appeared Olga Zarestky-Fakelmann, who I am satisfied is the person mentioned in and who executed the within Release and who knows the contents thereof and thereupon I acknowledge that she signed, sealed and delivered the same as her voluntary acts and deeds for the uses and purposes therein expressed.

Katherine B. Shaughnessy
(Seal)

NOTARY PUBLIC

Katherine B. Shaughnessy
My Commission Expires
September 30, 2015

Prepared by:

/s/ Vittorio S. LaPira
Vittorio S. LaPira, Esq.

RESOLUTION

BE IT RESOLVED that the Hillsborough Township Board of Education (hereinafter referred to as the "Board") hereby accepts the Release executed by Olga Zarestky-Fakelmann, which is annexed hereto and made a part hereof by reference; and

BE IT FURTHER RESOLVED that the Board hereby appoints Olga Zarestky-Fakelmann to the position of K-12 District Supervisor of Fine and Performing Arts, effective July 1, 2011 in accordance with the terms and conditions contained in said Release; and

BE IT FURTHER RESOLVED that the Board President and Board Secretary/School Business Administrator are hereby authorized and directed to execute any documents necessary to effectuate said Release.

ROLL CALL VOTE:

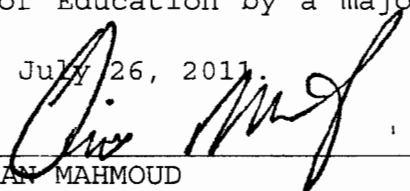
AYES: Mr. Gillette, Mrs. Haas, Mrs. Haley, Mr. Kinst, Ms. Le,
Dr. Rosenberg

NAYS: None

ABSTENTIONS: None

CERTIFICATION

I hereby certify that the within Resolution was adopted by the Hillsborough Township Board of Education by a majority vote at its duly authorized meeting on July 26, 2011.



AIMAN MAHMOUD
Board Secretary/School Business
Administrator

DATED: July 27, 2011

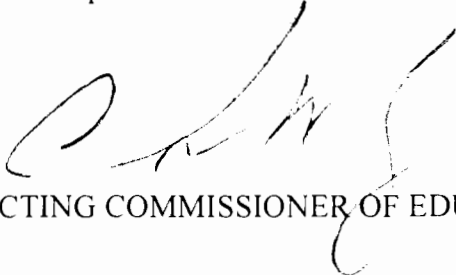
OAL DKT. NO. 661-12
(EDU 9191-11 ON REMAND)
AGENCY DKT. NO. 203-7/11

J.C. and V.M., on behalf of minor children, N.C. and Z.C.,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION ON REMAND
	:	
RESPONDENT.	:	

The record of this matter on remand, the amended consent order, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C. 1:1-19.1* have been reviewed.

Upon review, the Commissioner approves the settlement terms as enunciated in the "Amended Consent Order – Settlement" and adopts the Initial Decision as the final decision in this matter. This case is hereby dismissed, subject to compliance with the terms of settlement.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/14/12

Date of Mailing: 3/15/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

AMENDED CONSENT ORDER

SETTLEMENT

OAL DKT. NO. EDU 00661-12

ON REMAND

OAL DKT. NO. EDU 09191-11

AGENCY DKT. NO. 203-7/11

J.C. AND V.M. O/B/O MINOR CHILDREN

N.C. AND Z.C.,

Petitioners,

v.

FORT LEE BOARD OF EDUCATION,

BERGEN COUNTY,

Respondent.

Jason L. Bittiger, Esq., representing petitioners (Law Office of Dennis A. Maycher, attorneys)

Yaacov Brisman, Esq., representing respondent (Cleary, Giacobbe, Alfieri, Jacobs, attorneys)

Record Closed: February 2, 2012

Decided: February 14, 2012

BEFORE SANDRA ANN ROBINSON, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on August 4, 2011, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Hearings were scheduled for November 1 and 2, 2011. During the pendency of the case at the OAL, the parties reached a tentative settlement. The terms of settlement were presented in a **CONSENT ORDER** that had the approval of the Fort Lee Board of Education (Board); by resolution the Board adopted it on November 7, 2011. However, the Acting Commissioner of Education reviewed the **CONSENT ORDER** and Remanded the document back to the OAL on January 17, 2012, for the following reasons:

1. The language in paragraphs 2 through 6 references "Actions that may have already taken place, thus preceding consideration of the settlement by the Commissioner of Education."
2. The language in paragraph 7 infers that, "The Administrative Law Judge (ALJ) seeks to retain jurisdiction of the matter in the event that a dispute arises regarding the district of residence of the minor children."
3. The petitioner's signature is required on the **CONSENT ORDER**, so as to perfect an agreement between the parties.

On January 26, 2012, counsel for the parties and the undersigned completed a conference for the purpose of discussing amendments of the initial **CONSENT ORDER**. Thereafter, on January 30, 2012, the parties agreed on the modifications as set forth in the attached **AMENDED CONSENT ORDER**.

FINDINGS AND CONCLUSION

I have reviewed the **AMENDED CONSENT ORDER** and I **FIND**:

1. The parties have amended paragraphs 2 through 6 of the initial **CONSENT ORDER**, which were addressed by the Acting Commissioner of Education and were cause for the rejection of the initial **CONSENT ORDER**. The parties presented the required modifications in the attached **AMENDED CONSENT ORDER**.
2. The parties have voluntarily agreed to the **AMENDED CONSENT ORDER** pending the approval of the Commissioner of Education.
3. The **AMENDED CONSENT ORDER** fully disposes of all issues in controversy and is consistent with the law.

I therefore **CONCLUDE** that the **AMENDED CONSENT ORDER** meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved.

ORDER

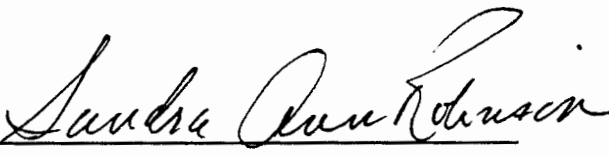
I approve the **AMENDED CONSENT ORDER SETTLEMENT** and hereby **ORDER** that the parties comply with the settlement terms, and that these proceedings be concluded, pending approval by the Commissioner of Education.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

February 14, 2012

DATE


SANDRA ANN ROBINSON, ALJ

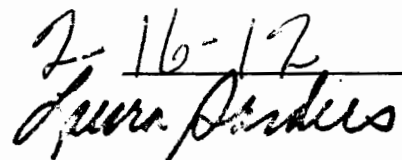
Date Received at Agency:

Date Mailed to Parties:

FEB 16 2012

Ir

attachment


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

J.C. and V.M., o/b/o N.C. and Z.C., minor
children,

Petitioners,

v.

FORT LEE BOARD OF EDUCATION

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No.: EDU 09191-2011-N
Agency Reference No.: 203-7/11

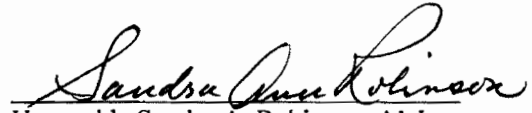
AMENDED CONSENT ORDER

THIS MATTER having been opened to the Court by the Law Offices Dennis A. Maycher, P.C., attorneys for Petitioners J.C. and V.M., o/b/o N.C. and Z.C. (Dennis A. Maycher, Esq., appearing), seeking to challenge Respondent Fort Lee Board of Education's (Yaacov Brisman, Esq., appearing) residency determination for said minor children, and the parties having reached an amicable resolution of this matter, and good cause having been shown;

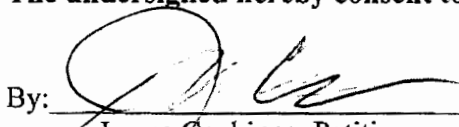
IT IS on this 10th day of February, 2012, ordered that:

1. The Consent Order entered by the Hon. Harold C. Hollenbeck, J.S.C., on June 5, 2008, granted residency for purposes of education to remain in Fort Lee only so long as the mother of Z.C. and N.C. resided in Fort Lee. As Z.C.'s and N.C.'s mother no longer resides in Fort Lee, the residency of the custodial parent, J.C., residing at 4 Seventh Street, Englewood Cliffs, New Jersey, shall now be the district of residency for the purposes of Z.C.'s and N.C.'s education.
2. Z.C. shall be entitled to attend Fort Lee Middle School through the completion of 8th grade. The Fort Lee Board of Education shall not seek compensation and/or reimbursement from Petitioners with regard to Z.C.'s attendance at Fort Lee Middle School.
3. Z.C. must continue the current residency and visitation arrangement she has with Petitioners. As such, Z.C. must continue to primarily reside with her aunt, V.M., who resides at 524 Bluff Road, Fort Lee, New Jersey.
4. Petitioners must enroll N.C. in the Englewood Cliffs School District upon approval of this Consent Order by the Commissioner of Education.

5. The District must provide all reasonable assistance with respect to enforcing N.C.'s current IEP, which will be prepared by the Fort Lee Board of Education within five (5) days of the approval of this Consent Order by the Commissioner of Education.
6. Upon approval of this Consent Order by the Commissioner of Education, the District and Petitioners shall split the costs of N.C.'s out-of-district residential placement from October 1, 2010 to June 30, 2011, with the District reimbursing \$50,000.00 to Petitioner J.C.
7. This Consent Order shall be subject to the Fort Lee Board of Education duly ratifying the terms of this Order within thirty (30) days of approval of same by the Commissioner of Education.
8. The parties shall be responsible for the payment of their own counsel fees and costs associated with the prosecution and defense of this matter. Neither Petitioners nor Respondent shall seek reimbursement and/or contribution from the other party relative to same.

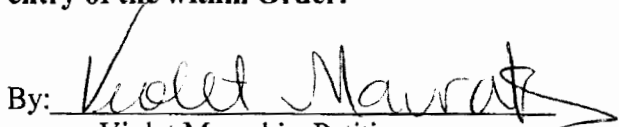

Honorable Sandra A. Robinson, ALJ

The undersigned hereby consent to the form and entry of the within Order:

By: 

James Cockinos, Petitioner

Dated: January 30, 2012

By: 

Violet Mavrikis, Petitioner

Dated: January 30, 2012

#2B

RESOLUTION NO. 24593

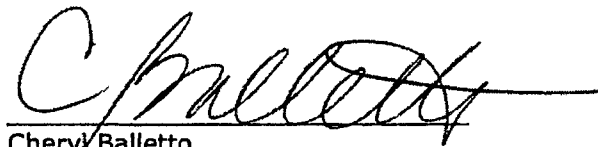
SETTLEMENT AGREEMENT – RESIDENCY ISSUE

BE IT RESOLVED, that upon the recommendation of the Acting Superintendent of Schools, the Board of Education agrees to a settlement in the matter of **JC and MV v. FLBOE** and authorizes the Business Administrator to disburse the monies as indicated in the confidential agreement.

DATED: November 7, 2011

*Please note that Mr. John Bang, Mrs. Linda McCue and Mrs. Angela Napolitano abstained.

*I hereby certify that this is a true and exact copy of resolution #24593 approved by the Fort Lee Board of Education on November 7, 2011.


Cheryl Balletto
Business Administrator/Board Secretary

Motion by: Mrs. Linda McCue

Seconded by: Mrs. Angela Napolitano

☒ Motion Passed

☐ Motion Failed

ROLL CALL	AYES	NAYS	ABSENT	ABSTAINED
MR. JOHN BANG	X			
MR. CARMELO LUPPINO	X			
MRS. LINDA McCUE	X			
MRS. ANGELA NAPOLITANO	X			
MR. YUSANG PARK	X			
MR. PETER SUH			X	
MR. JOSEPH SURACE	X			
MS. HELEN YOON	X			
MR. ARTHUR LEVINE	X			

OAL DKT. NO. EDU 10979-11
AGENCY DKT. NO. 249-8/11

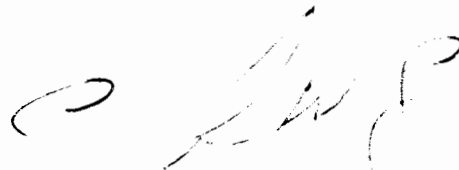
IN THE MATTER OF THE TENURE :
HEARING OF ROBERT MORRIS, :
BUENA REGIONAL SCHOOL DISTRICT, : COMMISSIONER OF EDUCATION
ATLANTIC COUNTY. : DECISION

The record of this matter, the parties' proposed Settlement Agreement and Release, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon careful review of the record, the Commissioner concurs with the Administrative Law Judge that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6. Consequently, this matter is no longer deemed to be a contested case before the Commissioner.

Accordingly, the parties' settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. A copy of this decision and its underlying record shall be forwarded to the State Board of Examiners for review and action as that body deems appropriate.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/14/12
Date of Mailing: 3/15/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10979-11

AGENCY DKT. NO. 249-8/11

**IN THE MATTER OF THE TENURE
HEARING OF ROBERT MORRIS,
BUENA REGIONAL SCHOOL DISTRICT,
ATLANTIC COUNTY.**

Vincent J. Pancari, Esq., for petitioner, Buena Regional School District
(Capizola, Pancari, Lapham & Fralinger, attorneys)

Ned P. Rogovoy, Esq., for respondent, Robert Morris

Record Closed: January 20, 2012

Decided: January 23, 2012

BEFORE W. TODD MILLER, ALJ:

This matter was transmitted to the Office of Administrative Law on September 15, 2011, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement is in compliance with the standards set forth in In Re Cardonick, 1990 S.L.D. 842 (1990):
3. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

January 23, 2012

DATE


W. TODD MILLER, ALJ

Date Received at Agency:

1/30/12

Date Mailed to Parties:

1/30/12

/sd

CAPIZOLA, PANCARI, LAPHAM & FRALINGER
A Professional Corporation
100 North Main Road
Vineland, New Jersey 08360
(856) 692-6900

Attorneys for Buena Regional School District

IN THE MATTER OF TENURE CHARGES
BROUGHT AGAINST ROBERT MORRIS,
TEACHER, BUENA REGIONAL SCHOOL
DISTRICT, ATLANTIC COUNTY,
NEW JERSEY

COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

OAL Docket No. EDU-10979-2011S
Agency Ref. No. 249-8/11

**SETTLEMENT AGREEMENT
AND RELEASE**

THIS SETTLEMENT AGREEMENT AND RELEASE (hereinafter referred to as the "Settlement Agreement") is made effective as of the 17th day of JANUARY, 2012, by and between the Petitioner, Buena Regional Board of Education, Buena Regional School District, Atlantic County, New Jersey (hereinafter referred to as the "Board") and the Respondent, Robert Morris, (hereinafter referred to as the "Respondent"), collectively the "Parties".

WHEREAS, the Board is a body corporate and politic of the State of New Jersey, charged with the statutory responsibilities of the management and administration of the Buena Regional School District in Atlantic County, New Jersey; and

WHEREAS, the Respondent is employed by the Board as a tenured teacher; and

WHEREAS, the Board filed certain tenure charges against Respondent alleging conduct unbecoming an employee, violations of District policy and applicable law and regulations, and insubordination, more specifically by (a) failing to obtain parental permission to take and publish student photographs; (b) making fellow staff uncomfortable; (c) failing to adhere to District computer use policy; (d) failing to follow District policy concerning classroom lighting requirements; (e) inappropriate comments/physical conduct with students; (f) overstepping his responsibilities with respect to disciplinary matters and taking actions in violation of students' privacy; (g) collectively demonstrating a pattern of unbecoming conduct, violations of school policy and insubordination as

more specifically described in the tenure charges filed by the Board on August 30, 2011 (the "Tenure Charges") attached hereto as **Exhibit A**; and

WHEREAS, the Respondent, by formal response, contested the tenure charges and offered explanations for his actions and behavior, attached hereto as **Exhibit B**; and

WHEREAS, the Commissioner of Education for the State of New Jersey (the "Commissioner") referred said charges to the Office of Administrative Law for a plenary hearing before the Honorable William T. Miller, A.L.J.; and

WHEREAS, a telephonic pre-hearing conference was held on October 7, 2011; and

WHEREAS, a pre-hearing Order was prepared and filed on October 7, 2011; and

WHEREAS, at the first hearing date scheduled for December 8, 2011, the parties discussed terms and conditions of a settlement agreement which they believe will resolve the dispute; and

WHEREAS, the parties wish to settle all controversies among and between them, including the charges contained in the tenure charges, the defenses and counterclaims, if any, contained in the response, and any and all related or unrelated claims, known or unknown, which could have been asserted by the Board or Respondent; and

WHEREAS, the Respondent acknowledges that on Monday, January 16, 2012, Respondent signed an undated letter of resignation and acknowledges understanding that the settlement agreement would be put in writing corresponding to the representations discussed between the parties and their attorneys attached hereto as **Exhibit C**; and

WHEREAS, this Agreement conforms to the discussions between the parties and their attorneys; and

WHEREAS, the parties acknowledge that the merits of the controversy are in dispute and that neither the Board nor Respondent admits any liability to either, but have reasons to desire that the matter be resolved; and

WHEREAS, the Board and Respondent specifically recognize and acknowledge that any settlement is contingent upon approval by the Commissioner as required by and consistent with the New Jersey Administrative Code, §6A:3-5.6 and *In the Matter of the Tenure Hearing of Frank Cardonick*, State Board of Education decision of April 6, 1983 (1990 School Law Decisions, S.L.C. 842, 846); and

NOW, THEREFORE, in consideration of the agreements, promises, covenants and conditions contained herein, the adequacy and sufficiency of which are expressly acknowledged by the parties hereto, the parties agree as follows:

(1) **DISMISSAL OF ACTION.**

(a) The Board will accept Respondent's letter of resignation and shall pay to Respondent the sum of Fifty Thousand Dollars (\$50,000.00). On the date this settlement is approved by the Commissioner of Education, Respondent shall be removed from the Board's payroll retroactive to the date of his resignation and no additional further payments, salary or benefits (including health benefits) shall be paid to Respondent.

(b) Payment of the \$50,000.00 shall be made to Respondent or his assignee in two equal payments of \$25,000.00 in the following manner: The Board, within two (2) weeks (ten (10) business days) of the Commissioner of Education's approval of this Settlement Agreement, shall issue a check payable to the order of Respondent or his assignee in the amount of \$25,000.00. Thereafter, the Board, on or before July 16, 2012, shall issue a second and final check to Respondent or his assignee in the amount of \$25,000.00 representing full and final satisfaction of this Settlement Agreement. The Board will report the payments to the taxing authorities via an IRS Form 1099.

(c) In the event that it is subsequently determined that either party owes any employment taxes with respect to this payment, Respondent expressly acknowledges and agrees that he and/or his heirs, executors, administrators and assigns, and not the Board, will be responsible for the payment of any such taxes, liabilities, payments or costs, interest and penalties. Respondent agrees to indemnify and hold harmless the Board to the full extent of any such taxes, liabilities, payments or costs, interest and penalties, which may be assessed against the Board in connection with any payment made to or on behalf of Respondent hereunder, however, it is acknowledged by all parties that this is a lump sum settlement for consideration of Respondent's resigning his position and any and all matters that were or could have been brought in this proceeding by Respondent, or any matter that could be brought against the Board in the future, and the Board agrees to dismiss with prejudice the tenure charges against Respondent and Respondent agrees to execute his resignation.

(d) Said payment received as provided in paragraphs 1(a) and 1(b) shall constitute full and absolute payment by the Board to Respondent for all salary, benefits, emoluments or other claims, rights or privileges Respondent has, may have, claims or may claim, including but not limited to salary for any period, accumulated sick leave, vacation or other paid leave, benefits, fringe benefits, pension contributions, in-kind or other contributions, opt-out or other payments excluding those benefits available under the Consolidated Omnibus Budget Reconciliation Act ("COBRA") and/or any pension payments Respondent may be eligible for under the New Jersey Teachers' Pension and Annuity Fund ("TPAF")

(e) Upon the approval of the Commissioner of Education of this Settlement Agreement, the Board shall be deemed to have withdrawn and dismissed the tenure charges and such charges shall also be deemed withdrawn and dismissed under the Department of Education, OAL Docket Number EDU-10979-2011S and Agency Reference Number 249-8/11, and the Board shall forward Respondent the first check provided for in paragraph 1(b) of this Settlement Agreement and Respondent's letter of resignation will become operative.

2. **RELEASE.** Respondent, personally and for his assignee, estate and/or heirs, waives, releases and gives up and all other claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that he may have against the Board and any and all of its officers, directors, agents, representatives and employees (present and forever), and their respective successors and assigns, heirs, executors and legal or personal representatives, based upon any act, event or omission occurring before the execution of this Settlement Agreement, including, but not limited to, any events related to, arising from or in connection with Respondent's employment with the Board or the tenure charges. Respondent specifically waives, releases and gives up any and all claims arising from or relating to his employment and/or association with the Board based upon any act, event or omission occurring before the execution of this Settlement Agreement, including, but not limited to, any claim that was asserted or could have been asserted under any federal or state statutes, regulations or common law or Board policies or regulations.

The released claims also specifically include, without limitation, any claims arising under any federal, state and local statutory or common law, such as Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, The Federal Age Discrimination and Employment Act, the Older Workers Benefit Protection Act, The Federal Family and Medical Leave Act, The Americans With Disabilities Act, The Employee Retirement Income Security Act, The Fair Labor Standards Act, The Equal Pay Act, The Rehabilitation Act of 1973, Age Discrimination in Employment Act ("ADEA"), the New Jersey Family Leave Act, the New Jersey Law Against Discrimination, the Fair Labor Standards Act, The New Jersey Wage and Hour Act, the New Jersey Conscientious Employee Protection Act, Title 18A of the New Jersey Statutes including any and all tenure statutes, and any and all amendments to any of same, and the Law of Contract and Tort, and any claim for recovery of costs and/or attorneys fees.

3. **NO CLAIMS PERMITTED/COVENANT NOT TO SUE.** Respondent waives his right to file any charge or complaint on his own behalf, to participate as a complainant, a plaintiff or a charging party in any charge or complaint, or to collect damages as a result of any charge or complaint

which may have been made by any other person or organization on his behalf, with respect to anything which has happened up to the execution of this Settlement Agreement, before any federal, state or local court or administrative agency against the Board except as such waiver is prohibited by law.

4. **ATTORNEY'S FEES.** Each party agrees that each party will bear its own costs and attorney's fees which have been incurred in connection with the within matter and in conjunction with the negotiations and preparation of this Settlement Agreement.

5. **NO ADMISSION OF LIABILITY.** It is expressly understood that neither the execution of this Settlement Agreement, nor any other action taken by the Respondent in conjunction with the Board's claims or this settlement, constitute admission by the Respondent or any violation of any law, duty or obligation. It is also understood that the acceptance of this settlement does not constitute any representation by the Board as to the merits of its claims or lack thereof.

6. **ENTIRE AGREEMENT.** This Settlement Agreement contains the sole and entire agreement between the parties hereto. Each party represents and acknowledges that prior to executing this Settlement Agreement, they consulted with or had an opportunity to consult with counsel, have had ample time to do so and that no party relied upon any representation or statement not set forth in this Settlement Agreement made by any other party hereto, or their counsel or representatives, with regard to the subject matter of this Settlement Agreement. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Settlement Agreement.

7. **BOARD RESOLUTION.** Attached hereto as **Exhibit D** is a true copy of a Resolution of the Board, adopted in compliance with the laws of the State of New Jersey, including the Open Public Meetings Act, duly satisfying the Settlement Agreement.

8. **COMMISSIONER'S APPROVAL.** It is expressly understood that this Settlement Agreement, and the settlement pursuant to the terms listed in the Settlement Agreement must first be approved by the Commissioner of Education and must meet the following standards as enumerated in N.J.A.C. 6A:3-5.6(a):

(a) **Accompaniment by Documentation as to the Nature of the Charges:** Petition of Charges are attached hereto and incorporated herein as **Exhibit A** with the response attached hereto and incorporated herein as **Exhibit B**.

(b) **Explanation of Circumstances Justifying the Settlement or Withdraw:** The Board agrees to request that the Commissioner of Education approve the Board's dismissal of tenure charges in light of Respondent's resignation and in light of the payment of \$50,000.00, made in two payments

of \$25,000.00, to Respondent in full and complete payment of all claims, losses, and so forth as more particularly enumerated herein including, but not limited to, any salary and other benefits for the 2011-2012 school year that might be due to Respondent. The Board believes that there are circumstances that justify settlement of the tenure charges. First, Respondent has agreed to resign his position in the District and has agreed not to seek any further employment within the District. Second, it is in the financial interest of the District to dispose of this matter by the payment of \$50,000.00 to Respondent. Currently, Respondent commands a salary over \$50,000.00 and will continue to have his salary increased on a yearly basis. Respondent also receives other benefits as part of his employment with the District. Payment of \$50,000.00 to Respondent will alleviate any back and future payments to Respondent, as well as any additional payments for earned vacation, sick pay, or any other benefits and payment of any other claims, losses, obligations and so forth as more particularly enumerated herein. Third, given the fact specific nature of the charges against Respondent and the inherent uncertainty of litigation, the Board believes it is in the best interest of the District to settle this matter with a guarantee that Respondent will no longer teach within the District. Respondent's resignation alleviates the need to further pursue any charges. In executing this Agreement, Respondent understands the ultimate decision with regard to the resolution of the tenure charges lies with the Commissioner of Education and in the event that the New Jersey Commissioner of Education rejects the settlement between the Board and Respondent, then this Agreement is completely null and void and the tenure charges currently pending will continue to be processed. Respondent understands and has been advised by his counsel of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate. Attached hereto as **Exhibit E** is Respondent's Affidavit showing that he has been counseled in every respect and knows that the Board of Examiners can act independently.

(c) Consent of both the charged and charging parties is evidenced by this Settlement Agreement.

(d) Indication the charged party entered into the Agreement with a full understanding of his rights is evidenced by this Settlement Agreement and is evidenced by Respondent's Affidavit attached hereto as **Exhibit E**.

(e) A showing that the Agreement is in the public interest is evidenced by this Settlement Agreement. This Settlement Agreement demonstrates that it is in the public interest as a result of the parties' separation and satisfaction of any and all claims related to the tenure charges. Additionally, the public interest is supported by saving valuable education time for both students and

District Staff. It is anticipated that students, teachers and administrators within the District would be required to miss valuable education time when school is in session in order to testify in this matter. Further, the avoidance of subjecting student witnesses to the stress of testifying in Court is of paramount importance to the Board, which is alleviated by approval of this Settlement Agreement. District students are also insured by approval of this Settlement Agreement that they would not have to interact with Respondent again. With respect to the teachers and administrators involved, the District avoids both the direct and indirect costs of having to provide substitutes for their services which includes not only the out of pocket costs, but the impact on the other students in the District. Lastly, this proposed Settlement Agreement represents cost savings to the Board and the public as a result of settling this matter and is significantly less than the costs associated with litigating the tenure charges, including appeals. Further, the cost savings to the Board and the public with the proposed payment to Respondent is also significantly less than keeping Respondent on staff. These cost savings associated with this matter will be able to be redirected in further focusing on other more valuable educational goals and needs within the District.

(f) Where the charged party is a teaching staff member, a showing that the teaching staff member has been advised by counsel and, by recitation of this provision that Respondent is advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of teaching certificate. Such showing is demonstrated by this Settlement Agreement and by **Exhibit E**.

9. **NON-DISCLOSURE**. Except as may be otherwise required of the Board pursuant to the Open Public Records Act and/or Open Public Meetings Act, such obligations may be modified by federal or state statutory or administrative provisions as to the privacy of personnel records, no party will broadcast or publicize financial or other elements of this settlement to any third party. The parties are free to respond to inquiries made of them by indicating that the matter has been amicably resolved or satisfactorily settled, and recognize that the Board may disclose the substantive details of this settlement pursuant to a lawful request by providing a lawful request with a copy of this Settlement Agreement.

10. **REFERENCE**. In the event the Board is contacted with regard to Respondent's employment, the Board will not provide any reference, positive or negative, and will only provide Respondent's dates of employment.

WHEREFORE, intending to be legally bound, the parties have agreed to the aforesaid terms and indicate their agreement by signing below.

PLEASE READ CAREFULLY. THIS AGREEMENT IS A LEGAL DOCUMENT AND INCLUDES A RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS, INCLUDING, WITHOUT LIMITATION, ALL CLAIMS ARISING UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, THE OLDER WORKERS BENEFIT PROTECTION ACT, THE AMERICANS WITH DISABILITY ACT, TITLE XII OF THE ADMINISTRATIVE RIGHTS ACT OF 1964, THE EQUAL PAY ACT, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, THE FAIR LABOR STANDARDS ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT, THE NEW JERSEY LAW AGAINST DISCRIMINATION, THE NEW JERSEY CONSCIENTIOUS EMPLOYEE PROTECTION ACT, TITLE 18A OF THE NEW JERSEY STATUTES INCLUDING ANY AND ALL TENURE STATUTES, STATE AND FEDERAL FAMILY LEAVE LAWS, STATE AND FEDERAL WAGE AND HOUR LAWS AND ANY OTHER FEDERAL, STATE, LOCAL OR COMMON LAW CLAIM.

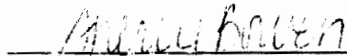
AGREED AND ACCEPTED:



ROBERT MORRIS

Date: 1-17-13

Sworn and subscribed to
before me this 12th day
of January, 2013.


Notary Public

Sherrie Bowen
Notary Public of New Jersey
Commission Expires 12/03/2009/14

I HEREBY ACKNOWLEDGE AND THAT I HAVE FULL AUTHORITY TO ACT ON BEHALF OF AND TO BIND THE BOARD TO THE TERMS SET FORTH IN THIS AGREEMENT.

Attested by:


JANN COHEN,
Business Administrator/Board Secretary

BUENA REGIONAL BOARD OF EDUCATION

BY: 
DAVID ANDERSON
President

CAPIZOLA, PANCARI, LAPHAM & FRALINGER
A Professional Corporation
100 North Main Road
Vineland, New Jersey 08360
(856) 692-6900

Attorneys for Buena Regional School District

IN THE MATTER OF TENURE CHARGES
BROUGHT AGAINST ROBERT MORRIS,
TEACHER, BUENA REGIONAL SCHOOL
DISTRICT, ATLANTIC COUNTY,
NEW JERSEY

:
: BEFORE THE COMMISSIONER
: OF EDUCATION, OF THE STATE
: OF NEW JERSEY
:

: Agency Docket Number:
:

: **STATEMENT OF TENURE CHARGES**

Walter W. Whitaker, Jr., Superintendent of the Buena Regional School District, County of Atlantic, State of New Jersey ("District"), pursuant to N.J.S.A. 18A:6-10 and N.J.S.A. 18A:6-11, hereby institutes the following tenure charges against teacher Robert Morris for conduct unbecoming an employee, violations of District policy and applicable law and regulations and insubordination:

Charge 1: Unbecoming Conduct and Policy Violation.

On or about December 17, 2008, Robert Morris, while assigned to the John C. Milanesi Elementary School as an ESL (English as a Second Language) teacher was observed taking photographs of students in the school hallway after the holiday concert. Mr. Morris was questioned about the reason for taking the pictures. He responded to another teacher that he "liked taking pictures of little girls".

Upon further investigation, Mr. Morris advised that he took pictures of students to put on the screensaver for his computer in his classroom. It was also determined that he had pictures of students from a field trip from a previous year posted on his personal Facebook page on the internet. Mr. Morris was reprimanded and verbally instructed as to the legal issues surrounding publishing photographs of students. A letter was placed in his personnel file regarding this matter.

EXHIBIT

A

Parental permission to take the student photographs and to publish them had not been obtained in violation of student privacy policies, laws and regulations.

WHEREFORE, Robert Morris should be terminated for unbecoming conduct and violations of policy and applicable law.

Charge 2: Unbecoming Conduct.

A newly assigned female preschool teacher at the John C. Milanesi Elementary School reported to the Principal, Anna Bettini, that she was uncomfortable whenever she was walking through the school hallways because of what the teacher felt was the inappropriate manner in which Robert Morris would stare at her. The teacher was a young, petite female who did not appear older in appearance than some of the District's high school students. She stated to Ms. Bettini that she found Mr. Morris' attention uncomfortable and unwelcomed. The teacher indicated that she was going to speak to Mr. Morris directly. No formal complaint was filed or pursued by the teacher.

WHEREFORE, Robert Morris should be terminated for unbecoming conduct.

Charge 3: Unbecoming Conduct in Violation of Policy.

On or about February 25, 2011, it was reported to Kenneth Nelson, the Principal of the Buena Regional Middle School, that a number of sixth grade students were accessing blocked sites on their school provided laptop computers using the login and password to the District network assigned to teacher Robert Morris. Mr. Morris was assigned, as an ESL teacher at both the Middle School and the John C. Milanesi Elementary School.

Investigation revealed that Mr. Morris had given his login and password to a student, I.M., apparently the year before when the student was in fifth grade. I.M., now in the sixth grade, discovered that the login and password were still operable to use on the laptop computers provided through a District grant to all sixth grade students. The login and password for the District network assigned to teachers allow full access to the network. The District network contains confidential information concerning both students and staff. Access by the teaching staff is allowed with respect to student records and other confidential information as a necessary component of a teacher's duties. Access by students on the District network is limited. Students do not have full access to confidential information stored on the District network. Additionally, the District blocks student access to sites determined by the District to be inappropriate for access by the students. I.M. was selling the login and

password of Mr. Morris to other sixth grade students who were using this information to gain access to sites blocked to students and potentially also to access confidential information on the network.

Both I.M. and Mr. Morris confirmed that Mr. Morris gave the login and password to I.M. Mr. Morris' actions in doing so violated District computer use policy, compromised the integrity of the District computer network, compromised confidential information and enabled students to access computer sites that had been determined inappropriate for student access, thereby potentially causing harm to these students. Mr. Morris also failed to report that his login and password had been compromised as required by District computer use policy.

WHEREFORE, Robert Morris should be terminated for unbecoming conduct and violation of policy.

Charge 4: Violations of Policy and Insubordination.

At the commencement of the 2010-2011 school year, the administration of the Buena Regional Middle School instituted a school policy that was discussed with all teachers assigned to the building. The policy involved the showing of videos or movies in the classroom. All teachers were instructed that when showing a video or movie in class, all of the lights in the classroom were not to be turned off. Sufficient lighting was to remain on in the classroom to enable the teacher to monitor student conduct at all times. This policy was adopted as a result of certain incidents which had occurred the previous year when classrooms were darkened resulting in certain students being charged with sexual harassment of another student.

It was reported to the Principal and Vice Principal that Mr. Morris was not following this policy and that his classroom was completely dark while showing videos and/or movies. The Principal, Kenneth Nelson, discussed the policy directly with Mr. Morris and directed him that he was to follow this policy by not turning all of the lights out in his classroom. It was reported again to both Mr. Nelson and the Vice Principal, Karen Santoro, that Mr. Morris was observed in his classroom with all of the lights out. Both Mr. Nelson and Ms. Santoro spoke again to Mr. Morris directing him that he was to follow this policy.

Mr. Morris' conduct violated school policy. His conduct further constituted insubordination in that the Principal and the Vice Principal were required to direct him on multiple occasions that he was required to follow this policy, before he adhered to the policy.

WHEREFORE, Robert Morris should be terminated for violation of policy and insubordination.

Charge 5: Unbecoming Conduct.

In March 2011, a teacher assigned to a classroom in the Buena Regional Middle School across the hall from the classroom assigned to Mr. Morris reported that on several occasions he had to request that Mr. Morris lower the volume on videos that Mr. Morris was showing in his classroom since the sound was loud enough to interfere with the teacher teaching his students. The teacher reported that the first two times he went to Mr. Morris' classroom directly and spoke to Mr. Morris who turned down the volume. Several days after the second incident, the volume was again intrusive in the teacher's classroom. The teacher sent a female student, Z.G., over to Mr. Morris' classroom to request that he turn the volume down. The teacher reported to the Vice Principal that upon the student's return to the classroom, the student was "shuddering". She told the teacher that Mr. Morris had put his hands on her by rubbing her hair while speaking to her. The student stated that she was very uncomfortable with him stroking her hair while explaining to her that he would "take care of" the sound volume.

After class, the teacher went over to Mr. Morris' classroom to speak with him. When the teacher looked into the classroom, he thought that the classroom was empty since the shades were fully drawn and all of the classroom lights were off. The teacher then heard students in the room and he entered the classroom. Mr. Morris was in a fully darkened classroom with his students in violation of the policy set forth in Charge 5 above.

The incident was reported to the Vice Principal who reported it to the Principal, Kenneth Nelson. Mr. Nelson spoke to Mr. Morris with regard to both the turning out of all the lights and the improper touching of the student.

WHEREFORE, Robert Morris should be terminated for unbecoming conduct.

Charge 6: Unbecoming Conduct, Violation of School Policy and Student Privacy Rights.

On April 1, 2011, Robert Morris sent an e-mail to the Vice Principal of the Buena Regional Middle School, Karen Santoro, regarding actions that he undertook while on bus duty at the John C. Milanesi Elementary School. Mr. Morris stated in his e-mail to Ms. Santoro that the driver of Bus 20 told him that a child, who Mr. Morris identified by the first name of Asia, from the Middle School constantly acted up on the bus, refusing to sit down and walking around the bus all of the way from the Middle School. The bus driver allegedly told Mr. Morris that this student was a constant

distraction to him while he was driving and would not listen to his direction. The student was left off at a daycare center in front of the John C. Milanesi Elementary School. Mr. Morris reported that following his bus duty, he stopped at the daycare center to discuss this student with the staff of the daycare facility.

Principal Kenneth Nelson and Vice Principal Karen Santoro of the Middle School had a conference with Mr. Morris. He was advised that he was not authorized on behalf of the District to go to the daycare center to look for the student and that he was overstepping his responsibilities. During that conference, Mr. Morris was very argumentative to both Mr. Nelson and Ms. Santoro regarding his conduct. He told Mr. Nelson and Ms. Santoro that prior to becoming an ESL teacher, he had been a private investigator working for the government investigating teacher misconduct. Mr. Morris was advised that he was not hired by the school district as a private investigator, but as an ESL teacher and that his duties did not involve investigating students or other staff or bus drivers. Mr. Nelson and Ms. Santoro contacted the transportation department since neither one of them had received any referrals or write ups regarding misbehavior on Bus #20 for anyone on the bus, including but not limited to any student by the first name of Asia. The transportation department confirmed that it had not received any discipline referrals from the bus driver of Bus 20 and therefore, there were no referrals or write ups to forward to Mr. Nelson or Ms. Santoro for attention.

In a subsequent discussion with Mr. Morris concerning this matter, Mr. Morris gave a conflicting statement regarding his reason for going to the daycare facility. Mr. Morris stated that he knew the student involved and that he was concerned about her as a result of the report from the bus driver. He stated that he went to the daycare center to seek the student out to talk to her and was not going there for the purpose of speaking to the staff about her.

Neither proffered reason for his actions justified Mr. Morris' conduct in violating the student's privacy and overstepping his responsibilities with respect to discipline matters.

WHEREFORE, Robert Morris should be terminated for unbecoming conduct and violations of policy.

Charge 7: Unbecoming Conduct.

On or about May 16, 2011, Kenneth Nelson, Principal of the Buena Regional Middle School, while doing a walk through of the building while classes were in session, entered the classroom of Mr. Morris. At that time, Mr. Nelson observed a female student in the classroom with her feet crossed on the desk. The student was seated directly in front of Mr. Morris. Mr. Nelson upon

entering the room directed the student to put her feet down and sit properly in her seat. When Mr. Nelson spoke to Mr. Morris after class concerning this incident, Mr. Morris stated that he had not seen the student, although the student was seated directly in front of him. Mr. Morris was directed to pay more attention to the conduct of his students during class. Mr. Nelson advised Mr. Morris that the manner in which the student was sitting was inappropriate and should not be allowed in Mr. Morris' classroom.

WHEREFORE, Robert Morris should be terminated for unbecoming conduct.

Charge 8: Unbecoming Conduct.

On or about May 13, 2011, several students approached Mr. Nelson visibly upset and asked if they could speak to him in private. The students were N.B., a seventh grade male student, M.R., A.A. and M.O., who were all seventh grade female students.

N.B. told Mr. Nelson about an incident that had taken place on May 12, 2011 while the students were in the cafeteria eating lunch. Mr. Morris was on cafeteria duty at the time. Mr. Morris approached the table where N.B. was seated.

N.B. stated that Mr. Morris began to rub his back and said, "I like how white your shoes are". A few minutes later, N.B. bent over to tie his sneakers. At that point, Mr. Morris commented to N.B. in front of the other students, "You are tempting me N., you are tempting me,". N.B. reported that the touching and the comments made to him by Mr. Morris really bothered him and upset him.

M.R., A.A. and M.O. confirmed N.B.'s statements. They were seated at the same table as N.B. throughout the incident. M.R., A.A. and M.O. also stated that Mr. Morris was always staring at them and it made them uncomfortable.

The Principal called into the office another staff member, Mr. Mancini. The students were asked to repeat their story. The students repeated the incident the same way as it was relayed to Mr. Nelson. The students were advised to tell their parents. Subsequently, Mr. Nelson heard from the parents of several of the students reporting that their children were very upset by the conduct and statements of Mr. Morris.

A Spanish teacher assigned to the Middle School, Hilde Pesantes, further reported to the Vice Principal, Karen Santoro, that on May 12, 2011, N.B. had come to her and relayed to her the incident which had occurred during lunch regarding Mr. Morris. N.B.'s statements to Ms. Pesantes were consistent with the statements N.B. made to Mr. Nelson on May 13th. Ms. Pesantes also stated that student M.R. came to her and confirmed the statements of N.B.

Mr. Morris' actions in touching the student and in making suggestive comments to the student were inappropriate and constitute unbecoming conduct toward the student involved, as well as the other students who were witnesses to this unbecoming conduct. Mr. Morris was suspended with pay for the remainder of the school year pending further investigation of this and the other incidents referred to in this Statement.

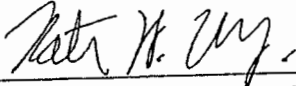
WHEREFORE, Robert Morris should be terminated for unbecoming conduct.

Charge 9: Unbecoming Conduct, Violation of Policy and Insubordination.

While charges 1 through 8 each individually constitute separate grounds for termination of Robert Morris as a tenured teacher, these charges collectively demonstrate and evidence a pattern of unbecoming conduct, violations of policy and insubordination which when viewed collectively, demonstrate that Mr. Morris should be terminated for such conduct.

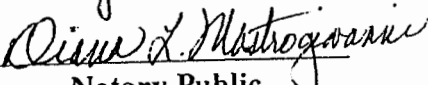
WHEREFORE, Robert Morris should be terminated for unbecoming conduct, violation of policy and insubordination.

Dated: August 30, 2011



Walter W. Whitaker, Jr., Superintendent
Buena Regional School District

Sworn and subscribed to
before me this 30 day
of August, 2011.



Notary Public

DIANA L. MASTROGIOVANNI
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES NOVEMBER 8, 2013

NED P. ROGOVOY, ESQUIRE, L.L.C.
782 South Brewster Road, Unit A6
Vineland, NJ 08361
(856) 205-9701
Attorney for Robert Morris

IN THE MATTER OF THE TENURE
HEARING OF ROBERT MORRIS,
EMPLOYEE OF BUENA REGIONAL
BOARD OF EDUCATION

: BEFORE THE COMMISSIONER OF
: EDUCATION OF THE STATE OF
: NEW JERSEY
:
: AGENCY DKT NO.
:
: **RESPONSE TO TENURE**
: **CHARGES**

ROBERT MORRIS, of full age, hereby certifies as follows:

Answer to Charge 1- Unbecoming Conduct and Policy Violation:

1. I began my teaching career at Buena Regional School District (BRSD) in September 2000 as an ESL (English as a Second Language) teacher. Prior to 2008, while assigned to Milanesi Elementary School, I did place some pictures of my ESL students on a field trip having a good time on Facebook for all to see. I was told never to do it again and I immediately took the pictures off my site and have never again used photographs of students as instructed.
2. On or about December 17, 2008, at our School Holiday Pageant Day when children were all dressed up for their Christmas musical performance, I took pictures with my new digital camera of the Christmas tree in the lobby, the children performing on the stage and my ESL students and other students who were all dressed up and I was going to review them with my students to show the meaning of celebration, fiesta, gala and pageant. Those pictures were never disseminated, however, I was called into a meeting and was told not to ever take pictures of the students and this was at the same time when I was admonished about placing students, having a good time, or

EXHIBIT

B

my Facebook page on the internet. I never again took photographs of students.

3. The comment that I "liked taking pictures of little girls" does not ring true to me. I am the father of children who were once little girls and I did like to take pictures of them when they were dressed up in their holiday clothes, but certainly there is no sinister connotation that should ever be taken if I did make the remark, which I don't remember making.

Charge 2 - Unbecoming Conduct:

4. I know the teacher that is being referenced and she knew my wife, who is a teacher in the Vineland system. We had conversation and she never advised me that she felt uncomfortable, and again, any connotation that I did something wrong or because it is characterized that she looked like a high school student is not an appropriate characterization which seems to in some way further demean my character and cause someone to believe that this representation is an example of unbecoming conduct. It is not unbecoming conduct.

Charge 3 - Unbecoming Conduct in Violation of Policy:

5. The representation in this charge that I had given I.M. my login and password for my laptop computer, and that I said that I did so, is absolutely not true. I taught I.M. in the elementary school two years prior to February 25, 2011 when I was teaching solely at the elementary school. I.M. was a very street smart, conniving student. In the fourth grade, when I taught him in my ESL classroom, we had 11 computers. When I teach English as a Second Language, pictures speak a thousand words, sometimes, the pictures have subtitles, but certainly they can depict concepts as has been pointed out in a prior answer such as fiesta. So through pictures, I teach the language of concepts both in English and Spanish.

6. At that time, in the elementary classroom where I controlled 11 computers, there would be many instances in 2008-2009 school year when the computers, for whatever reason, would shut

down and I would have to restart them by logging on and using the password which I had in the District, and which I was still using in February 25, 2011 when this incident came to the forefront. I had to log in using my password, because we used many ESL internet sites for teaching.

7. I.M., while watching me restart computers, however that may have occurred, learned and memorized and in essence stole through his clever observation my password that allows me to login. I did not, and never have, given any student my password. If I did, more than one student would have come to the fore since it is readily known that students will obviously try to abuse the internet and, therefore, we keep those passwords and, therefore, the ability to login to the internet absolutely sacrosanct. My password in February, 2011 was the same as 2008.

8. I.M., through that methodology described, usurped my password and I later found was coerced by someone else, JS, to reveal it. JS then sold that password to other students.

9. Obviously the minute we learned this was the case, the issue was resolved.

10. The allegation that I gave this 4th grader the ability to login to my computer by providing my password is an improper characterization of what happened. My conduct in this matter was not unbecoming.

Charge 4 - Violations of Policy and Insubordination:

11. I first wish the reader of this rebuttal of this charge to know that in the middle school, I had one class of 6th grade and one class of 7th grade students. The 6th grade had 5 students and the 7th grade had 4 students and each class would meet for 1 ½ hours of instruction. My other time was spent in the elementary school. During that hour of instruction, the final ½ hour was used for video instruction since I have demonstrated before pictures are worth many words. The room at the middle school has what is called a smart board which can be seen by all the students and it is

controlled from the teacher's computer and acts as an overhead projector. It is a large permanent screen, approximately 4' x 4' in size and it can also be operated manually because it has an interactive touch screen computer program as well as its own volume knob control in addition to the computer control.

12. As has been aforesaid, many of the videos which I use have subtitles, some in Spanish, some in English, and some in both. Also, some of the pictures and videos which are shown on the smart screen are pictures that are taken at night.

13. The charge says that teachers were instructed that all of the lights in the classroom were not to be turned off since there were charges the prior year about one student sexually harassing another which couldn't be monitored because of the darkened room. Firstly, I want the reader here to know that I never received any type of instruction at the beginning of the year nor did I receive a policy where that concept was presented. I didn't even know that was an issue until on or about May 13, 2011. The fact remains that I am easily able to monitor the 5 students in my 6th grade class and the 4 students in my 7th grade class since they are sitting in front of me and we are looking at the smart screen somewhat above our heads. If there were any inappropriate conduct between students, I would, whether the lights were on or off, be able to detect it.

14. It is a significantly better viewing quality of the smart screen for the purpose of my teaching if the lights are out.

15. However, now that I am being made fully aware of the significance and the adamant approach by the administration of the concept, it will no longer occur.

Charge 5 - Unbecoming Conduct:

16. Again, as aforesaid, I employ the smart screen ½ hour for each one of my 1 ½ hour classes of instruction of my 6th and 7th grade students. Realize that this is much more than other teachers

would use the smart screen, and I am, certainly, sympathetic to the fact that the volume seems carry through the ceiling and as I am told into other classrooms.

17. It has come about, prior to March, 2011, when a teacher, in this case, Mr. D who teaches Math across the hall has called me on our intercom phone and advised that the sound was too loud in his classroom and, of course, I immediately turned it down.

18. Actually on this day in March when we began to use the smart screen, I could immediately tell when it went from one program to another that there was a volume increase and went to the screen itself and turned down the volume just before there was a knock at my classroom door.

19. When I went to the classroom door, I was aware that a female student was requesting me to turn down the volume and because I had already done so before her knock on the door, I put my hand on her shoulder, turned her around, and told her to go back to her classroom. I never stroked her hair, however, it is possible that my touching her shoulder and turning her around caused my hand to touch her hair, but I am not aware of that fact. I never said anything except "ok, go back to your classroom" and I don't understand the significance of this complaint.

20. I don't understand either why the teacher didn't just call me on my phone as he had done in the past. However, again, any sinister connotation based on this incident is just wrong.

Charge 6 - Unbecoming Conduct, Violation of School Policy and Student Privacy:

21. I have been doing dismissal at the John C. Milanesi Elementary School for 10 years. I handle the outside position where the buses load and I call the bus numbers on a two-way radio as the buses arrive. I get to know the bus drivers by name and we chat everyday and they tell me if they have problems with children on the bus. On or about Thursday, March 31, 2011, Danny Marandino, whom I know, was the newly assigned driver on bus 20, asked to talk to me about a problem that just occurred on the bus. He had just finished his run for the middle school and had pulled up to the elementary school and told me about a female Spanish student who would not sit

down and was walking all around the bus and wouldn't listen to him. He also described her to me. He was worried about the child being injured if the bus had to stop or swerve because the child would not remain in her seat. He was very upset and worried because he believed her distraction might cause him to have an accident. He did not know the child's name, but he told me that he drops her off at One Love Child Care which is a day care facility located right next to Milanesi Elementary School. I told the bus driver that I would look into it. When bus dismissal was over, I decided, on my way home, to stop at One Love Child Care to tell the aide who watches the children at the center and who knows me. I told her that the bus driver wanted them to know that the girl he drops off from the middle school was giving him a rough time because she was walking all around the bus. The aide said, "Oh, you mean Asia?" whom I then suspected to be Asia Morales, whom I know and who has had disciplinary problems in the past. I asked the aide to please counsel her about it. I further happen to know that a student who rides bus 20 is CS, who is a middle school student whom I have known since 1st grade. Her step-mother is a substitute teacher in the district. I asked CS if there was a girl named Asia on bus 20 and she advised that there were two, but said that Asia Morales was the one causing the problem.

22. This is now said to be unbecoming conduct and a violation of a policy of which I am not familiar.

23. I sincerely was trying to resolve what I perceived to be a real bus problem which put Asia Morales and all students on the bus in harm's way. I was going to attempt to make sure that the message was sent to Asia Morales that she needed to be confined to her own seat and not walking around when the bus was moving. The only reason I took the next step was that I was sincerely concerned about the safety of the children and wanted to try to resolve the problem by supplying the information to the middle school assistant principal who would handle the matter. Any other connotation placed on my actions is inappropriate.

Charge 7 - Unbecoming Conduct:

24. First of all, May 16, 2011, would have been a date after my suspension, but assuming that is a typographical error, I do remember the Principal coming into my room and correcting this child's posture, but certainly she did not have her feet on the desk; she had them either on the rung of another chair or rung of the desk. I can't really remember since I didn't believe it was significant whatsoever, in fact, the Principal then was joking with the students and everything seemed to be fine. In fact, he appeared to be kidding. So I am taken by surprise that this incident would be an act of unbecoming conduct.

Charge 8 - Unbecoming Conduct:

25. The middle school has several lunch periods of 30 minutes each. I arrive at the middle school on or about 10:30 a.m. and have been assigned to "cafeteria duty" from 12:15 p.m. to 12:45 p.m. with 2 other teachers. Therefore, I teach my 6th grade class for 1 ½ hours, then I am assigned to the cafeteria from 12:15 p.m. to 12:45 p.m. In the cafeteria, there are about 18 round tables where 5 or 6 children can sit comfortably and there are about 60 children in the cafeteria group that I monitor and the tables are approximately 10 feet apart. Because there have been problems with students leaving the cafeteria early as well as students moving from table to table, I station myself close to the double doors which comprise the entrance/exit area to the cafeteria and set up a formal monitor station and a sign out table next to the doors. That was my base for observation during cafeteria duty. Everyone had to sign out in front of me and if they had a pass to the youth center, or elsewhere, they had to show it to me. From that position, I can scan all 18 tables. Attempting to resolve problems in the cafeteria, I also developed a letter titled Cafeteria Considerations. This letter was distributed to all tables during all lunches, which had worked well to correct many problems we were experiencing.

N.B. sits at a table with 3 other girls and his table is approximately 35' away from my station at

the double doors. On May 12, 2011, as the lunch period was underway for 5 minutes or so and prior to my taking my stand at the door, I was using a wooden yard stick to police the trash from the floor and I felt someone strolling and heard someone shuffling behind me. I turned to notice that it was N.B. He was away from his table and he had brand new \$150 branded sneaks and I said to him "Nick, if I ever wore such angelic white sneaks like that in my day, other kids would be stepping all over them to make them dirty." As I did that, I tapped the back bottom of his right heel with my yard stick to nudge him back to his table. We were laughing the whole time. Then, when I took my regular observation position at the double door and about 5 minutes later as I was scanning the cafeteria, I noticed to my right that a person was scrunched on the floor. As I looked closer, I saw it was N.B., away from his table again. My immediate thought was "what is he doing here?" He was about 35' from the table where he usually eats with the girls. He was squatting down with his left foot extended. The sneaker on his left foot was very untied and loose and it appeared that Velcro attachments might be loose in addition to the laces. When I was a football kicker, the center would snap the ball to the holder and the holder would put the ball on the toe of his foot to elevate the ball from the ground so that the kicker could get loft. N.B.'s position reminded me of a holder and, therefore, again attempting to use humor in order to try to get him back to the table and stop squatting in the middle of the room, I said "You're tempting me Nick; I used to be a football kicker." With that he popped up and returned to his table laughing. Again, a minute or so later, I went over to the table where Nick was sitting with the girls and said, "You know I was just kidding Nick, I was a football kicker." which I again reiterated and everybody laughed.

26. I don't believe the girls could have in anyway heard what I said to N.B. when he was squatting with his left leg out trying to tie his shoes since they were a good distance away and the cafeteria was noisy.

27. I really don't know what connotation is being place upon this incident; however, I can certainly tell you that I was doing my best with words to keep N.B. in his proper position.

28. Honestly, N.B., is known to be a showoff, and while I like him, if he is not properly controlled, he can be a ring leader who can spark conduct which can then cause a situation to get out of control.

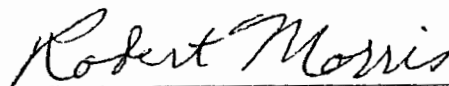
Summary:

I have had a long career and have never in any venue been accused of any inappropriate conduct towards anyone. Any suggestion that I have an unclean motive in the performance of my duties is untrue and I intend, in whatever setting, to defend the appropriateness of my actions.

I ask that the Board of Education not in any way certify any tenure charges against me, however, should that occur, I will have no choice but to defend on the basis of the thrust communicated in the answers to these charges herein.

I hereby certify that the foregoing statements made by me are true and correct to the best of my knowledge and belief. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date: 8-4-11


Robert Morris

PROOF OF SERVICE

I, Ned P. Rogovoy, Esquire, hereby certify as follows:

On the 13th day of September, 2011, I served a sealed envelope containing a copy of the
Response to Tenure Charges by certified mail, return receipt requested and regular mail to:

Thomas Kearney, Board Secretary
Buena Regional School District
P.O. Box 309
Buena, NJ 08310

Barbara R. Lapham, Esquire
CAPIZOLA PANCARI LAPHAM & FRALINGER
100 North Main Road
Vineland, NJ 08360

I certify that the foregoing statements made by me are true. I am aware that if any of the
foregoing statements made by me are willfully false, I am subject to punishment.

Dated: September 13, 2011



Ned P. Rogovoy, Esquire
Attorney for Respondent

To the Buena Regional Board of Education:

I, Robert Morris, hereby resign my employment with the Buena Regional School District,
effective _____, 2012.

Robert Morris

ROBERT MORRIS

Sworn and subscribed to
before me this 17th day
of January, 2012.

Shirley Brown

Notary Public

Shirley Brown
Notary Public - State of New Jersey
Commission Expires 12/31/2014



RESOLUTION

WHEREAS, there is an action with claims pending between the BUENA REGIONAL SCHOOL DISTRICT (the "District"), and ROBERT MORRIS, before the Commissioner of Education and/or the Office of Administrative Law, namely OAL Docket No. EDU-10979-2011S and Agency Reference No. 249-8/11; and

WHEREAS, the parties desire to fully and finally settle and resolve any and all actions of any kind between them, including the above referenced matter; and

WHEREAS, the parties have drafted a Settlement Agreement and General Release which fully and finally settles and resolves any and all actions of any kind between them, including the above referenced matters; and

WHEREAS, the Settlement Agreement provides, in part, that in consideration for Robert Morris tendering of his resignation, the District shall request that the Commissioner of Education dismiss its action or claims against Mr. Morris and shall issue two separate checks to Mr. Morris or his assignee, each in the amount of \$25,000.00, as more fully set forth in the Settlement Agreement and Release; and

WHEREAS, the Buena Regional Board of Education (the "Board"), is a body corporate and politic of the State of New Jersey, charged with the statutory responsibilities of the management and administration of the District in Atlantic County, New Jersey, who has the statutory authority to enter into the Settlement Agreement and Release; and

WHEREAS, an executive session meeting of the Board was held on Tuesday, January 17, 2012 at 6:00 p.m. at 125 Weymouth Road, Buena, New Jersey, where the Board reviewed and considered the Settlement Agreement and General Release; and

WHEREAS, during open session, the Board determined by a recorded vote of a majority of the entire membership of the Board with 6 members voting in favor, 0 members voting against, and 0 members abstaining, to approve the Settlement Agreement and accept Robert Morris' resignation; and

WHEREAS, the Board specifically recognizes and acknowledges that the settlement is contingent upon approval by the Commission of Education as required by and consistent with the New Jersey Administrative Code, §6A:3-5.6, and In the Matter of the Tenure Hearing of Frank Cardonick, State Board of Education decision of April 6, 1983 (1990 School Law Decision, S.L.C. 842, 846); and

NOW, BE IT RESOLVED, that the Board hereby accepts the Settlement Agreement which will fully and finally settle and resolve any and all actions of any kind between the parties, including the above referenced matters, and authorizes two separate payments to Robert Morris in the amount of \$25,000.00 each, as more fully set forth in the Settlement Agreement and Release; and

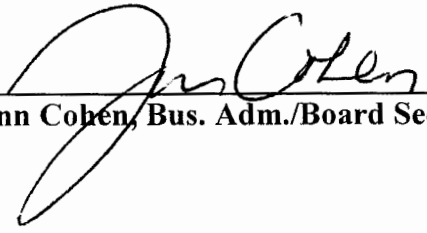
EXHIBIT

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BE IT FURTHER RESOLVED, that the Board hereby accepts Robert Morris' resignation upon approval by the Commissioner of Education.

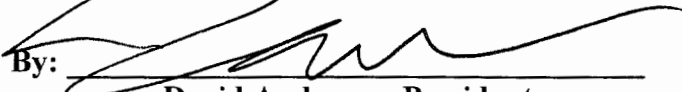
ADOPTED this 17th day of JANUARY, 2012.

Witnessed or Attested to by:



Jann Cohen, Bus. Adm./Board Sect.

**BOARD OF EDUCATION OF THE BUENA
REGIONAL SCHOOL DISTRICT**

By: 

David Anderson, President

CAPIZOLA, PANCARI, LAPHAM & FRALINGER
A Professional Corporation
100 North Main Road
Vineland, New Jersey 08360
(856) 692-6900

Attorneys for Buena Regional School District

IN THE MATTER OF TENURE CHARGES
BROUGHT AGAINST ROBERT MORRIS,
TEACHER, BUENA REGIONAL SCHOOL
DISTRICT, ATLANTIC COUNTY,
NEW JERSEY

COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

OAL Docket No. EDU-10979-2011S
Agency Ref. No. 249-8/11

AFFIDAVIT OF ROBERT MORRIS

STATE OF NEW JERSEY :
:SS
COUNTY OF CUMBERLAND :

I, Robert Morris, of full age, being duly sworn according to law, upon my oath, depose and say.

1. I have reviewed the Settlement Agreement and Release and all of its terms and conditions as contained therein and understand its ramifications, including the fact that the Board of Examiners will independently review the facts surrounding the tenure charges and have the right to bring an Order to Show Cause to suspend or revoke my license.

2. Additionally, I was advised that I could have proceeded to trial, where I would have been able to cross-examine the Board's witnesses, present evidence, testify on my own behalf and present witnesses to testify in my defense. I fully understand that, after considering the Board's accusations and my defenses, the Judge would have made a determination regarding whether or not the

EXHIBIT

E

Board of Education had, by a preponderance of the evidence, proved one or more of the charges as more specifically set forth in the Statement of Tenure Charges filed by the Board.

3. I have entered into this Settlement Agreement freely and voluntarily and no one has forced or coerced me to resign from my position. I have done so of my own free will, knowing the perils and benefits, that I will or could derive.

Dated: 1-17-12

Robert Morris
ROBERT MORRIS

Sworn and subscribed to
before me this 17th day
of January, 2012.

Shirley Bowen
Notary Public

Shirley Bowen
Notary Public of New Jersey
2009/14

**State of New Jersey**

DEPARTMENT OF EDUCATION

PO Box 500

TRENTON, NJ 08625-0500

CHRIS CHRISTIE
*Governor*KIM GUADAGNO
*Lt. Governor*CHRISTOPHER D. CERF
Acting Commissioner

March 15, 2012

Nathanya G. Simon, Esq.
Schwartz, Simon, Edelstein & Celso
100 S. Jefferson Rd., Suite 200
Whippany, NJ 07981

Dear Ms. Simon:

I have received and reviewed your request for a declaratory ruling concerning the meaning of *N.J.A.C. 6A:12-9.1(b)*. Your request does not comply with the requirements of *N.J.A.C. 6A:3-2.2*; the petition does not name a respondent as required. Although it appears that you have served a copy of your request upon the Attorney General's office, that office does not represent any person or entity with a position adverse to the one you articulate.

Accordingly, pursuant to my discretionary authority under *N.J.A.C. 6A:3-2.1(a)*, I decline to entertain your petition at this time.

Sincerely,

A handwritten signature in black ink, appearing to read "C. D. Cerf", written over a horizontal line.

Christopher D. Cerf
Acting Commissioner

CDC/MKD/mbo
c: Michael Walters, SDAG

Mailed: 3/16/12

M.M.-C. on behalf of minor child, T.C., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
 OF UNION, UNION COUNTY, :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioner filed a *pro se* residency appeal in October 2010, challenging the determination of the respondent Board to remove her niece, T.C., from Union Township schools. Petitioner contended that she was awaiting a court date for proceedings that would grant her custody of T.C., and that her niece was living with her in Union. T.C.'s mother, D.C.-R resides in Newark. T.C. attended Union High School from September 27 until December 1, 2010. The respondent Board claimed tuition for two months of ineligible enrollment in the amount of \$2,634. Subsequent to testimony presented on the first day of hearing, the Board agreed to settle the matter for a payment of \$1,000 from M.M.-C., who submitted a statement indicating that she promised to pay \$1,000, but would be unable to make any payment until she was "gainfully employed." As of the date of the ALJ's Initial Decision in this matter, no payment had been made to respondent from M.M.-C.

The ALJ found that: the petitioner bears the burden of proving domicile within the school district under *N.J.S.A. 18A:38-1*; in this case, petitioner disclosed during testimony that T.C. was living with M.M.-C. while D.C.-R traveled for work, but usually lived with her mother in Newark; the parties in this matter entered into a settlement agreement knowingly and voluntarily, which agreement was made absent a payment plan; as petitioner failed to pay the amount agreed to in the settlement, the Board requested a judgment in favor of the respondent for the full amount of tuition owed for the period of T.C.'s ineligible attendance, \$2,634. The ALJ concluded that there are no further facts in dispute and, accordingly, the Board is owed tuition reimbursement in the amount of \$2,634.

Upon a full and independent review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, ordered petitioner to pay respondent Board \$2,634, and dismissed the petition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12946-10

AGENCY DKT. NO. 619-10/10

M.M.-C. ON BEHALF OF MINOR CHILD, T.C.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF UNION, UNION COUNTY,**

Respondent.

M.M.-C., pro se

John P. Harrington, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: January 30, 2012

Decided: January 30, 2012

BEFORE MUMTAZ BARI-BROWN, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner M.M.-C. on behalf of her child T.C. challenges the determination of the Union Township Board of Education (Board) to remove T.C. from enrollment because he is not a resident of the school district. Additionally, petitioner challenged the Board's counterclaim for tuition for the period of ineligible attendance.

he is not a resident of the school district. Additionally, petitioner challenged the Board's counterclaim for tuition for the period of ineligible attendance.

On November 23, 2010, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held on June 27, 2011. Subsequent to the hearing, the parties had several telephone conferences with the undersigned. Thereafter, they reached an agreement, which is contained in separate documents filed with the undersigned. Additionally, respondent's document contained a motion for decision for full tuition if petitioner fails to comply with the agreement. Upon review of the documents the record closed on January 30, 2012.

FACTS

Based on a review of the relevant and undisputed evidence I **FIND** as **FACT**:

Petitioner M.M.-C. resides in Union Township and is the aunt of T.C. D.C. is the mother of T.C. and they reside in Newark. T.C. attended Union High School from September 28, 2012 to December 1, 2010.

Respondent claims tuition for two months of ineligible enrollment for the sum of \$2,634.00. Karen Dunn, Business Administrator for the Board submitted a certification, which shows the calculation of tuition from the period of September 28, 2010, to December 1, 2010, at a monthly rate of \$1,317.00. (R-2.)

After the first hearing date on the issues of T.C.'s residence and the Board's claim for tuition reimbursement, the parties settled the matter. M.M.-C. submitted the following statement:

This letter is to confirm that I agree to pay the Township of Union Board of Education the sum of \$1,000 in settlement of the above captioned matter.

However, there is no payment arrangement agreed to as of yet, and since I do not have access to the resources at the present time, there is no way I can make any payments on any amount until gainfully employed. Thank you for your and kind consideration in this matter.

Respectfully yours,
[M.M.-C.]
[October 3, 2011]

cc: John P. Harrington, Esq.

DISCUSSION AND CONCLUSIONS

The state of New Jersey provides that "public schools shall be free to. . . any child who is domiciled within the school district." N.J.S.A. 18A:38-1(a). The domicile of a minor child follows that of his parents. See V.R. on behalf of A.R. v. Bd. of Ed. Of Hamburg, 2 N.J.A.R. 283, 286. The applicable statute, N.J.S.A. 18A-38-1(b)1, reads, in pertinent part:

Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the District, if so required by the board, a sworn statement that he is domiciled in the District and is supporting the child gratis and will assume all personal obligation for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parents or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economical hardship and that the child is not residing with the resident of the District solely for the purpose of receiving a free public education in the District. The statement shall be accompanied by documentation to support the validity of the sworn statement, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Petitioner bears the burden of proving domicile within the school district under N.J.S.A. 18A:38-1. Petitioner disclosed during testimony that D.C. traveled for work and M.M.-C. helped to care for T.C. During this period, T.C. attended Union High School for two months. Subsequent to the testimony, Petitioner and the Board agreed to settle the matter on the condition petitioner pay the school \$1,000.00. While the settlement agreement provides no schedule for payment, petitioner promised to pay when she obtains employment.

The Board accepted the agreement to settle the matter for \$1,000.00 payment from M.M.-C. However, the Board argues that petitioner has not offered a payment plan therefore, Respondent submits:

Based on that, it is Respondent's position that Petitioner has repudiated the proposed settlement and the compromise settlement is not binding on Respondent."

In the event that petitioner tenders the full One Thousand (\$1,000.00) dollar payment to Respondent prior to the issuance of Your Honor's decision, Respondent would be willing to agree to renew the prior settlement discussions to confirm a settlement of the matter. Absent that, Respondent is entitled to entry of the decision in its favor for the full sum of two Thousand Six Hundred and Thirty-Four (\$2,634.00) dollars in unpaid nutrition.

Essentially Respondent seeks enforcement of the agreement and in the alternative summary decision for full tuition.

New Jersey has a strong policy favoring the settlement of lawsuits. Dept. of Public Advocate v. N.J. Bd. of Public Utilities, 206 N.J.Super. 523 (App. Div. 1985). This policy is premised on "the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone. In recognition of this principle, courts should strain to give effect to the terms of a settlement whenever possible." 206 N.J.Super. at 528.

An agreement to settle a lawsuit is a contract Pascarella v. Bruck, 190 N.J.Super. 118 (App. Div. 1983), cert. den., 94 N.J. 600 (1983). Courts must honor and enforce settlements as it does other contracts. Id. at 124-125. However, a court may refuse to enforce a settlement if the moving party can demonstrate, by clear and convincing proof, fraud or other compelling circumstances. De Caro v. De Caro, 13 N.J. 36 (1953).

In determining whether the circumstances of the case are sufficiently compelling to vacate a settlement the courts generally focus on the moving parties representation by competent legal counsel, his awareness of the terms of the agreement and whether he knowingly and voluntarily entered into the settlement agreement. [A] showing of "deception, lack of independent advice, abuse of confidential relations or similar indicia generally found in the reported instances where equity has declined to enforce, as unfair or unconscionable, an agreement voluntarily executed by the parties" may justify the setting aside of a settlement. 13 N.J. at 44. The only basis for vacating the settlement is on a showing ... of fraud or other compelling circumstances. Pascarella, 190 N.J.Super. at 124-125.

Here, the parties entered into an agreement knowingly and voluntarily. The agreement was made absent a payment plan. Thus, upon petitioner's failure to pay the agreed amount the Board may seek enforcement of the settlement or summary decision for tuition owed.

Summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). Furthermore, the rule provides that "[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), the New Jersey Supreme Court clarified the summary judgment standard. Ultimately, it is not a court's role "to weigh

the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 540.

Karen Dunn, Business Administrator for the Board assessed tuition for the period T.C. attended Union High School. The tuition cost from the period of September 28, 2010 to December 1, 2010 \$2,634.00 at a monthly rate of \$1,317.00. (R-2.) The evidence was undisputed.

Based on the whole of the record I **CONCLUDE** the parties entered an agreement to settle the matter upon petitioner's payment of \$1,000.00.

I further **CONCLUDE** that either party may seek enforcement of the settlement in the appropriate tribunal.

I further **CONCLUDE** that there exists no disputed facts remaining to be resolved.

ORDER

Accordingly, it is **ORDERED** that Union Township Board of Education is owed tuition reimbursement in the amount of \$2,634.00.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 30, 2012
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Date Received at Agency:

1-30-12
Alma Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:
dr

JAN 31 2012

JOSEPH PINSL.	:	
	:	
PETITIONER.	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF IRVINGTON.	:	
ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – now a tenured elementary teacher in respondent's school district – sought back pay, leave benefits and pension credits in connection with his employment in the district prior to the issuance of his certificate of eligibility with advanced standing (CEAS) in September 2004. Petitioner accepted a teaching position beginning in September of 2003 based on a contingency employment agreement with the respondent district, with the expectation that his CEAS would be issued imminently. When it was not, the respondent Board instead employed petitioner for the 2003-04 school year as a *per diem* substitute teacher, at a rate of pay that was less than the salary included in the contingency contract he had signed. Although paid as a substitute, petitioner contends that he was in charge of his own fifth grade classroom for the entire year and treated as a regular teaching staff member, except for his rate of compensation and lack of benefits. The respondent Board asserted that petitioner received the salary and benefits to which he was entitled.

The ALJ found, *inter alia*, that: because petitioner did not receive any teaching certificate from the State of New Jersey at any time during the 2003-04 school year, he did not comply with one of the express contingency terms of his Contingency Employment Contract and the contract was therefore void; there is no legal and competent evidence that the petitioner's principal promised that he would receive retroactive pay; petitioner admitted that he delayed asserting a right to retroactive pay and benefits until he was granted tenure; petitioner initially filed a complaint in the Superior Court in November 2009, which was dismissed; the parties agreed that the six-year statute of limitations was tolled upon the filing of petitioner's claim in Superior Court; and the petitioner filed his complaint more than six years from the date when his cause of action for a compensation differential accrued. Accordingly, the ALJ denied petitioner's appeal.

Upon careful and independent review, the Commissioner concurred with the ALJ that the petition must be dismissed as untimely, but noted that the applicable limitations period is not the six-year statutory period for contract disputes that would attach in Superior Court. Jurisdiction in this case lies with the Commissioner, and the applicable limitations period is 90 days, as set forth in N.J.A.C. 6A:3-1.3(i). Accordingly, the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 6363-10
 AGENCY DKT. NO. 100-5/10

JOSEPH PINSL.	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF IRVINGTON,	:	
ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	

This controversy was brought before the Commissioner by a teacher who – due to delays in the issuance of his certificate of eligibility with advanced standing (CEAS) to teach elementary education – was hired as a substitute in his first year of employment with respondent, *i.e.* the 2003-04 school year. He was paid on a *per diem* basis and was assigned to the same fifth grade class for the entire academic year.¹ Petitioner received his CEAS at the beginning of his second year of employment with respondent and was subsequently paid the appropriate teacher salary. Five years later, in November 2009, petitioner filed suit in Superior Court seeking reimbursement of the differential between the *per diem* pay he received for the 2003-04 school year and the salary he would have earned had his CEAS been timely issued – plus ancillary benefits and pension credits. That action was transferred to the Commissioner for adjudication on or about May 18, 2010.

¹ While it does not affect the outcome of this case, the Commissioner is constrained to remind the parties that the employment of an uncertified teacher for more than 20 days in the same position in a district is a violation of N.J.A.C. 6A:9-6.5.

Upon review of the record² and Initial Decision of the Office of Administrative Law (OAL), to which Decision no exceptions have been filed, the Commissioner concurs with the Administrative Law Judge (ALJ) that the petition must be dismissed as untimely. However, the applicable limitations period is not the six-year statutory period for contract disputes that would attach in Superior Court. Jurisdiction over this controversy lies with the Commissioner, and the applicable limitations period is 90 days, as set forth in *N.J.A.C. 6A:3-1.3(i)*.

Accordingly, the petition is dismissed.

IT IS SO ORDERED.³



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/16/12

Date of Mailing: 3/16/12

² No hearing transcripts were provided to the Commissioner.

³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 06363-2010

AGENCY DKT. NO. 100-5/10

JOSEPH PINSL,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF IRVINGTON, ESSEX COUNTY,**

Respondent.

Santo J. Bonanno, Esq., for petitioner

Ronald C. Hunt, Esq., for respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: November 4, 2011

Decided: December 19, 2011

BEFORE **EVELYN J. MAROSE, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Joseph Pinsl, seeks back pay, leave benefits, and pension credits in connection with his employment with the Board of Education of the Township of Irvington, Essex County (Irvington) during the 2003–04 school term. The Irvington Board of Education asserts that petitioner received the salary and benefits to which he

was entitled and opposes petitioner's request for back pay, leave benefits, and pension credits.

Petitioner filed a Complaint in the Superior Court of New Jersey, Law Division, Bergen County, Docket No. 10368-09, on November 25, 2009. Upon motion by respondent, which was opposed by the petitioner, the complaint was dismissed without prejudice. By Order dated April 30, 2010, the Court provided petitioner with thirty days to file his claim with the Office of Administrative Law (OAL). If the OAL determined that it did not have jurisdiction, petitioner would have thirty days to file a motion to restore his complaint to the active trial calendar. The Court tolled the statute of limitations until jurisdiction was established either by the OAL or the Superior Court. In the event that the petitioner did not file his claim within thirty days with the OAL, or file a motion to restore within thirty days should the OAL determine that it did not have jurisdiction, then respondent could submit a certification, reciting the appropriate facts, to the Superior Court. The case would then be dismissed with prejudice. (R-11.)

The matter was transferred to the OAL on June 10, 2010, for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held on March 15, 2011. The record remained open until May 23, 2011, in connection with the submission of a document and correspondence regarding the document. Due to a voluminous caseload, the time for issuance of this Initial Decision was extended to November 14, 2011. Prior to the issuance of this Initial Decision, the record was re-opened. Upon receipt of correspondence from the parties relating to the statute of limitations, the record closed on November 4, 2011.

FACTUAL DISCUSSION AND FINDING OF FACTS

Alberta Sharif, the director of Human Resources, testified on behalf of respondent. Petitioner testified on his own behalf. Santo Bonanno, Esq., petitioner's attorney, also briefly testified to identify two letters that he had written, to which he never received a response on behalf of respondent.

TESTIMONIAL AND DOCUMENTARY EVIDENCE

Joseph Pinsl

Petitioner Joseph Pinsl testified that after completing all of the necessary requirements, he applied to the State of New Jersey for his Teaching Certificate. He also applied for employment as a teacher in the Irvington School District. After the principal and superintendent recommended that petitioner be hired, he was offered a Contingency Employment Contract ("contract"), which he signed on August 6, 2003. The contract provided that the employment agreement was valid only after verification of the submitted documentation, criminal history review and approval by the Board of Education (Board) at a regularly scheduled monthly Board meeting. (P-3; P-1.) The contract provided that petitioner was hired as a fifth-grade teacher from September 1, 2003, to June 30, 2004, at an annual salary of \$35,608. The contract also provided that petitioner was required to hold a Teaching Certificate issued by the State of New Jersey and that the certificate had to be in full force and effect. If petitioner did not hold a certificate, he had to procure a certificate before the date when he would begin service and before entering upon the duties of his teaching position. Once petitioner obtained his Teaching Certificate, he had to show the Teaching Certificate to the County superintendent of schools and to the superintendent of the Board (or Board secretary if there was not a superintendent). A provision of the contract provided that the contract would only be valid after verification of submitted documentation, criminal history review and approval by the Board at a regular monthly Board meeting. (P-1.)

Petitioner did not receive his Teaching Certificate prior to the beginning of the school term in September 2003, though he, and others on his behalf, made many telephone calls to the State as to why the certificate had not yet been received. In fact, he did not receive his Teaching Certificate until October 2004. (P-2.)

Despite his failure to procure a Teaching Certificate from the State, petitioner was employed by Irvington from September 2003 to June 2004, and for the month of September 2004. (P-6.) He was paid as a substitute teacher, rather than as a teacher.

His salary ranged from \$100 to \$125 per day, which was less than the annual salary of \$35,608 referenced in his proposed contract. (R-1; R-2.) Petitioner testified that his job responsibilities did not differ from those of a teacher who had received his or her Teaching Certificate. He had his own fifth-grade class for the entire school year. He received notice of, and attended, all workshops offered to teachers during the 2003–04 academic school year.

On September 4, 2004, the State of New Jersey issued a Certificate of Eligibility with Advanced Standing ("Certificate") to petitioner. The Certificate noted:

John J. Pinsl has completed an approved college teacher preparation program and is eligible to seek employment in positions requiring the Provisional Certificate in the area of Elementary School Teacher in Grades K–5. The provisional Certificate will be issued contingent upon evidence of employment in a district that agrees to provide an approved induction program, including required job support and performance evaluation.

[R-3.]¹

Petitioner did not receive the State-issued Certificate until October 2004. Upon receipt, he provided the Certificate to Irvington. At the October 27, 2004, meeting, the Irvington Board of Education made several appointments by resolution, including petitioner's appointment as fifth-grade teacher at the Grove Street School, at an annual salary of \$36,808, Step 3, effective October 28, 2004. (R-4.)

On November 25, 2009, petitioner filed a Complaint in the Superior Court of New Jersey, asserting that he was entitled to back pay, leave benefits and pension credits for the 2003–04 academic year, during which he was paid at an hourly substitute's rate. (P-4.) As a result of a motion filed by Irvington, petitioner's Complaint was dismissed without prejudice, to allow petitioner thirty days to file his claim with the OAL. (R-11.)

¹In October 2005, the State of New Jersey issued petitioner a Standard Certificate. That certificate certified that "John J. Pinsl has met all of the requirements established by the State Board of Education and is authorized to serve in the public schools of New Jersey as an Elementary Teacher in Grades K–5." (R-7.)

Though petitioner was a union member, he never filed a grievance with the union. Petitioner never made a demand for back pay and/or benefits directly to the Board until November 2009, shortly before his Complaint was filed. (P-5.) He also never demanded back pay and/or benefits from the director of Human Resources. Petitioner discussed the concept of a retroactive pay differential with his school principal, Alan A. Gamba. Petitioner stated that it was his building principal who provided him with a copy of Governor McGreevey's Executive Order No. 138, issued on October 12, 2004, which related to the delay in processing teachers' certifications and the possibility of paying substitute teachers retroactively according to the teachers' salary guide. (P-2.) Petitioner acknowledged that he could have made a claim for back pay and benefits many years ago. Initially, he chose not to file a claim or initiate a legal proceeding until he had received tenure. He feared filing a claim, before receipt of tenure, as it might adversely affect his consideration for a fourth-year contract.

Alberta Sharif, Director of Human Resources

Alberta Sharif testified regarding Irvington's hiring process for teachers. Job candidates who are recommended for hire by a school principal are initially offered a "Contingency Employment Contract." The contract is valid only after verification of submitted documents, a criminal background check and approval by the Board of Education. The contract is also contingent upon the candidate submitting a Certificate of Eligibility, a Provisional Certificate or a Standard Certificate issued by the State.

To substitute for a teacher, a person must present a different certificate. Substitute Teacher's Certificates are issued by the counties, upon proof of completion of sixty undergraduate college credits. In Irvington, substitutes earn between \$100 and \$125 per day. Substitutes who will likely work every day were initially referred to as "Permanent Substitutes." Now they are referred to as "Building Substitutes." Substitutes are not paid for days that they do not work. They receive no vacation days, sick days or personal days. They earn no pension credits.

During petitioner's job interview in August 2003 he expressed his belief that he would shortly be receiving a Teaching Certificate from the State of New Jersey.

However, when petitioner did not provide Irvington with a Teaching Certificate by the beginning of the 2003–04 academic school year, his name was not placed on the Board of Education's agenda for a teaching appointment. His name was placed on the agenda for appointment as a substitute teacher. (R-1.) Petitioner worked as a substitute teacher in Irvington for the entire 2003–04 academic school year. During that year, he never presented Irvington with a Teaching Certificate issued to him by the State of New Jersey.

At the beginning of the 2004–05 academic year, since petitioner had not yet presented Irvington with a Teaching Certificate issued to him by the State, his name was again placed on the Board agenda for appointment as a substitute teacher. The Board agenda noted that he would be assigned to the Grove Street School, and be paid \$125 per diem. (R-2.)

The first time that petitioner provided Irvington with a Teacher Certificate was October 2004. (R-3.) Petitioner was listed on the October Board agenda for appointment as a teacher, and his appointment was approved. (R-3.) He was immediately paid according to the teachers' salary guide (Step 3) and began receiving benefits, including pension credits, sick days, and personal days. Ms. Sharif was unaware of petitioner's claim of entitlement to retroactive salary and benefits for the 2003–04 academic school year and for a portion of the 2004–05 academic school year until she learned that petitioner had filed a Complaint in November 2009.

Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses, I **FIND** the following pertinent **FACTS**:

Petitioner executed a Contingency Employment Agreement on August 6, 2003, wherein it was agreed that Irvington would employ petitioner as a fifth-grade teacher from September 1, 2003, to June 30, 2004, at an annual salary of \$35,608. The contract expressly provided that it would only be valid after verification of submitted documents, criminal history review and approval by the Irvington Board of Education at a regular scheduled monthly Board meeting. The contract also provided that petitioner

was required to hold, or obtain, a Certificate issued by the State of New Jersey before he began service or entered upon the duties of his position. The Certificate had to be in full force and effect and submitted to the County superintendent of schools and to the superintendent of Irvington. (P-1.) Though petitioner applied for a Certificate prior to executing the Contingency Employment Agreement, he did not receive a Certificate from the State of New Jersey until October 2004. Accordingly, I **FIND** that petitioner did not comply with one of the expressed contingency terms of his contract for the 2003–04 academic school year.

When petitioner did not present, to Irvington, a Teaching Certificate issued by the State of New Jersey before the start of the 2003–04 academic school year, the Board approved his hiring as a substitute teacher for a per-diem rate of \$100. His compensation did not include benefits such as sick and personal leave time or pension credits. When petitioner did not present a Teaching Certificate issued by the State of New Jersey before the start of the 2004–05 academic school year, the Board approved his hiring as a substitute teacher at Grove Street School for a per-diem rate of \$125. His compensation again did not include benefits such as sick and personal leave time or pension credits. Upon presentation to Irvington of a Teaching Certificate issued by the State of New Jersey, petitioner was listed on the next Board agenda for appointment as a teacher. His appointment was approved, effective the day after the Board meeting. Petitioner was then paid on the teachers' salary guide, Step 3, and was entitled to benefits such as sick, personal and vacation days, and pension credits. During the 2003–04 academic school year and in September and October of 2004, though petitioner was paid at a substitute's rate and was not entitled to benefits, he was the sole teacher assigned to a fifth-grade class in the Grove Street School. I **FIND** that despite the duties that petitioner was assigned from September 2003 through October 2004, until he presented Irvington with a Teaching Certificate and was appointed as a teacher by the Board, he was compensated at a substitute-teacher rate.

Discovery is a process that allows each party to learn about the other side's case. The purpose of discovery is to make sure that there are no surprises at the hearing, so the result will be based on the merits of the case. During discovery, each side learns the evidence that will be used at trial to support either side's case. All

discovery must be completed ten days before the first hearing date. N.J.A.C. 1:1-10.4(e). During the hearing of this matter, for the first time petitioner provided a document to his counsel that he received some time in 2004 or 2005. The document, a press release from the Office of the Governor concerned an Executive Order issued by Governor McGreevey (Release) relating to a delay in processing teaching certificate applications, was presented in support of petitioner's claim of entitlement to back pay and benefits. (P-2.) Since petitioner had not provided the document to his counsel, petitioner's counsel had not provided the document in response to discovery demands that were served by Irvington upon petitioner. Irvington objects to late introduction of the Release, which was known to petitioner for many years, as unfair, prejudicial and untimely. I **FIND** that the Release was not produced in accordance with the New Jersey Administrative Code and should be suppressed.

Petitioner's counsel argued that whether or not Exhibit P-2 is suppressed, the subject of the exhibit, Executive Order #138 of Governor James E. McGreevey, should be considered by me as controlling law. Upon review, I **FIND** that Executive Order #138 is not applicable to petitioner. (R-3.) Executive Order #138, which was signed on October 12, 2004, provides relief for approximately 1,000 applicants whose applications had not yet been processed at the time of the signing of the Order. However, the State of New Jersey issued a Certificate of Eligibility with Advanced Standing to petitioner in September 2004. Even if petitioner was by definition entitled to some relief provided in Executive Order #138, and he is not, the bulk of the damages asserted by petitioner are beyond the scope of the Order. Executive Order #138 only references the ability to possibly qualify for back pay to the beginning of the 2004–05 academic year. Petitioner seeks back pay for the full 2003–04 academic year and approximately two months of the 2004–05 term.

Both parties agree that petitioner filed a Complaint in the Superior Court of New Jersey on November 25, 2009. Petitioner argues that his claim did not accrue until after he learned that Irvington would not pay him retroactively, as his principal led him to believe. Petitioner's principal did not testify at the hearing. All alleged statements made by the principal are hearsay. While hearsay is admissible in administrative agency proceedings, it is subject to the "residuum rule," which mandates that there must be a

residuum of legal and competent evidence in the record to support it. Weston v. State, 60 N.J. 36, 51 (1972). I **CONCLUDE** that no legal and competent evidence was presented that the petitioner's principal promised that he would receive retroactive pay. To the contrary, Alberta Sharif testified that the principal had no authority to even consider any requests for retroactive pay or any other financial adjustment. All such requests had to be made to her or to the superintendent or Board.

LEGAL ANALYSIS AND CONCLUSIONS

No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools and of such other certificate, if any, as may be required by law.

[N.J.S.A. 18A:26-2.]

Petitioner executed a Contingency Employment Agreement on August 6, 2003, wherein it was agreed that the Irvington Board of Education would employ petitioner as a fifth-grade teacher from September 1, 2003, to June 30, 2004, at an annual salary of \$35,608. The contract expressly provided that it would only be valid after verification of submitted documents, criminal history review and approval by the Irvington Board of Education at a regular scheduled monthly Board meeting. The contract also provided that petitioner was required to hold, or obtain, a Certificate issued by the State of New Jersey before he began service or entered upon the duties of his position. The Certificate had to be in full force and effect and submitted to the County superintendent of schools and to the superintendent of Irvington. Though petitioner applied for a Certificate prior to executing the Contingency Employment Agreement, he did not receive a Certificate from the State of New Jersey at any time during the 2003–04 academic year. Since petitioner did not comply with one of the express contingency terms of his Contingency Employment Contract, and Irvington by statute could not employ petitioner as a teaching staff member, I **CONCLUDE** that the contract was void.

The parties agree that that the six-year statute of limitations was tolled upon the filing of petitioner's claim in the Superior Court of New Jersey on November 25, 2009. As noted above, no credible evidence was presented that petitioner delayed filing a complaint in reliance upon promises of retroactive pay by his principal. Petitioner himself testified that he delayed asserting a right to retroactive pay and benefits until he was granted tenure. Petitioner was aware from the first check that he received in September 2003 that Irvington was paying him in accordance with the per-diem rate given to a substitute teacher, despite his assignment to a fifth-grade class and to the duties performed by teachers who had received their certificates. I **CONCLUDE** that petitioner filed his Complaint more than six years from the date when his cause of action for a compensation differential, including back pay and benefits, accrued.

ORDER

It is **ORDERED** that petitioner's request for entitlement to back pay, leave benefits, and pension credits is hereby **DENIED**.

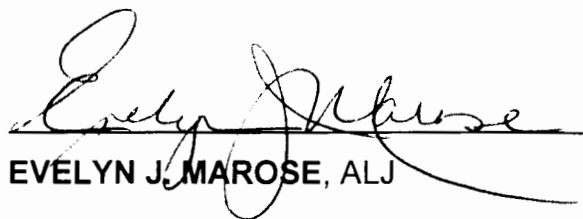
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2011

DATE


EVELYN J. MAROSE, ALJ

Date Received at Agency:

December 19, 2011

Date Mailed to Parties: December 20, 2011

kp/sej


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Petitioner:

Joseph Pinsl
Santo Bonanno, Esq.

For Respondent:

Alberta Sharif

EXHIBITS

Petitioner:

- P-1 Contingency Employment Agreement
- P-2 McGreevey Issues Order on Teachers' Certification Process, dated October 12, 2004
- P-3 Unsigned note from Grove Street School regarding appointment of Pinsl for the 2003–04 school year
- P-4 Letter from Santo Bonanno, Esq., to President, Paul Inman, Irvington Board of Education, dated September 3, 2009
- P-5 Letter from Santo Bonanno, Esq., to President, Paul Inman, Irvington Board of Education, dated November 4, 2009 (executed by Mr. Bonanno)
- P-6 Letter from Alan A. Gamba, Principal, to Mr. Pinsl, dated June 21, 2004

Respondent:

- R-1 Board Resolution as to Substitute Teaching Personnel, at a pay rate of \$100 per day, effective for the 2003–04 school year (unsigned)
- R-2 Board Resolution to pay Joseph Pinsl \$125 per day for days worked at Grove Street School, unsigned
- R-3 The State of New Jersey Certificate of Eligibility with Advanced Standing, issued September 4, 2004, noting that the Provisional Certificate will be issued

contingent upon evidence of employment in a district that agrees to provide an approved induction program, including required job support and performance evaluation

- R-4 Personnel Resolution, dated October 27, 2004, noting as Item 5(g) the appointment of Joseph Pinsl, 5th Grade Teacher, Grove Street School, at an annual salary of \$36,808, Step 3, BA Level, effective October 28, 2004
- R-5 Letter from Santo Bonanno, Esq., to President, Irvington Board of Education, dated November 4, 2009 (unsigned)
- R-6 Agreement Between the Irvington Board of Education and Irvington Teacher Association, Teacher Unit, July 1, 2007–June 30, 2009
- R-7 State of New Jersey, Standard Teaching Certificate for Elementary Teacher in Grades K–5, Issued 10/05
- R-8 Employment Contract for John J. Pinsl, from September 1, 2007, to June 30, 2008, at an annual salary of \$45,095
- R-9 County Substitute Teacher's Certification, issued to John Pinsl, for all grades, K–12, in the public schools of Essex County, issued September 5, 2003, to January 2, 2007
- R-10 Contingency Employment Contract between Joseph Pinsl from September 1, 2003, to June 30, 2004 (marked void)
- R-11 Order of Menelaos W. Toskos, J.S.C., dated April 30, 2010

OAL DKT. NO. EDU 1409-12
AGENCY DKT. NO. 26-2/12

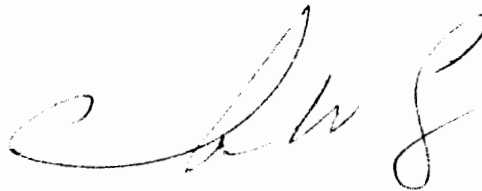
ANATOL M. KOUS.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP	:	DECISION ON MOTION
OF OLD BRIDGE, MIDDLESEX COUNTY.	:	
DAVID CITTADINO, ANTHONY ARICO,	:	FOR EMERGENT RELIEF
JOANN PISCATELLI, ANNE CHOMKO,	:	
NICOLE SALADINO, TOM RICHMOND, OLD	:	
BRIDGE EDUCATION ASSOCIATION, and	:	
NEW JERSEY EDUCATION ASSOCIATION.	:	
RESPONDENTS.	:	

Petitioner is a certified teacher whose employment with the respondent board of education was terminated in July 2009 after petitioner failed to respond to tenure charges brought against him. In February 2012 he filed a petition to reopen the referenced litigation, seeking reinstatement and back pay. Accompanying the petition was an application for emergent relief, which was promptly forwarded to the Office of Administrative Law (OAL) and expeditiously adjudicated there.

In conjunction with his consideration of the OAL Order denying petitioner emergent relief, the Commissioner has reviewed the record, including an audio recording of the February 27, 2012 hearing in the OAL. For the reasons expressed by the Administrative Law Judge, the Order is adopted.

Accordingly, the status quo is maintained and the matter has been returned to the OAL for disposition of the remaining issues by way of an Initial Decision.

IT IS SO ORDERED.¹



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/15/12

Date of Mailing: 3/16/12

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (N.J.S.A. 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 01409-12

AGENCY DKT. NO. 26-2/12

ANATOL M. KOUS.

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE,
MIDDLESEX COUNTY, DAVID CITTADINO, ANTHONY ARICO,
JOANN PISCATELLI, ANNE CHOMKO, NICOLE SALADINO,
TOM RICHAMOND, OLD BRIDGE EDUCATION ASSOCIATION
AND NEW JERSEY EDUCATION ASSOCIATION,**

Respondent.

Anatol M. Kous, petitioner appearing pro se

Christopher B. Parton, Esq., for Respondents Old Bridge Board of Education,
Cittadino, Arico and Piscatelli (Kenney, Gross, Kovats & Parton, attorneys)

Steven R. Cohen, Esq for Respondents Old Bridge Education Association,
Chomko, Saladino and the New Jersey Education Association (Selikoff &
Cohen, attorneys)

Record Closed: February 27, 2012

Decided: March 2, 2012

BEFORE **WALTER M. BRASWELL**, ALJ:

STATEMENT OF THE CASE

This matter arises out of a "Petition to Re-open the Tenure Charges Against Anatol M. Kous" filed with the Department of Education by Petitioner, Anatol M. Kous, pro se, on February 2, 2012. The Petition included a request for injunctive relief, and was transferred on an expedited basis to the Office of Administrative Law and set down for an emergent hearing on February 6, 2012. At the request of the Petitioner due to scheduling conflicts, the matter was rescheduled for a hearing on 1:30pm on Monday, February 27, 2012.

An appearance was made and a brief was submitted on February 20, 2012 by Christopher B. Parton, Esq., Kenney, Gross, Kovats & Parton, Esqs., on behalf of the Respondent Board of Education and its agents Cittadino, Arico and Piscatelli ("the Board Respondents"). An appearance was made and a brief was submitted on February 7, 2012 by Steven R. Cohen, Esq., Selikoff & Cohen, PA, on behalf of Respondents Old Bridge Education Association and its agents Chomko and Saladino, as well as the New Jersey Education Association ("the Union Respondents").¹

The relief sought by Petitioner is as follows:

1. That the Commissioner enters an Order reopening the Tenure Litigation that was concluded against Petitioner by a final order of the Commissioner dated July 17, 2009;
2. That the Commissioner declares the Petitioner's termination, which resulted from said litigation, illegal; and

¹ At the hearing, neither Respondents' counsel nor Petitioner were able to identify named Respondent Tom Richmond, and as such, no claims against such a Respondent are addressed herein.

3. That the Commissioner enter injunctive relief reinstating the employment of the Petitioner and awarding him back pay and emoluments.

The Board and Union Respondents seek the following relief:

1. The denial of any claim for emergent relief; and
2. The dismissal of the Petition in its entirety on the combined or alternative bases of untimeliness under the controlling laws and regulations and the lack of subject matter jurisdiction in the Commissioner;

As such, the I have considered the papers submitted by the parties and counsel where applicable, the arguments made, and the applicable laws, regulations and decisional law. For good cause having been shown, I now rule as follows:

PROCEDURAL HISTORY

This matter arises from a series of events taking place two and a half years ago in 2009. At that time, Petitioner was a teaching staff member employed by Respondent, the Old Bridge Board of Education. As acknowledged in his papers, Petitioner was going through various and significant personal difficulties at that time. As a result of those difficulties, Petitioner apparently exhibited what the Board of Education and Administration determined to be a deviation from normal physical or mental health. Therefore, pursuant to state statute N.J.S.A. 18A:16-2, Petitioner was placed on paid leave and directed to undergo a psychiatric assessment of fitness to return to work. Documents in the record, including the exhibits to Petitioner's papers, evidence that the directive to undergo such an assessment was made and discussed no later than November 2008. The record reflects that Petitioner sought legal counsel from at least two attorneys, each of whom corresponded and spoke with the former Board Attorneys regarding the directive for Petitioner to undergo the assessment.

Notwithstanding the district's directive, over the period between November 2008 and May 2009, Petitioner neither underwent a psychiatric assessment as directed, nor challenged the Board's directive that he obtain such an assessment. Ultimately, on April 17, 2009 Tenure Charges for Insubordination were filed with the Board Secretary. Petitioner and his attorney were served with said Charges, but chose not to respond. As such, the Board voted on the Charges on May 19, 2009, and the Charges were filed with the Commissioner of Education on June 1, 2009.

The Board provided Petitioner with written notice of those Charges via certified mail on May 20, 2009. Again, Petitioner chose not to respond. The Commissioner's office then independently contacted Petitioner on June 2, 2009 to respond to the Tenure Charges. He signed for the Certified Mail copy of the Commissioner's letter on June 4, 2009. However, again, he failed or refused to respond to the Charges. At the hearing, Petitioner admitted receiving and signing for the Certified Mail copy of the Charges and the letter from the Board of Education, but stated that he was "inundated with mail at that time," and that he neither opened nor read either documents.

The Commissioner granted Summary Decision in favor of the Board of Education by decision dated July 17, 2009 under Agency Docket No. 109-6/09. That decision was never appealed, nor was reconsideration of that decision sought by any party. No subsequent case history existed until Petitioner first raised the issue of "re-opening the case" in a December 13, 2011 letter to the Commissioner. In a January 4, 2012 response, Director Kathleen Duncan of the Bureau of Controversies and Disputes advised Petitioner that his procedural avenue would be to file a Petition of Appeal, and this Petition followed.

PETITIONER'S APPLICATION FOR EMERGENT RELIEF

Petitioner requested emergent relief of reinstatement and back pay pending a hearing.

Regarding the petitioner's request for emergent relief I ruled that petitioner cannot meet the required elements of Crowe v. DeGioia, 90 NJ 126, 132-34 (1982) and that as such, injunctive relief could not be entered.

RESPONDENT'S MOTION FOR DISMISSAL

Both the Board Respondents and the Union Respondents have also moved for the dismissal of the Petition of Appeal in its entirety. These motions are made on the basis of alleged untimeliness of the Petition of Appeal, as well as an alleged lack of jurisdiction.

The Commissioner of Education and the OAL reserve the authority to dismiss a Petition of Appeal for failure to state a claim upon which relief may be granted, whether for want of subject matter jurisdiction, because such a an application is time-barred, or for other reasons. N.J.A.C. 6A:3-1.10; N.J.A.C. 1:1-12.

The Union Respondents argue that the majority of the claims in the Petition of Appeal fall outside of the subject matter jurisdiction of the Commissioner, as they do not arise under N.J.S.A. Title 18A, as required by N.J.S.A. 18A:6-9. Specifically, the Union Respondents posit that all claims of failure of the duty to represent—arising out of Petitioner's claims that the Union did not provide him with adequate backing in 2009, are cognizable only under the PERC Act, N.J.S.A. 34:13A-1.1 et seq., particularly section 5.4(b)(1). For this conclusion, the Union Respondents rely upon Belen v. Woodbridge Bd. of Ed., 142 N.J.Super. 486 (App.Div.), *certif. den.* 72 N.J. 458 (1976); Kaczmarek v. New Jersey Tpk. Auth., 77 N.J. 329, 336-37 (1978); City of Hackensack v. Winner, 82 N.J. 1, 24 (1980).

The Union Respondents, as joined by the Board Respondents, also note that any claim cognizable as an Unfair Labor Practice Charge, including for the failure of the duty of fair representation, carries a limitations period of 180 days. N.J.S.A. 34:13A-5.4(c). Such a period would have run, at the latest, 180 days after the Commissioner's above-

cited July 17, 2009 decision, on or about January 17, 2010, now more than two years ago.

The Board Respondents make a similar claim with regard to the claims of ethical misconduct by their various agents. Respondents assert that such claims are cognizable only under the School Ethics Act, N.J.S.A. 18A:12-24 and 24.1, and are strictly irrelevant to the matter before this Court. Moreover, the Board Respondents note that with regard to any claim of an ethics violation on behalf of a school official or employee, N.J.A.C. 6A:28-6.5 imposes a 180-day limitations period. Finally, the Union Respondents argue that Petitioner's claims of right-to-counsel was not violated, as the operative law, N.J.S.A. 18A:6-20, does not oblige either a Board of Education or a bargaining unit to provide legal services. Moreover, the record is clear—again from documents submitted by Petitioner—that the NJEA did, in fact, arrange for representation of Petitioner by Michael Barrett, Esq., and that for his own reasons, and after documented discourse between Mr. Barrett and the Board Attorney, Petitioner chose to no longer avail himself of Mr. Barrett's representation.

With regard to the remaining claim—the application to “re-open the tenure case,” both groups of Respondents make the same argument. Petitioner testified on his own behalf that he was aware of the requirement to undergo a psychiatric fitness-for-duty assessment. The Board had the right to impose such a requirement per N.J.S.A. 18A:16-2, subject to Petitioner's right to contest that requirement, to which he did not avail himself. Despite discourse between two different attorneys on behalf of Petitioner and the former Board Attorney and repeated warnings between November 2008 and April 2009, Petitioner never submitted himself to the assessment.

Similarly, the record, notably including Petitioner's testimony, is clear that he received the Tenure Charges from the Board of Education via Certified Mail, and that he also received a letter from the Commissioner of Education instructing him to respond to the Tenure Charges or face default. Petitioner posits that he was “inundated with mail” at the time, and his testimony also indicates that he was facing various personal

difficulties. However, the fact remains that he took no action whatsoever to respond to—or even open, by his own admission—official, certified communications from his employer and from the Commissioner of Education.

Time-bars in litigation before the Commissioner are promulgated for a reason, and are uniformly enforced. Kaprow v. Berkeley Tp. Bd. of Ed., 131 N.J. 572, 587 (1993); Portee v. Newark Bd. of Ed., 94 N.J.A.R.2d (EDU) 381, 383. These time limitations are strictly enforced—at times to the detriment of a litigant filing an action two days too late, Dreher v. Jersey City Bd. of Ed., 1987 S.L.D. 1706, *aff'd* State Bd. of Ed. 1988 S.L.D. 2439, *rev'd on other grounds*, App.Div. A-6120-82 (Feb. 28, 1958).

Based upon these facts, which I **FIND** to be accurate and conclusive in the record, Respondents argue that there is no basis upon which to “re-open the tenure case” at this point. As noted above, the applicable Department of Education regulations and Rules of Court provide for a ten-day limitations period for a motion for reconsideration, and a 45-day limitations period for an appeal to the Appellate Division. Petitioner took no action whatsoever to avail himself of either. As of the date of the arguments in this matter, the Board Respondents’ counsel accurately calculated that it had been 933 days since the Commissioner issued the decision at issue. The Board and Union Respondents submit that there is no excusable neglect or justification for such a delay, and moreover, Petitioner presents none in his moving papers and arguments.

ORDER

Based upon the foregoing, it is **ORDERED** that the within Petition of Appeal is **DISMISSED** with prejudice, for the reasons set forth above.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 3, 2012
DATE

Walter M. Braswell
WALTER M. BRASWELL, ALJ

Date Received at Agency:

Date Mailed to Parties:

ljb

IN THE MATTER OF THE TENURE :
HEARING OF PAMELA WILLIAMS : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION
OF CAMDEN, CAMDEN COUNTY. :

SYNOPSIS

Petitioning Board filed tenure charges of unbecoming conduct, neglect of duty and insubordination against respondent, a tenured special education teacher, and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the allegations – which respondent has chosen not to deny – may be deemed admitted and are sufficient to warrant termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured teaching position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for action against respondent's certificate as that body deems appropriate.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 3/16/12
Mailed 3/21/12

AGENCY DKT NO. 41-2/12

IN THE MATTER OF THE TENURE :
HEARING OF PAMELA WILLIAMS : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION
OF CAMDEN, CAMDEN COUNTY. :

For the District, Louis R. Lessig, Esq., Brown & Connery LLP

No appearance by or on behalf of Pamela Williams

This matter was opened before the Commissioner of Education on February 23, 2012 through the certification of tenure charges of unbecoming conduct, neglect of duty and insubordination by the School District of the City of Camden against Pamela Williams, a tenured special education teacher in the District.

By notice dated February 23, 2012, the Commissioner directed respondent, via both certified and regular mail – the certified copy having been signed for on February 27, 2012 – to file an Answer to the tenure charges against her. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified “*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*” and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted by the charged employee. No reply was received from respondent or any attorney on her behalf.

The Commissioner has reviewed the tenure charges certified against respondent by the District, *i.e.*, unbecoming conduct, neglect of duty and insubordination, and the statement of evidence in support of those charges. The District further reports that Ms. Williams has been, and continues to be, absent without official leave from her assigned duties since September 1, 2011.

Deeming the allegations to be admitted and noting that respondent has failed to respond to the charges certified against her, the Commissioner finds that the District has demonstrated that respondent is guilty of unbecoming conduct, neglect of duty and insubordination, warranting dismissal from her tenured position.

Accordingly, summary decision is hereby granted to the District, and respondent Pamela Williams is dismissed from her tenured teaching position in the District's employ as of the date of this decision. A copy of this decision is being forwarded to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED.¹



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/16/12

Date of Mailing: 3/21/12

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).

SUSAN DUNBAR BEY, PRESIDENT	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
SEAN BROWN, MEMBER	:	
CAMDEN BOARD OF EDUCATION,	:	
	:	
RESPONDENT,	:	
_____	:	

SYNOPSIS

The School Ethics Commission determined that Camden Board of Education member Sean Brown violated *N.J.S.A.* 18A:12-24.1(i) of the Code of Ethics for School Board Members when he compared Camden's Superintendent of Schools to a terrorist on his Facebook page. After considering the nature of the charge, the Commission recommended that the Commissioner of Education impose a penalty of censure.

The Commissioner, whose jurisdiction – in the absence of an appeal – is limited to reviewing the Commission's recommended sanction, did not adopt the Commission's recommendation that respondent be censured, but instead elected to change the penalty to a reprimand based upon the absence of any prior violations by respondent. Accordingly, the Commissioner ordered that the above-named respondent be reprimanded as a school official found to have violated the School Ethics Act.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

March 20, 2012

SEC DKT. NO. C25-11
AGENCY DKT. NO. 365-12/11

SUSAN DUNBAR BEY, PRESIDENT	:	
CAMDEN BOARD OF EDUCATION,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
SEAN BROWN, MEMBER	:	
CAMDEN BOARD OF EDUCATION,	:	
	:	
RESPONDENT,	:	
_____	:	

The record of this matter and the decision of the School Ethics Commission (Commission) have been reviewed.¹ In its decision, the Commission determined that respondent – Camden Board of Education member Sean Brown – violated *N.J.S.A.* 18A:12-24.1(i) of the Code of Ethics for School Board members when he published, on his Facebook page, certain statements comparing the Camden School District Superintendent to a terrorist. Further, the Commission determined that censure is the appropriate penalty. (Commission Decision at 8)

Initially, it must be emphasized that pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is not reviewable by the Commissioner unless a notice of appeal is filed pursuant to P.L. 2008,c. 36 and *N.J.A.C.* 6A:4. Because respondent did not file such an appeal, this decision is restricted solely to a review of the Commission's recommended penalty.

¹ No exceptions to or appeals of the Commission's decision have been filed.

In recommending the penalty of censure in the instant case, the Commission recognized "respondent's right to express his difference of opinion with the Board and the administration." (Commission Decision at 7) However, the Commission determined that the approach utilized by respondent violated *N.J.S.A. 18A:12-24.1(i)* of the Code of Ethics for School Board Members, which provides: "I will support and protect school personnel in proper performance of their duties."

The Commissioner concurs that comparing the Superintendent to a terrorist goes beyond the expression of differences or good faith criticism of the Superintendent's performance. To the contrary, such a public slur by a Board member is likely to undermine the Superintendent's effectiveness. Further, the Commissioner agrees with the Commission that "in using social media, the affirmative duties within the Code of Ethics for School Board Members may not be overlooked." (Commission Decision at 8) This is so because while Facebook is a vehicle for people to communicate simultaneously with friends, it operates in a manner that allows wide distribution of the entries of any given Facebook user. Indeed, respondent testified before the Commission that he has approximately 1200 Facebook "friends" and that most of his Facebook comments are accessible to the public. (Commission Decision at 3)

The Commission decided upon the sanction of censure to convey a "cautionary message" of first impression that social media postings do not lie outside the purview of the Code of Ethics for School Board Members. (Commission Decision at 8) In view of the absence of prior violations by respondent, the Commissioner has elected to change the penalty to a reprimand.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/20/12

Date of Mailing: 3/21/12

SUSAN DUNBAR BEY

**BEFORE THE SCHOOL
ETHICS COMMISSION**

v.

**SEAN BROWN
CAMDEN BOARD OF EDUCATION
CAMDEN COUNTY**

**Dkt. No. C25-11
DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed on May 16, 2011 by Susan Dunbar Bey alleging that Sean Brown, a member of the Camden Board of Education ("Board") violated the School Ethics Act ("Act"), N.J.S.A. 18A:12-21 et seq. Specifically, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(g) and (i) of the Code of Ethics for School Board Members in connection with statements made on his Facebook page and in a newspaper article. The respondent filed an answer on June 8, 2011. The answer alleged that the complaint was frivolous. Pursuant to N.J.A.C. 6A:28-7.2(b), the complainant was accorded the opportunity to submit a reply to the frivolous allegation, but did not.

The parties were notified by letter dated June 22, 2011 that the Commission would consider this matter at its meeting on July 26, 2011 in order to make a determination pursuant to N.J.A.C. 6A:28-10.8(a) as well as to consider the allegation of frivolousness. At its meeting on July 26, 2011, the Commission voted to find that the above-captioned complaint was not frivolous, in accordance with the standard set forth at N.J.A.C. 6A:28-1.2. Additionally, pursuant to N.J.A.C. 6A:28-10.8(a), the Commission voted to retain this complaint for hearing.

By letter dated October 12, 2011, the parties were notified that this matter would be scheduled for hearing at the Commission's meeting on November 22, 2011. Both parties appeared *pro se*. After hearing all testimony, as summarized below, the Commission voted during the public portion of its meeting to find that the respondent had violated the Act, as set forth below.

SUMMARY OF THE RECORD

The complainant, who is President of the Board, testified that the respondent was present at the Board's meeting on January 25, 2011 and, after the meeting, he stated on his Facebook page that the Board President does not let students speak. In this instance, the complainant explained that a student representative was going to make statements at the meeting which the complainant believed would be detrimental, so she, as Board President, did not allow the student representative to speak. Exhibit C-1, a printout of the respondent's Facebook page, was accepted into evidence. In response to questions from the Commission, the complainant stated that the student was, indeed, a student representative and not a voting member of the Board. The

complainant further testified that the Board's counsel was present at the meeting, but did not raise a concern about not letting the student speak.

The complainant testified that on May 2, 2011, the respondent posted a statement on his Facebook page wherein he compared the Superintendent to a terrorist. Exhibit C-2 was accepted into evidence and the complainant read from the text of the posting, which also included a picture of the Superintendent. The complainant testified that such writings hurt the students who grapple with constant negative publicity about the District. Moreover, when Board members say such things, the complainant testified that there is an assumption that the Board member has some insight, which is not true.

The complainant testified that the media frequently attend Board meetings in pursuit of a story. Based on her training, she believes that she, as the President, is the spokesperson for the Board. The complainant read from a newspaper article published on May 8, 2011, which was accepted as Exhibit C-3. Therein, the respondent is quoted stating there has been no improvement in the graduation rate for years. The complainant testified that she particularly objected to the respondent's statement in the article that the Board and the administrators believe that minorities cannot perform better than they are performing. In response to questions from the Commission, the complainant could not point to any specific inaccuracy with respect to the respondent's statement about graduation rates, but added that the official graduation rates were not available when he made this statement. The complainant questioned the basis for the respondent's statement about the Board and the administration being satisfied with the students' performance.

The respondent, Sean Brown, has been a member of the Board since May 2010. He stated that he believes the basis of these charges is an ideological difference of opinion. As to his comments on Facebook, the respondent questioned how any such statements were any different from him making statements to a group of his friends at his home. In the instance following the January 25th Board meeting, the respondent said that he merely posted what happened at that meeting. The respondent testified that the complainant did not let the student representative speak. He explained that at the Board meeting, there was a proposed after school program and the Board was being asked to approve the teachers for the program. The respondent testified that the student's question was essentially challenging the wisdom of an afterschool program and whether it would be effective, but the complainant did not let the student finish. Maybe, the respondent posited, the student was going to make a statement about a teacher, but he affirmed that it irritates him when students are not able to speak. This was the essence of his statement on his Facebook page. He also referred to the fact that the District did not, after six months, have a District plan. Thus, he stated that parents and students needed to be scared because the District was not providing a thorough and efficient education. The respondent testified that the forthcoming QSAC¹ report will verify his admonition. The respondent stated that he has an obligation to let the community know this information.

¹ "QSAC" refers to the New Jersey Quality Single Accountability Continuum. NJQSAC is a system for evaluating and monitoring all public school districts in the State. It is designed to be a single, comprehensive accountability system that consolidates and incorporates the monitoring requirements of applicable State and Federal programs. Under NJQSAC, districts are evaluated in the areas of instruction and program, personnel, fiscal management,

In response to cross-examination from the complainant, the respondent explained that Facebook is a tool for him to share information with his friends and his only limitation in doing so should be that he cannot discuss matters that were discussed in closed session. In response to questions from the Commission, the respondent stated that, as of today, his Facebook account is not public. However, he stated that most of the things that he has on his page are accessible to the public and he has about 1,200 Facebook friends.

With respect to Exhibit C-2, the respondent testified that he wrote this statement at about 1:00 in the morning. Noting that he is always careful in choosing his words, he posted, "Now if we could only do something about our local terrorists that destroy dreams and burn futures." The respondent notes that in this posting, he did not directly mention a particular person. He testified that the reason the picture of the Superintendent is there is because when he posted the link to the Camden City Public Schools, the Superintendent's picture came up. The respondent was clear in his testimony that he saw the Superintendent's picture before allowing the statement to "go live," but he did not remove it. He affirmed that he does not regret the posting. He stated that it was "possibly mean," but "not inappropriate." The respondent explained that there was so much attention on May 1, 2011 about the killing of Osama Bin Laden, he could not help but think how "off-focus" people were in that there are so many people struggling in the City of Camden. On cross-examination, the respondent further explained that he did not take down the picture of the Superintendent because he was claiming that there are certain people who are terrorists for their own District and the Superintendent was included in that group.

With respect to his comments to the press as shown in Exhibit C-3, the respondent's testimony addressed the complainant's concern with his statement in the article that the Board and the administrators believe that minorities cannot perform better than they are performing. On this, the respondent testified that meeting after meeting, he believes there is an ideology exhibited by some that a 50% graduation rate is the best they can do in a poor minority community. He stated that he hears this all the time and maintains there is a philosophical difference about education and how the Board chooses to use its power to meet its duty to provide a thorough and efficient education. The respondent acknowledged that he cannot speak for the Board and that the better practice is to allow the Board President to be the spokesperson. However, the statements in Exhibit C-3 represent his opinion; he chose to talk to the media because he maintains that parents need to know that not everyone wants to be a cheerleader or blind supporter of poor management. When cross-examined about the basis for this statement, the respondent replied that this is the way the District is governed. He based his statement on comments from the Superintendent and from other Board members. He testified that he believes the students suffer because of the poor management in the District.

Complainant's Exhibits²

C-1	Facebook posting about the January 25, 2011 Board meeting.
C-2	Facebook posting from May 2, 2011.
C-3	Article published in May 8, 2011.

operations and governance, so as to determine the extent to which they are providing a thorough and efficient education. N.J.A.C. 6A:30-1.1.

² The respondent did not offer any exhibits into evidence.

FINDINGS OF FACT

The Commission finds the following facts:

1. The complainant is the President of the Board.
2. The respondent has been a member of the Board since May 2010.
3. At the Board's meeting on January 25, 2011, the complainant believed that a student representative was going to make inappropriate statements, so she, as Board President, did not allow the student representative to speak.
4. The respondent posted the following statement on his Facebook page after the January 25, 2011 Board meeting:

The school board President doesn't let students speak; the board votes for programs that are not effective; six months is not long enough to write a plan. PARENTS AND STUDENTS - BE SCARED. (Exhibit C-1)

5. The respondent posted the following statement on his Facebook page on May 2, 2011:

Now if we could only do something about our local terrorists that destroy dreams and burn futures. (Exhibit C-2)

Under this statement is a link to the Camden City Public Schools and a picture of the Superintendent. The respondent acknowledged that he saw the photo, but did not remove it.

6. The following statement appeared in the press on May 8, 2011:

School board member Sean Brown said he had been unable to secure information from the district about how the graduation rate is calculated and how newly funded police officers would be assigned in the schools. "There is no improvement in high school graduation in many years, nor are there many initiatives to address that issue," Brown said. "What happened in Newark is exactly what needs to happen in Camden," Brown said. "The difference between some of the school board members and school administrators and me is that they believe that poor, minority students can't do any better than this." (Exhibit C-3)

ANALYSIS

The complainant bears the burden of factually proving any violations of the Code of Ethics for School Board Members in accordance with the standards set forth at N.J.A.C. 6A:28-6.4(a). See also, N.J.S.A. 18A:12-29(b). Here, the complainant asserts that the respondent's actions violated N.J.S.A. 18A:12-24.1(g) and (i) of the Code of Ethics for School Board Members.

Count 1

In Count 1 of the complaint, the complainant asserts that after the January 25, 2011 Board meeting, the respondent made inaccurate statements pertaining to the Board president and Board business on his Facebook page, which was in violation of N.J.S.A. 18A:12-24.1(g), which provides:

I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

The Commission's regulations require that:

Factual evidence of a violation of the confidentiality provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that the respondent(s) took action to make public, reveal or disclose information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices. Factual evidence that the respondent violated the inaccurate information provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that substantiates the inaccuracy of the information provided by the respondent(s) and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances. N.J.A.C. 6A:28-6.4(a)7.

The respondent does not deny that he made the statement in Exhibit C-1 on his Facebook page. Although the complainant claims the statement was inaccurate, she also testified that she did, indeed, prohibit the student from speaking at the January 25, 2011 meeting. As to the remainder of the posting, the complainant has offered no evidence that substantiates that the respondent posted inaccurate information. Rather, it appears that the respondent was offering his personal opinion. Accordingly, the Commission finds that the complainant failed to factually establish that the respondent violated N.J.S.A. 18A:12-24.1(g) and Count 1 is, therefore, dismissed.

Count 2

In Count 2 of the complainant, the complainant asserts that on May 2, 2011, the respondent compared the Superintendent to a terrorist on his Facebook page, which was in violation of N.J.S.A. 18A:12-24.1(i), which provides:

I will support and protect school personnel in proper performance of their duties.

The Commission's regulations require that:

Factual evidence of a violation of N.J.S.A. 18A:12-24.1(i) shall include evidence that the respondent(s) took deliberate action which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties. N.J.A.C. 6A:28-6.4(a)9.

The respondent does not deny that he was responsible for the Facebook posting in Exhibit C-2. In this connection, the Commission notes that it has found violations of N.J.S.A. 18A:12-24.1(i) where the comments made to or about a school employee were direct, confrontational and intimidating. For instance, in I/M/O Charles Fischer, Eatontown Bd. of Ed., Monmouth County, C30-03 (February 24, 2004), Commissioner of Education Decision No. 157-04SEC, April 12, 2004, the Commission found that a board member violated N.J.S.A. 18A:12-24.1(i) when he called an employee at home and became angry when she refused to provide him with the reports that he had requested. In I/M/O David Kanaby, Hillsborough Bd. of Ed., Somerset County, C53-05 (July 24, 2007), Commissioner of Education Decision No. 350-07SEC, September 10, 2007, the Commission found that the respondent Board member violated N.J.S.A. 18A:12-24.1(i) when he sent an email to the Superintendent which was both "threatening and intimidating" in that it asked the Superintendent for an accounting of her personal leave. The Board member sent the email to all Board members, as well as the Business Administrator, the Assistant Superintendent and his subordinate. The Commission found the respondent's email to be "a personal and highly critical expression of his anger towards the superintendent in the proper performance of her duties." (Kanaby at slip op. page 3)

In I/M/O David Hollander, Springfield, Bd. of Ed., Union County C49-07 (February 24, 2009), aff'd, Commissioner of Education Decision No. 62-10ASEC, decided March 5, 2010, the respondent Board member wrote a letter to the State complaining about his Superintendent. The Commission found that the letter was not a mere statement of disagreement or dissatisfaction with the Superintendent's handling of matters. The respondent accused the complainant of allowing his administrative staff to violate Board policy, then directed his recriminations to the attention of State officials. Finally, in Brown et al. v. David Matthews, City of Englewood Board of Education, Bergen County, C13-07 (October 27, 2008), aff'd, Commissioner of Education Decision No. 123-09A, April 14, 2009, the Commission found the respondent in violation of N.J.S.A. 18A:12-24.1(i) when he refused to cooperate with the District's affirmative action officer (AAO) and, in so doing, engaged in offensive comments so upsetting to the employee that she resigned as the District's AAO.

Here, the Commission finds that the respondent's action in posting the "terrorist" message was, indeed, deliberate. He candidly testified that, even though he did not mention a particular person in the text, when the Superintendent's photo came up as a result of posting a link to the District's website, he saw the picture and did not remove it. The respondent explained that he did not take down the picture of the Superintendent because he was claiming that there are certain people who are terrorists for their own District and the Superintendent was included in that group. In so stating, the respondent explained that there was much attention focused on the killing of Osama Bin Laden, but not enough attention focused on the struggles of the students in the City of Camden. The respondent testified that he does not regret the posting; he stated that it was "possibly mean," but "not inappropriate."

The Commission disagrees. While it recognizes the respondent's right to express his difference of opinion with the Board and the administration, it must also find, under these circumstances, that the respondent's chosen method and manner for doing so was inappropriate. Comparing the Superintendent to a terrorist, on a social media outlet which allowed for access by many people, was an intentionally confrontational act. In this connection, the Commission acknowledges the complainant's observation that members of the community assume that Board members have insight that others do not have. Thus, when a sitting Board member makes such a judgmental proclamation, it is likely to be credited far more than a statement offered by an ordinary citizen. As such, the Commission finds that the statement may reasonably be considered as undermining, opposing, compromising or harming the Superintendent in the proper performance of her duties. Accordingly, the Commission finds that the complainant has established that the respondent violated N.J.S.A. 18A:12-24.1(i).

Count 3

In Count 3 of the complainant, the complainant asserts that the respondent was quoted in a newspaper article in which he made inaccurate statements concerning fellow board members and school administration. The complainant asserts this was a violation of N.J.S.A. 18A:12-24.1(g) and (i), as set forth above. The respondent does not deny that he made the statements to the media that are in Exhibit C-3. To the extent that the complainant claimed that the graduation statement was inaccurate, she offered no evidence to substantiate the alleged inaccuracy. The complainant's testimony on this count essentially focused on the respondent's statement that the school board members and school administrators believe that poor, minority students cannot do any better. While this may be a loaded statement, the Commission finds that absent any evidence to the contrary, it appears that the respondent was, again, offering his personal opinion. Accordingly, the Commission finds that the complainant failed to factually establish that the respondent violated N.J.S.A. 18A:12-24.1(g). Neither does the Commissioner find that the complainant's statements to the media rise to the level of a violation of N.J.S.A. 18A:12-24.1(i). Accordingly, Count 3 is, therefore, dismissed.

DECISION

For the reasons set forth above, the Commission dismisses Counts 1 and 3 in the complaint, but finds that Sean Brown has violated N.J.S.A. 18A:12-24.1(i) of the Code of Ethics for School Board Members as set forth in Count 2.

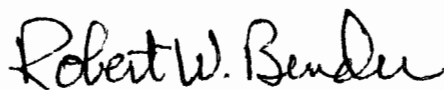
PENALTY

The Commission recommends a penalty of censure in this matter. In so doing, the Commission notes that this is essentially a matter of first impression. That is, while there have been incidents of Board members posting inappropriate information online at NJ.com, (see, I/M/O Valerie Jordan, High Bridge Bd. of Ed., Hunterdon County, C03-09 (April 20, 2010) Commissioner of Education Decision No. 173-10SEC, decided June 7, 2010; Jacobs v. Delbury, Sussex Wantage Reg'l Bd. of Ed., Sussex County, C44-07 (November 25, 2008) Commissioner of Education Decision No. 7-09 SEC, decided January 9, 2009), this is the first time the Commission has found a violation of the Act for a Board member's postings on Facebook. As such, the Commission declines to necessarily be guided by the penalties designated in those online cases (reprimand and six-month suspension, respectively) or even by the penalties issued in the matters cited in this decision (i.e., I/M/O Charles Fischer, supra; I/M/O David Kanaby, supra; I/M/O Hollander, supra; and Brown et al. v. David Matthews, supra.) Rather, the Commission takes this opportunity to impress upon this respondent, as well as other Board members, that in using social media, the affirmative duties within the Code of Ethics for School Board Members may not be overlooked. The Commission finds that a censure is an appropriate sanction to convey this cautionary message.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the School Ethics Commission's recommended sanction. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of violation. Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of violation may file, within **13 days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4 within **30 days** of the filing date of the decision from which the appeal is taken. The filing date shall be three days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (13 days from the

date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

A handwritten signature in black ink that reads "Robert W. Bender". The signature is written in a cursive style with a large, stylized "R" and "B".

Robert W. Bender
Chairperson

Mailing Date: December 21, 2011

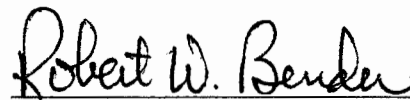
Resolution Adopting Decision – C25-11

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof, and the testimony of the parties from its hearing on November 22, 2011; and

Whereas, at its meeting on November 22, 2011, the Commission dismissed Counts 1 and 3 in the complaint, but found that the respondent violated N.J.S.A. 18A:12-24.1(i) of the Code of Ethics for School Board Members as set forth in Count 2 and recommended a penalty of censure; and

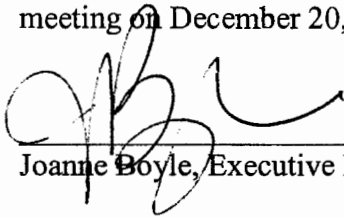
Whereas, at its meeting on December 20, 2011, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs it staff to notify all parties to this action of the decision.



Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on December 20, 2011.



Joanne Boyle, Executive Director

OAL DKT. NO. EDU 11821-11
AGENCY DKT. NO. 270-9/11

D.J., on behalf of minor child, D.J., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF EWING,
MERCER COUNTY, :
RESPONDENT. :
_____ :

The record of this matter, the parties' proposed Settlement and Release, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/22/12

Date of Mailing: 3/22/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11821-11

AGENCY DKT. NO. 270-9/11

D.J. O/B/O D.J.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF EWING MERCER COUNTY,**

Respondent.

D.J., parent of D.J., petitioner, appearing pro se

Joseph L. Roselle, Esq., for respondent (Schenck, Price, Smith & King, LLP,
attorneys)

Record Closed: February 6, 2012

Decided: February 8, 2012

BEFORE PATRICIA M. KERINS, ALJ:

This matter was transmitted to the Office of Administrative Law on October 3, 2011, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement and Release, along with a Board Resolution indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

2/8/12
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency:

2/10/12

Date Mailed to Parties:

2/10/12

/lmz

EXHIBITS

Jointly submitted:

- J-1 Settlement Agreement and Release
- J-2 Board Resolution

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for the
Ewing Board of Education

RECEIVED
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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

D.J. o/b/o D.J.,

Petitioners,

v.

EWING BOARD OF EDUCATION,

Respondents.

BEFORE THE COMMISSIONER
OF EDUCATION

OFFICE OF ADMINISTRATIVE LAW

OAL Docket No.: EDU-11821-11

Agency Ref. No.: 270-9/11

SETTLEMENT AND RELEASE

This Stipulation of Settlement and Release ("Agreement") is made by and between Petitioner, Darrell Jones, and the Respondent, Ewing Board of Education ("Board").

RECITALS

WHEREAS, in or about August of 2011, Respondent Ewing Board of Education held that, based on the results of a residency investigation, minor student D.J. was not domiciled in the Ewing School District ("District") and thus not entitled to a free, public education in the District and passed a resolution ordering the removal of the students from the District; and

WHEREAS, Petitioner thereafter commenced an administrative action to challenge the Board's residency determination with regard to D.J.; and

WHEREAS, this administrative action is captioned D.J. o/b/o D.J. v. Ewing Board of Education, and is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 11821-11, Agency Dkt. No. 270-9/11

("the Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, in order to avoid the expense, inconvenience, distractions and inherent uncertainties associated with continuation of this dispute, and the fees and expenses that inevitably would result therefrom, the Parties, by this Agreement, herein agree to adopt a full and final settlement of any and all claims, lawsuits, complaints, and/or disputes between Petitioners and Respondent in connection with any and all damages and losses arising from the Litigation; and

WHEREAS, by this Agreement, Petitioner will voluntarily dismiss the Litigation with prejudice, without costs to any party as against the other;

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. The Parties mutually agree that, during the pendency of the residency investigation, which began on or about May 5, 2011 through June 30, 2011, D.J. was found not to be domiciled in Ewing, but rather, in Trenton, New Jersey.
2. Petitioners shall pay the Board the sum of Two Thousand, Three Hundred Thirty Four dollars and Seventy-Eight cents (\$2,334.78), representing back tuition due and owing for the period of D.J.'s ineligible attendance in the District during the 2010-2011 school year and which shall constitute a full and final settlement of the claim for back tuition asserted against Petitioners by Respondent Board of Education in the Litigation.
3. The amount of \$2,334.78 is to be paid as follows: Within fifteen (15) days following the adoption by the Board of Education of a resolution accepting this Agreement, but in

no case prior to the receipt of a fully executed copy of this Agreement, Petitioners shall make an initial payment in the amount of One Hundred Dollars (\$100.00), in the form of a check made payable to the "Ewing Board of Education," hand-delivered or mailed to the office of Brian Falkowski, School Business Administrator/Board Secretary, at the District Administration office, 2099 Pennington Road, Ewing, New Jersey 08618. The remaining amount of \$2,234.78 shall be paid in equal monthly installments of Fifty Dollars (\$50.00) each, until the full amount has been satisfied. Nothing herein shall prevent Petitioner from paying a greater amount than the monthly payment amount, provided that at least the minimum payment of \$50.00 is received monthly.

4. Each payment of \$50.00 is due on the first (1st) day of each Month at the office of the School Business Administrator at the above address, beginning in the month following that in which the initial payment was made. Payments received by the School Business Administrator after the 5th of the month shall incur a late fee of \$5.00. Any payment and late fee not received by the 15th of the month shall constitute a default by Petitioner and a breach of this Agreement. Petitioner will receive receipts for each payment from the School Business Administrator.
5. Petitioner, in consideration of this Stipulation of Settlement and Release, and in full, final, and complete settlement of the matter, hereby agree to a withdrawal and/or dismissal, with prejudice, of their Petition of Appeal in this matter.
6. Petitioner further understands and agrees that, if they fail to make a payment in accordance with the agreed-upon payment plan, the entire remaining unpaid amount shall immediately become due and owing, payable in a single lump sum.

7. Petitioner further agrees to indemnify Respondent for any and all costs, including court costs and attorneys fees, associated with any action instituted by Respondent to enforce the terms of this Agreement should Petitioner breach the Agreement and/or fail to adhere to the agreed-upon payment plan.
8. The terms of this Agreement shall in no way constitute acceptance or assent by the Board that D.J. nor any other child of Petitioner is automatically entitled to a free public education in the District at any point in the future, and the Parties understand and agree that Respondent reserves the right to investigate D.J.'s and/or Petitioner's residency status in the District at any time, in order to determine whether or not Petitioner and/or his child(ren) remain domiciled in the District.
9. This Agreement is subject to approval by the Ewing Board of Education. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.
10. In exchange for the above consideration, Respondent Ewing Board of Education agrees to release Petitioner from any and all claims, cross-claims, counterclaims, demands, liabilities, damages, indebtedness, costs, attorneys' fees, actions or obligations of any nature, which solely arise out of or are related in any way to this Litigation, through the date of this Agreement.
11. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.
12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

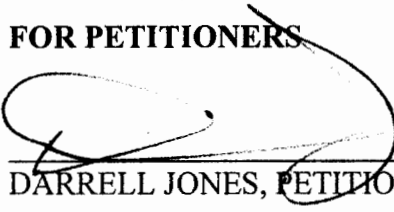
13. Petitioners hereby represent that he is freely entering into this Agreement, that he was advised of his right to obtain counsel of his choosing and has knowingly waived that requirement, and that he has read and fully understand the contents and effects of this Agreement.
14. This Settlement may be subject to the approval of the Office of Administrative Law and the Commissioner of Education. In the event that such approval is necessary, the terms of this Agreement shall not be binding until said approvals are received.
15. This Agreement shall be binding upon all parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors, predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, shareholders, members, employees, agents and assigns.
16. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than those set forth herein. This Agreement supersedes all previous arrangements or understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioners and Respondent.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement,
consisting of six pages, effective on the day and year first above written.

FOR PETITIONERS

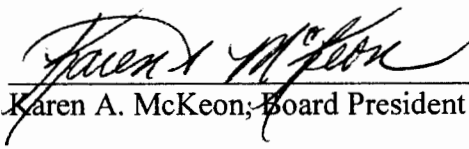
Date: 1/23/12



DARRELL JONES, PETITIONER

FOR RESPONDENT,
EWING BOARD OF EDUCATION

Date: 1/30/12



Karen A. McKeon, Board President

EWING TOWNSHIP BOARD OF EDUCATION

District Administrative Offices
2099 Pennington Road
Ewing, NJ 08618

(609) 538-9800, ext. 1302—(609) 538-0041 (fax)

CERTIFIED BOARD RESOLUTION

RECORDED
2012 FEB -6 A 931
STATE OF NEW JERSEY
OFFICE OF ADMIN. LIAISON

I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE
RESOLUTION OF THE EWING TOWNSHIP BOARD OF EDUCATION.

THIS MEETING WAS HELD ON JANUARY 30, 2012.

Following is the Board vote on this Resolution

On motion by Ms. Benedetti, seconded by Mrs. Staub, the Board approved
this Resolution by the following roll call vote:

YEAS: Mrs. Staub, Mr. Bradley, Mr. Mack, Mr. Benedetti, Ms. Benedetti, Mr.
Ewell, Mr. White, Dr. Palmer and Mrs. McKeon

NAYS: None



Brian S. Falkowski
Board Secretary

SEAL

The Ewing Public Schools

Providing a Foundation for Life

BOARD OF EDUCATION
EWING PUBLIC SCHOOLS

Action Item: New Business

Board Meeting Date
January 30, 2012

Discussion Area: Finance & Operations

Subject: Residency Settlement Agreement

Contact: Brian S. Falkowski, School Business Administrator

ACTION

1. BACKGROUND:

This is a residency issue for minor D.J. v. the Ewing Board of Education.

2. ADMINISTRATIVE CONSIDERATION/RECOMMENDATION:

RESOLVED, that the Board approves the settlement in the matter captioned D.J. o/b/o D.J. v. Ewing Board of Education, OAL Dkt. No. EDU 11821-11, in accordance with the terms and conditions therein; and

BE IT FURTHER RESOLVED, that the Board President is authorized to sign the agreement on behalf of the Board.

3. FISCAL IMPACT:

Agreement states that the "Petitioners shall pay the Board the sum of Two Thousand, Three Hundred Thirty Four dollars and Seventy-Eight cents (\$2,334.78), representing back tuition due and owing for the period of D.J.'s ineligible attendance in the District during the 2010-2011 school year".

4. BOARD ACTION REQUESTED:

Approval

OAL DKT. NO. EDU 3174-12
AGENCY DKT. NO. 53-3/12

D.D., on behalf of minor child, D.D.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE	:	APPLICATION FOR EMERGENT RELIEF
TOWNSHIP OF WAYNE, PASSAIC	:	
COUNTY,	:	
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner finds that the petitioner has demonstrated entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 N.J. 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6, with respect to petitioner's claim that D.D. was not afforded adequate due process prior to his long-term suspension.¹

Pursuant to *N.J.A.C.* 6A:16-7.3(a)10, in each instance of a long-term suspension, the board of education is required to provide the student with a formal hearing where the student is given the opportunity to present a defense to the charges. In this case, it is undisputed that D.D. was not given a formal hearing by the Board in connection with his suspension that stemmed from an incident at school, and a positive test result for the steroid Nandrolone. Regardless of whether D.D.'s suspension was for medical or disciplinary reasons, D.D. was still

¹ Based on the current record before the Commissioner, petitioner has not established an entitlement to emergent relief under *Crowe v. DeGioia*, 90 N.J. 126 (1982) with respect to his claim that D.D. should be immediately allowed back in school.

entitled to the due process protections outlined in *N.J.A.C. 6A:16-7.3*.² The regulations also require the Board, at the completion of a long-term suspension, to either reinstate the student or to continue the suspension. *N.J.S.A. 18A:37-5*; *N.J.A.C. 6A:16-7.3(c)*. Pursuant to *N.J.A.C. 6A:16-7.3(c)*, this determination must be made based on the following criteria:

- i. The nature and severity of the offense;
- ii. The district board of education removal decision;
- iii. The results of any relevant testing, assessments or evaluations of the student; and
- iv. The recommendation of the chief school administrator, principal or director of the alternate education program or home or other in-school or out-of-school instruction program in which the student has been placed. [*N.J.A.C. 6A:16-7.3(c)1.i.-iv.*]

Based on the circumstances in this case, the Commissioner finds that the Board shall provide the petitioner with a due process hearing to determine whether D.D.'s suspension was appropriate, and if so, whether the long-term suspension should continue or whether D.D. should immediately return to the general education program.³ Therefore, the Board is directed to provide the petitioner with a due process hearing as soon as possible, but not later than March 31, 2012. To that end, if there are currently no Board meetings scheduled prior to March 31, 2012, the Board is directed to schedule a special meeting to afford the petitioner with the opportunity to have a due process hearing. The Board is reminded that it must also continue to follow the applicable regulatory provisions concerning the educational services that must be provided to D.D. while he is on long-term suspension. *N.J.A.C. 6A:16-7.3(a)9*.

² It is not clear from the record whether D.D. is in fact being held out of school for medical reasons, disciplinary reasons or a hybrid of both.

³ The Commissioner is mindful of the petitioner's assertion that a formal hearing at this juncture should not further delay the ultimate resolution of this matter since the Board should have conducted the hearing when D.D. was initially suspended in January. The petitioner, however, did not challenge the Board's failure to provide the petitioner with a hearing until he filed this application for emergent relief on March 5, 2012.

Accordingly, the recommended decision of the ALJ is modified for the reasons expressed herein, and the petitioner's application for emergent relief is adopted with respect to the petitioner's claim that D.D. was not afforded a formal hearing prior to his long-term suspension. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.⁴


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/21/17

Date of Mailing: 3/22/12

⁴ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING

EMERGENT RELIEF

OAL DKT. NO. EDU 03174-12

AGENCY DKT. NO. 53-3/12

D.D., SR ON BEHALF OF D.D..

Petitioner,

v.

**TOWNSHIP OF WAYNE BOARD OF
EDUCATION, PASSAIC CO.,**

Respondent.

Frederick E. Gerson, Esq., for petitioners, D.D., Sr. as guardian ad litem for
D.D., Jr. (Feitlin, Youngman, Karas & Gerson, L.L.C., attorneys)

Nathanya G. Simon, Esq. and John Croot, Esq., for Respondent, Wayne Board
of Education (Schwartz, Simon, Edelstein & Celso, attorneys)

BEFORE **WALTER M. BRASWELL, ALJ**:

STATEMENT OF THE CASE

This matter arises out of a Petition filed with the Department of Education on March 5, 2012, by D.D., Sr., as Guardian Ad Litem for D.D., Jr., a minor, seeking that

D.D., Jr. be immediately permitted back into Wayne Hills High School. The Petition included an emergent motion requesting the minor, D.D., Jr., who has been suspended, without a hearing, for two months, to be immediately allowed back into school. The motion included Affidavits of the minor and his parents, a report from the minor's drug counselor and a report from a toxicologist hired by the Petitioner.

On March 6, 2012, the matter was transmitted from the Department of Education to the Office of Administrative Law and set down for a motion to be heard on March 12, 2012. An appearance was made by Frederick E. Gerson, Feitlin, Youngman, Karas & Gerson, L.L.C., on behalf of Petitioners. An appearance was made and a brief and Certifications were submitted on March 12, 2012 by Nathanya G. Simon, Esq. and John Croot, Esq., Schwartz, Simon, Edelstein & Celso, attorneys on behalf of Respondent, Wayne Board of Education.

The relief sought by the Petitioner is the immediate reinstatement of D.D., Jr., back to Wayne Hills High School.

The Board of Education seeks not to permit D.D. back to school pending a negative, non-dilute chemical screen.

As such, I have considered the papers submitted by the parties and counsel, the arguments made, testimony of the minor, D.D., Jr., the exhibits presented at the hearing, and the applicable laws, regulations and decision law.

For good cause having been shown, I now rule as follows:

This matter arises from events that occurred at the Wayne Hills High School, in Wayne, New Jersey on or about January 11, 2012. At that time, D.D., Jr. was a Junior in High School. He apparently had some altercation with another minor, R.I. It is undisputed that R.I. started the altercation. Based on the actions of D.D., Jr. during the altercation, he was requested to take a steroid test. D.D., Jr. initially refused to take the

steroid test. Thereafter, on or about January 18, 2012, D.D., Jr. consented to the steroid test. The steroid test was positive for the anabolic steroid, Nandrolone. D.D., Jr. was not allowed back to school pending a negative steroid test.

D.D., Jr. took a subsequent steroid test, which, again, was positive for the steroid, Nandrolone. As a result, D.D., Jr. was not allowed back to school. D.D. was not provided with any notice of any due process rights to a hearing and was not provided with a hearing in reference to his continued absence from school.

As a result, on or about March 5, 2012, D.D., filed the aforementioned Petition for relief, with Affidavits of D.D., Jr., D.D., Sr., and Certification of D.D.'s mother and counsel.

In addition, D.D. presented a letter from the drug evaluator who is on the Commissioner's approved list of drug counselors. D.D. also presented a report from a toxicologist.

The Petition and Motion were forwarded to the OAL and Motion was heard on March 12, 2012. At that time, Respondent's counsel provided a letter memorandum and Certifications.

PETITIONER'S APPLICATION FOR EMERGENT RELIEF

The minor has certified and testified that he had taken the steroid Nandrolone in October and November, 2011. D.D., Jr. testified that he purchased Nandrolone from a fellow student. He testified that he purchased enough Nandrolone for ten (10) injections. However, he stopped after four (4) injections, in November, 2011. He testified that he has the remaining amount in the original vial.

Exhibits were presented at trial showing D.D. during the time period, October, 2011/November, 2011 in which he testified he injected the steroid. He testified that he

had lost twenty three pounds (23) since he stopped taking the steroid in November, 2011. The photographs depicting how he looked while taking the steroid compared to now were accepted into evidence.

Petitioner also presented a report from Amy Klein the drug counselor recommended by the respondent whom he was sent to. The drug counselor prepared a report stating that D.D., Jr. should return to school.

Petitioner's Motion papers included a report from a toxicologist, Dr. Robert Lipsey. Dr. Lipsey's report stated that Nandrolone could remain in a person's system for up to eighteen (18) months in the lay literature, but it has been documented to stay in a person's body, and can be detected for up to six (6) months in actual lab analysis. The report further stated that while the person may not be actively taking the drug for months, the tests may be positive, but there would be absolutely no impairment or visible signs or symptoms for trace amounts in the person's urine or blood.

Respondent's position is that there is a zero tolerance and students are not be permitted back to school, regardless of how long a drug may remain in one's system, until there is an actual negative blood test. The Respondent's position is that this policy is necessary for the safety of the Petitioner and other students. Respondent indicated that this matter was treated primarily as a medical rather than a disciplinary matter. Nevertheless, Respondent offered to provide Petitioner with a due process hearing at the next Board of Education meeting. Petitioner denied that this was a medical rather than a disciplinary matter and argued that the due process procedures in reference to a suspension were applicable.

Based upon the aforesaid facts, I find as follows,

By consent, Petitioner must provide the remaining portion of the steroid to Respondent's counsel by 12:00 p.m. on Wednesday, March 14, 2012. I further find that the minor, D.D., Jr., was in a confrontation on or about January 11, 2011, which was

initiated by another student, R.I. I find that D.D., Jr.'s behavior in reference to the confrontation was not appropriate. Moreover, I find that D.D., Jr. has already been disciplined for two (2) months. Respondent's position is that there must be no traces of the steroid in his system prior to being allowed in school. This constitutes an indefinite suspension which I find is improper.

I find there is no basis to continue to keep D.D., Jr. out of school. I find that the fact that he has been out of school for two months is an example to others not to take steroids and to keep him out longer is unfair and not the appropriate remedy pursuant to N.J.S.A. 18A:40A-12(b).

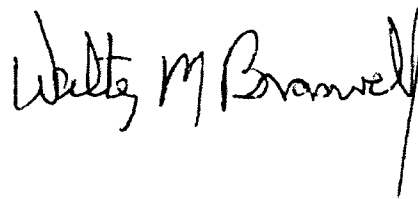
N.J.S.A. 18A:40A-12(b) is the proper statute in reference to a student's use of anabolic steroids. The statute states, in part, A "if it is determined that the pupil's involvement with and use of these substances represents a danger to the pupils health and well being, the coordinator or other teaching staff member shall refer to the pupil to an appropriate treatment program which has been approved by the Commissioner of Health and Senior Services."

I find that the above is the remedy pursuant N.J.S.A. 18A:40A-12(b), and this has, in fact, been accomplished. Based on the above and based on the arguments of counsel and testimony, I find that D.D. should be immediately allowed back into school.

ORDER

Based on the foregoing, it is **ORDERED** that the Motion for Emergent Relief is **GRANTED** for the reasons set forth above.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.



March 13, 2012

DATE

ljb

WALTER M. BRASWELL, ALJ

#109-12R

RAYMOND RUIZ,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF FORT LEE,	:	
BERGEN COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner in this case on remand – whose position as a substance awareness counselor (SAC) was eliminated in a reduction in force (RIF) at the end of the 2009-2010 school year – asserts that the respondent Board improperly terminated his employment in violation of his tenure rights by failing to re-employ him in one of two school psychologist positions held by non-tenured staff members. At the time of his hire in September 2006, petitioner held a Certificate of Eligibility (CE) which allowed him to seek provisional employment as a SAC. He served for four years under that provisional certification. Petitioner had also earned an educational services certificate with a standard endorsement as a School Psychologist, but had not served in that capacity in respondent's district. The Board contends that petitioner never earned tenure in its district. An Initial Decision from the Office of Administrative Law (OAL), issued in May 2011, determined that petitioner was not employed under tenure at the time of his RIF because he had not earned a standard certificate as a SAC. The ALJ recommended dismissal of the case. The Commissioner subsequently issued a decision remanding the case to the OAL for additional factual findings concerning whether or not petitioner had satisfied the conditions of provisional certification and the requirements for standard certification.

On remand, the ALJ found, *inter alia*, that: petitioner's provisional SAC certification has now expired; petitioner did not meet the academic requirements for standard SAC certification prior to his termination by respondent and prior to the expiration of his provisional certificate, nor has he done so to date; petitioner's claims that he was impeded by the respondent and by the Department of Education in his attempts to earn standard SAC certification were fully adjudicated in a related appeal to the New Jersey State Board of Examiners (NJSBOE) and are barred in the instant matter under the doctrine of collateral estoppel; and it is unnecessary to reach to petitioner's argument that his tenure rights extend to all endorsements on his educational services certificate, entitling him to positions held by non-tenured school psychologists. The ALJ concluded that petitioner was not employed under tenure at the time of his RIF, and ordered his appeal dismissed.

Upon thorough and independent review, the Commissioner adopted the Initial Decision as the final decision in this case. In so doing, the Commissioner found, *inter alia*, that the NJSBOE previously determined that petitioner had not satisfied the academic requirements for a standard SAC endorsement, and the Commissioner had upheld this determination. The lack of qualifications for a standard SAC endorsement bar the petitioner from claiming tenure in respondent's district and, in turn, preclude petitioner from any "bumping rights" in the wake of the RIF. Nor does respondent have any jurisdiction to waive the regulatory requirements or disturb the determinations of the NJSBOE. Accordingly, the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

March 26, 2012

OAL DKT. NO. EDU 9871-11
(EDU 8187-10 on remand)
AGENCY DKT. NO. 153-7/10

RAYMOND RUIZ,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
BOROUGH OF FORT LEE,	:	
BERGEN COUNTY,	:	
	:	
RESPONDENT.	:	

This matter originally came before the Commissioner when respondent terminated petitioner's employment as a substance abuse counselor (SAC) – as a result of a reduction in force (RIF). Petitioner maintained that he had achieved tenure in the SAC position and, because he possessed a standard school psychologist endorsement to an educational services certificate, his tenure in the SAC position allowed him "bumping rights" to school psychologist positions in respondent's district that were held by non-tenured employees. On August 17, 2011, the Commissioner remanded the case to the Office of Administrative Law (OAL) for factual findings as to whether – at the time that he was "RIF'd" – petitioner had satisfied all of the conditional requirements of his provisional certificate, which he would have had to have done in order to claim tenure rights.

Upon review of the record, the OAL's Initial Decision on remand and petitioner's exceptions, the Commissioner adopts the Initial Decision as the final decision in this case. The record reveals that the New Jersey State Board of Examiners (NJSBOE) determined on

July 28, 2010 that petitioner had not satisfied the academic requirements for a standard SAC endorsement.¹ Petitioner appealed to the Commissioner, but the Commissioner upheld the NJSBOE's determination in a decision dated December 23, 2011. No appeal of the Commissioner's decision was filed.

In light of the Commissioner's holding that the NJSBOE correctly found petitioner to have fallen short of the academic requirements for a SAC endorsement, the Administrative Law Judge (ALJ) assigned to the remanded action against the Fort Lee Board of Education correctly determined in her Initial Decision that the lack of qualifications for a standard SAC endorsement barred petitioner from claiming tenure in respondent's district. In turn, the lack of tenure precluded petitioner from any "bumping rights" in the wake of the above referenced RIF.

Petitioner's exceptions to the Initial Decision on remand rely heavily upon the respondent district's failure to timely process the paperwork required for the securing of "a provisional educational services certificate with a SAC endorsement." *N.J.A.C.* 6A:9-13.2(e)(1). However, the provisional SAC endorsement was issued well before the RIF and is not at issue here. Nor is there any allegation that respondent failed to execute its responsibility to provide a six-month school residency program for petitioner – another prerequisite to the issuance of a standard SAC endorsement. *N.J.A.C.* 6A:9-13.2(e)(3).

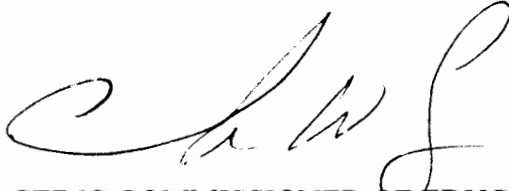
Rather, as explained in the Initial Decision, the basis for petitioner's ineligibility for a standard SAC endorsement was his failure to complete the academic requirements set forth in *N.J.A.C.* 6A:9-13.2(e)(2). Of the three preconditions to standard SAC endorsements that are

¹ The NJSBOE determined that petitioner failed to satisfy *N.J.A.C.* 6A:9-13.2(e)(2), which requires that he complete a Department-approved graduate curriculum with a range of 21-27 semester-hour credits that include the study areas set forth in *N.J.A.C.* 6A:9-13.2(c)(i) through (ix).

set forth in *N.J.A.C.* 6A:9-13.2(e), the second one – *N.J.A.C.* 6A:9-13.2(e)(2) – calls for full responsibility on the part of the candidate. More specifically, it is the candidate who must ensure that he or she has completed the appropriate courses. It is then the responsibility of the NJSBOE to determine whether the candidate has satisfied the requirements of *N.J.A.C.* 6A:9-13.2(e)(2). Neither petitioner's lack of diligence in clarifying and, if necessary, supplementing his academic qualifications, nor any alleged delays on the part of the NJSBOE can bestow upon the respondent in this case – *i.e.*, the Fort Lee Board of Education – the jurisdiction to determine that petitioner had satisfied all of the conditional requirements of his provisional certification so as to qualify for the standard SAC endorsement, which is prerequisite to petitioner's achievement of tenure. Thus, petitioner did not achieve tenure in respondent's district and holds no bumping rights.

Accordingly, the petition is dismissed.

IT IS SO ORDERED.²



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/26/12

Date of Mailing: 3/27/12

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 09871-11

AGENCY DKT. NO. 153-7/10

(Remand of EDU 08187-10)

RAYMOND RUIZ,

Petitioner,

v.

**BOARD OF EDUCATION OF THE BOROUGH
OF FORT LEE, BERGEN COUNTY,**

Respondent.

Gregory T. Syrek, Esq., for petitioner, Raymond Ruiz (Bucceri and Pincus,
attorneys)

Yaacov Brisman, Esq., for respondent, Board of Education of the Borough of
Fort Lee (Cleary, Giacobbe, Alfieri, Jacobs, attorneys)

Gail Kanef Oxfeld, Esq., for intervenor, Reina Sandouk (Oxfeld Cohen,
attorneys)

Record Closed: January 27, 2012

Decided: February 10, 2012

BEFORE ELLEN S. BASS, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Raymond Ruiz, a substance awareness coordinator (SAC) employed by respondent, the Board of Education of the Borough of Fort Lee (the Board), asserts that the Board improperly terminated his employment due to a reduction in force (RIF), effective June 30, 2010. Ruiz contends that the Board acted in violation of his tenure rights by failing to re-employ him in professional positions he held under tenure, and that are presently held by non-tenured staff members.

Ruiz filed his appeal with the Commissioner of Education (the Commissioner) on July 15, 2010.¹ An answer was filed on behalf of the Board and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on July 29, 2010. An order permitting Reina Sandouk to intervene was entered on November 23, 2010. An Initial Decision was issued on May 19, 2011. (C-1.) On August 17, 2011, the Commissioner issued a decision remanding the case to the OAL for additional factual findings. (C-2.)

I conferred with counsel via telephone on December 9, 2011; all agreed that the issues raised by the remand decision did not warrant a reopening of the evidentiary record. Counsel were afforded an opportunity to file briefs addressing the issue raised by the Commissioner's remand decision. The Board and the intervenor chose not to do so, relying instead on their submissions below. Ruiz submitted a certification and letter from counsel dated January 20, 2012, and received by me on January 27, 2012, at which time the record closed. (P-1.)

ISSUE PRESENTED ON REMAND

Has Ruiz satisfied the conditions of his provisional certification and the requirements for standard certification and, if so, did he achieve tenure in the Fort Lee public schools?

¹ Ruiz's original appeal bore docket number EDU 08187-10.

FINDINGS OF FACT

The findings of my May 19, 2011, Initial Decision are incorporated herein by reference. (C-1.) I additionally **FIND** as follows:

Ruiz's provisional certification has expired.² Ruiz did not meet the academic requirements for standard certification prior to his termination in Fort Lee, prior to the expiration of his provisional certificate, nor has he done so to date. Ruiz's eligibility for standard certification as a SAC was the subject of an appeal by him in Ruiz v. State Board of Examiners, EDU 12754-10, which I decided via Initial Decision dated November 9, 2011. (C-3.) Ruiz had challenged the denial of his application for standard certification. My Initial Decision affirmed the action of the State Board of Examiners, and was adopted by the Commissioner on December 23, 2011. (C-4.)

The thrust of the facts contained in Ruiz's certification is that he was unable to earn standard certification through no fault of his own. But Ruiz admits that as early as February 25, 2008, he received an e-mail from the Fort Lee Human Resources officer stating that he might be short credits needed for standard certification. It was then that Ruiz began to urge the Office of Licensure and Credentials that the 21–27 missing credits were encompassed in other course work he had completed. Those efforts continued with a package of information sent to the coordinator of administrative training of the Office of Licensure and Credentials, including transcripts and other documents which purported to demonstrate that the required course work was complete. On December 11, 2009, another e-mail from Human Resources in Fort Lee again alerted Ruiz that he needed an additional 21–27 credits to qualify for standard certification. Rather than take the required courses, Ruiz continued to assert that they were unnecessary. By December 15, 2009, he had filed a letter of appeal with the director of the Office of Licensure and Credentials. Ruiz took two more graduate courses at Montclair State University in May 2010; nonetheless, the Board of Examiners continued to maintain that he lacked sufficient credit for standard certification.

² As noted in the Initial Decision (C-1), a renewal of Ruiz's provisional certificate was issued in August 2009. The provisional certificate is a temporary two-year certificate; hence, it expired in July 2011. N.J.A.C. 6A:9-6.2; N.J.A.C. 6A:9-2.1.

Ruiz urges that the Fort Lee district was slow in formalizing his provisional certification. This point was duly noted by the Commissioner, who reminded the Board “that the responsibility for securing provisional certification for a novice professional lies with the school district that hires the staff member.” (C-2 at 4.) As a result, the Commissioner held that Ruiz was deemed to have worked under his provisional certificate throughout his employment in Fort Lee. (C-2 at 5.) But the district’s misfeasance in no way impacted Ruiz’s ability to complete the course requirements for standard certification.

Ruiz’s employment in Fort Lee terminated on June 30, 2010. As of the date of his termination, Ruiz had not yet received a decision on his application for standard certification. In a decision dated July 28, 2010, the Examiners concluded that Ruiz had satisfied all the requirements for certification except for 21–27 semester-hours credits completed through a State-approved graduate program.³ Ruiz had failed to supply the Examiners with a Verification of Program Completion (VOPC) form properly completed and signed by the appropriate representative of New Jersey City University (NJCU), where he had completed his graduate credits. His application for standard certification was denied, and an appeal of the Examiners’ decision to the Commissioner followed.

Ruiz initially continued to maintain that he had completed the needed course work, and that he could not complete the VOPC form because he was not being directed to the proper representatives of NJCU. But with the assistance of the deputy attorney general assigned to the Examiners appeal, Ruiz was put in contact with the correct signatory for the VOPC form, a Dr. Warren. Ruiz submitted a certification in his Examiners appeal stating, “[a]fter several weeks of attempting to get a definitive answer, [I] was informed that Dr. Warren would sign the form if [I] took two more classes at NJCU and those classes happened to be offered that upcoming summer semester.” (C-3.) It was thus clear that Ruiz continued to be short credits, and for this reason was deemed ineligible for standard certification.

³ It is uncontroverted and I **FIND** that Ruiz had met the other requirements for certification, including completion of a six-month residency while employed full time under a provisional certificate, per N.J.A.C. 6A:9-13.2(e)(3).

ANALYSIS AND CONCLUSIONS OF LAW

Tenure is a legislative status that is earned by operation of law, and upon meeting the precise requirements of the tenure statute. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982); Zimmerman v. Newark Bd. of Educ., 38 N.J. 65 (1962). Ruiz's claims spring from N.J.S.A. 18A:28-5, which provides in pertinent part:

The services of all teaching staff members . . . in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect . . . shall be under tenure during good behavior and efficiency . . . after employment in such district or by such board for:

- (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
- (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
- (c) The equivalent of more than three academic years within a period of any four consecutive academic years.

In my Initial Decision, I concluded that a provisional certificate is not the "proper certificate" contemplated by N.J.S.A. 18A:28-5, and that, accordingly, Ruiz was not employed by the Board under tenure at the time of his RIF. In so determining, I gave consideration to the argument that Ruiz's rights should be governed by the holding in Anson v. Bridgeton Board of Education, 1972 S.L.D. 638. There it was determined that one of the petitioners was employed under "an appropriate provisional certificate issued by the State Board of Examiners" and thus had earned tenure. Anson, supra, 1972 S.L.D. at 639. I was of the view that the provisional certificate when Anson was decided came with far different standards and requirements. In 1972, the provisional certificate was issued for one year to applicants for a standard certificate who were short academic credits. The holder was assured continued eligibility for employment so long as the needed credits were earned. Id. at 638 (citing N.J.A.C. 6:11-4.2).

In the ensuing years, the certification process underwent sweeping changes. In 1984, major reforms were enacted to eliminate the practice of emergency licensure from academic teaching fields, and in 1988–89, further amendments required candidates for licensure to serve a provisional year of employment under the guidance of a mentor, and as a condition of earning permanent licensure. 28 N.J.R. 5128(a) (December 16, 1996). I thus concluded that the provisional certificate as it is issued today is a substandard certificate that allows its holder to pursue the required mentoring and experience needed to qualify for standard certification, and that only standard certification is the “proper certificat[ion] in full force and effect” contemplated by the tenure law. N.J.S.A. 18A:28-5. Since Ruiz had not earned standard certification prior to his termination, I concluded that he could not successfully assert that he had earned tenure in Fort Lee.

But the Commissioner took pains to emphasize that Anson remains good law, citing the following language:

The holder of a provisional teaching certificate accepts a conditional requirement of earning four academic credits per year, and the validity of a provisional certificate cannot be questioned as it relates to tenure, **so long as this requirement is met.**

[C-2 at 6, citing Anson, supra, 1972 S.L.D. at 638 (Commissioner’s emphasis).]

The Commissioner thus held that Ruiz would have earned tenure in Fort Lee under his provisional certificate if he had “satisfied all of the conditional requirements of his provisional certification.” (C-2 at 6.) The Commissioner elaborated that tenure is “conditioned not just upon . . . years of service under provisional certification, but also upon . . . timely completion of the academic and professional requirements for standard certification.” (C-2 at 8.)

Ruiz did not timely complete the academic requirements for standard certification either prior to the termination of his employment in Fort Lee, or prior to the expiration of

his provisional certificate. Nor has he done so to date. Accordingly, I am compelled to again **CONCLUDE** that Ruiz was not employed under tenure at the time of his reduction in force.

Ruiz asserts via his certification that he diligently worked to timely complete the conditional requirements of his provisional certification, and that he “complied with every obligation placed upon [him].” He urges that he should not be penalized for ministerial errors by the Board and Department of Education that impeded his ability to earn standard certification. But these claims by Ruiz were fully adjudicated in his appeal before the State Board of Examiners, and revisiting them is barred under the doctrine of collateral estoppel. It is well established that a party is precluded from relitigating any issue actually determined in a prior action. See State v. Gonzalez, 75 N.J. 181, 186 (1977); United Rental Equip. Co. v. Aetna Life and Cas. Ins. Co., 74 N.J. 92, 101 (1977). The policy considerations that support judicial doctrines like collateral estoppel—finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expense; elimination of conflicts; and basic fairness—have equal applicability in the administrative forum. Hackensack v. Winner, 82 N.J. 1, 32 (1980).

In light of my continued conclusion that Ruiz did not earn tenure, it remains unnecessary to reach his remaining argument that his rights extend to all endorsements on his educational services certificate and that he is entitled to the positions held by non-tenured school psychologists by virtue of his tenure status. Dennerly v. Bd. of Educ., 131 N.J. 626 (1993); Ellicott v. Franklin Twp. Bd. of Educ., 251 N.J. Super. 342 (App. Div. 1991).

ORDER

Based on the foregoing, it is hereby **ORDERED** that the petition of appeal be **DISMISSED**.

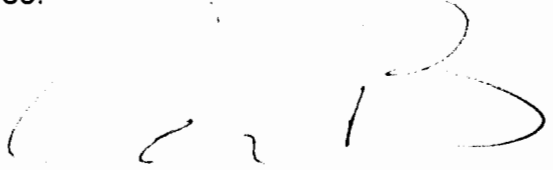
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 10, 2012

DATE



ELLEN S. BASS, ALJ

Date Received at Agency:

Date Mailed to Parties: **FEB 13 2012**



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner

None

For Respondent

None

Exhibits

For Petitioner

P-1 Certification of Raymond Ruiz

For Respondent

None

Judge's Exhibits

- C-1 Initial Decision, EDU 08187, dated May 19, 2011
- C-2 Commissioner's Decision, EDU 08187, dated August 17, 2011
- C-3 Initial Decision, EDU 12754-10, dated November 9, 2011
- C-4 Commissioner's Decision, EDU 12754-10, dated December 23, 2011

CECILIA CRESPO,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	
	:	DECISION
NEW JERSEY STATE BOARD OF	:	
EXAMINERS,	:	
	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Pro-se petitioner appealed the respondent's denial of her application for the issuance of a Principal Certificate of Eligibility (PCE). Petitioner contended that, pursuant to *N.J.A.C. 6A:9-12.5(a)*, the 31.5 credits that she earned toward completion of a post-master's program in Educational Administration at Drexel University satisfies the "coherent sequence of 30 semester hours credits" required by the regulation. Respondent asserted that: the regulation requires completion of a post-master's program; petitioner never completed her program at Drexel University; petitioner is therefore not eligible for the PCE. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: pursuant to *N.J.A.C. 6A:9-12.5(a)liii*, candidates for the PCE must complete a post-master's program; by regulation, petitioner had to meet the requirement that she complete a post-master's program, not just acquire credits toward completion of the program; petitioner has not shown, and cannot show, that she has completed a post-master's program; and there are no material facts in dispute and the matter is ripe for summary decision. The ALJ concluded that petitioner does not meet the requirements for issuance of a PCE and accordingly ordered the petition dismissed.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, granted summary decision in favor of respondent and against petitioner, and dismissed the petition. In so doing, the Commissioner noted that denial of PCE to petitioner is compelled by law as petitioner has not satisfied the basic eligibility requirements for the certificate of eligibility that she seeks.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 10769-11
AGENCY DKT. NO. 233-8/11

CECILIA CRESPO,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
NEW JERSEY STATE BOARD OF	:	
EXAMINERS,	:	
	:	
RESPONDENT.	:	
_____	:	

The Commissioner has reviewed the record of this case and the Initial Decision of the Office of Administrative Law (OAL),¹ and concludes that petitioner has not satisfied all of the regulatory requirements for earning a principal's certificate of eligibility (PCE).

N.J.A.C. 6A:9-12.5(a) identifies five conjunctive prerequisites for attaining a PCE. Respondent maintains that petitioner failed to satisfy the first prerequisite, rendering her ineligible for a PCE regardless of whether she met the remaining four requirements.² That first prerequisite, set forth in *N.J.A.C.* 6A:9-12.5(a)(1), mandates that a candidate complete one of four program options (i. ii. iii, or iv).

More specifically, to satisfy the first of the five prerequisites for a PCE, a candidate must have either completed a masters or higher degree program in "educational leadership, or in curriculum and instruction, or in one of the recognized fields of leadership and

¹ Neither party filed exceptions to the Initial Decision.

² Section 3 of the petition appears to incorrectly allege that respondent's rejection of petitioner's application for the PCE was based upon a failure by petitioner to satisfy the second prerequisite for a PCE, *i.e.*, the condition of completing 30 or more graduate credits in certain designated subjects. *N.J.A.C.* 6A:9-12.5(a)(2)

management,” *N.J.A.C.* 6A:9-12.5(a)(1) (i and iv), **or** have completed a post-masters “certificate of advanced study in educational administration and supervision,” *N.J.A.C.* 6A:9-12.5(a)(1) (ii), **or** have “**completed** [a post-masters program of 30 credits] at one institution in fields outlined in (a)1i above” [*i.e.* educational leadership, curriculum and instruction or recognized fields of leadership or management], *N.J.A.C.* 6A:9-12.5(a)(1) (iii). (Emphasis added.)

It is undisputed that petitioner did not earn the post-baccalaureate degrees called for in options i and iv of *N.J.A.C.* 6A:9-12.5(a)(1). Nor has petitioner produced a certificate of advanced study in educational administration and supervision as referenced in option ii of *N.J.A.C.* 6A:9-12.5(a)(1). It remains for the Commissioner to determine whether petitioner’s studies at Drexel University satisfy the conditions set forth in option iii of *N.J.A.C.* 6A:9-12.5(a)(1).

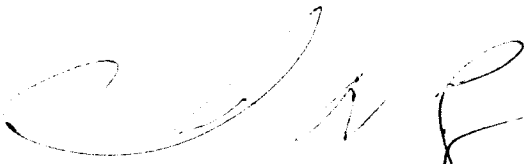
In so determining, the Commissioner notes that petitioner conceded in her pleadings that she did not complete the Drexel University program, which apparently requires at least 48 semester hours. (Petition at 2) Thus, the Commissioner must concur with respondent and the Administrative Law Judge (ALJ) that petitioner failed to satisfy option (iii) of *N.J.A.C.* 6A:9-12.5(a)(1), pursuant to which a candidate must hold a masters degree and **complete** – at one institution – “a post-masters program in a coherent sequence of 30 semester hour credits [in fields outlined in *N.J.A.C.* 6A:9-12.5 (a)(1)(i)] as they appear on the institution’s transcripts.”³

Having failed to satisfy any of the four options set forth in *N.J.A.C.* 6A:9-12.5 (a)(1), one of the five conjunctive prerequisites for a PCE, petitioner was not eligible to receive that certification when she submitted her application to respondent in 2011. The Commissioner

³ Further, a CE candidate may be required to prove completion of a post-masters program by submitting a Verification of Program Completion form (VOPC) filled out by the applicable college or university. *Glennon v. New Jersey State Board of Examiners*, Commissioner Decision No. 306-09 (September 18, 2009). Petitioner produced no such VOPC.

accordingly concludes that it was not arbitrary, capricious or unreasonable for respondent to deny the application. The Initial Decision is adopted as the final decision in this case, summary disposition is granted in favor of respondent and against petitioner, and the petition is dismissed.

IT IS SO ORDERED.⁴



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/28/12

Date of Mailing: 3/29/12

⁴ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (N.J.S.A. 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10769-11

AGENCY DKT. NO. 233-8/11

CECELIA CRESPO,

Petitioner,

v.

NEW JERSEY STATE BOARD

OF EXAMINERS,

Respondent.

Cecelia Crespo, petitioner, pro se

Caroline Jones, Deputy Attorney General, for respondent (Jeffrey S. Chiesa,
Attorney General of New Jersey, attorneys)

Record Closed: December 8, 2011

Decided: January 30, 2012

BEFORE LISA JAMES-BEAVERS, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 17, 2011, petitioner Cecelia Crespo sought a declaratory ruling that she completed the requirements for a Principal Certificate of Eligibility pursuant to N.J.A.C. 6A:9-17.13. She also sought a declaration that she is eligible for Principal and

Supervisory Certificates. However, since the denial of her Supervisor certification was not reviewed by the State Board of Examiners, which transmitted the case to the OAL, it is not currently before me.

On September 8, 2011, respondent New Jersey State Board of Examiners (respondent) filed a motion to dismiss in lieu of answer and a brief in support of the Motion. On September 12, 2011, the Bureau transmitted to and filed the case with the Office of Administrative Law (OAL) for hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On November 30, 2011, I denied the motion to dismiss on the grounds that Ms. Crespo had alleged enough facts in her pleadings to require the respondent to file an answer. On December 7, 2011, respondent filed an answer to the petition. I held a telephone conference with the parties on that date. Both indicated that they were amenable to having me treat the motion to dismiss in lieu of answer and the reply as cross-motions for summary decision and decide whether declaratory judgment may be granted in petitioner's favor. Based on the information before me, I am granting respondent's motion for summary decision and denying that of petitioner.

FINDINGS OF FACT

The following material facts are undisputed. Therefore, I **FIND** them as **FACT**.

Ms. Crespo earned a Master's degree in City/Regional Planning from Rutgers University. She then enrolled in an Education Administration program at Drexel University earning a total of 31.5 credits by the fall quarter of 2010. Ms. Crespo satisfied the requirements toward certification, except for evidence of completion of a program of study. Ms. Crespo did not complete the program. (Petition at 2). Ms. Crespo's coursework in Education Administration is within the letter of Endorsement Code 0299 requiring thirty credits in an Educational Leadership program. After Ms. Crespo submitted her application for the Principal Certificate of Eligibility, the Office of Licensing and Credentials (OLC) informed her that if she submitted a Verification of Program Completion (VOPC), a review by the credentials board would not be

necessary. Thinking that her requirements had been fulfilled, she began an educational Doctorate program in Educational Leadership at Rutgers without completing the 48+ Master's Program in Educational Administration. When she received the denial of her application from OLC, she submitted her application to the Credentials Review Board with her transcript and course evaluation that she believed showed adherence to the regulation N.J.A.C. 6A:9-3.4(a)1-6, prescribing Interstate School Leaders Licensure (ISLLC) standard, for review of her coursework. On March 31, 2011, the Board determined that petitioner did not satisfy the basic requirements for issuance of a certificate.

CONCLUSIONS OF LAW

In order to be issued an administrative certificate for principal, an applicant must show that she completed a state approved educational leadership preparation program for candidates matriculated and enrolled in such a program on or after September 1, 2008. N.J.A.C. 6A:9-12.5(a). Petitioner argues that she successfully completed the program because she met the requirements that:

1. She holds a master's degree from a regionally accredited college or university and completed a post-master's program in a coherent sequence of thirty semester hour credits as they appear on the institution's transcript.
2. She completed a minimum of thirty graduate credits, in addition to the master's program, in the quality components of preparation to promote student learning as set forth in N.J.A.C. 6A:9-3.4(a)1-6.
3. She completed a 300-hour internship in educational leadership independent of other course requirements;
4. She passed a State-approved examination of knowledge that is acquired through study of the topics listed in N.J.A.C. 6A:9-12.5(a)2 and that is most directly related to the functions or principals as defined in N.J.A.C. 6A:9-12.3(b); and

5. She provided documentation evidencing completion of five years of successful educational experience under a valid provisional or standard New Jersey or equivalent out-of-State certificate.

Ms. Crespo argues that respondent defines its credentials review as "a request to substitute alternate education or experience, submitted by an applicant to the Board following an adverse evaluation of credentials by the [OLC] due to a licensure deficiency or compliance with a regulatory requirement in accordance with N.J.A.C. 6A:9-17.13." She contends that respondent contradicted its defined task when it decided that the only way that it could determine successful completion of a program was through a VOPC, saying, "The Board views completion holistically for any one of the educational leadership preparation programs upon receipt of the VOPC form." (Board decision at 4). She submits that respondent should have reviewed the history of her experience of effective teaching and education leadership in New Jersey.

Respondent, both in its answer and motion, disputes that petitioner has submitted all documents and proofs that she has met the requirements for Principal Certificate of Eligibility. It states that the regulation requires that an applicant "**complete a post-master's program** in a coherent sequence of 30 semester hour credits as they appear on the institution's transcript." N.J.A.C. 6A:9-12.5(a)1iii (emphasis supplied). The requirement of a VOPC is to verify that the program was completed. The necessity of the VOPC is obvious given the mandatory nature of the regulatory certification requirements. See Glennon v. New Jersey State Board of Examiners and Centenary College, EDU 7419-07, Final Decision (September 18, 2009). In the Glennon case, the Final Decision upheld the Board's requirement that an applicant provide verification from the college the applicant attended pursuant to the certification requirement that applicant complete a post-baccalaureate program.

Petitioner has not shown and cannot show that she completed a post-master's program. She has over thirty credits in addition to her masters. However, the respondent made it known to petitioner that it cannot waive regulatory requirements. Thus, petitioner's expectation that respondent would consider her history of experience

in effective teaching and education leadership was an unrealistic one. By regulation, she had to meet the requirement that she complete a post-master's program, not just acquire credits toward it. Accordingly, I **CONCLUDE** that petitioner did not meet the requirements for the Principal Certificate of Eligibility since she did not complete the post-master's program.

Summary decision is appropriate when the papers filed show there is no genuine issue of material facts challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5. I **CONCLUDE** respondent's papers have demonstrated that there are no material facts in dispute and judgment in its favor is appropriate as a matter of law.

ORDER

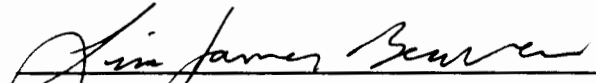
Based on the foregoing, I **ORDER** that Ms. Crespo's request for declaratory ruling that she is entitled to a Principal Certificate of Eligibility be **DENIED** and her petition **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 30, 2012
DATE


LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

1/31/12

Date Mailed to Parties:

1/31/12

cmo

BOARD OF EDUCATION OF THE CITY :
OF ELIZABETH, UNION COUNTY,

PETITIONER,

COMMISSIONER OF EDUCATION

V.

DECISION

NEW JERSEY STATE DEPARTMENT
OF EDUCATION, OFFICE OF
COMPLIANCE INVESTIGATIONS,

RESPONDENT.

SYNOPSIS

Petitioning Board challenged respondent's determination that petitioner violated provisions of the Public School Contracts Law when it awarded a contract for school uniforms to The Uniform Group in 2006, and respondent's consequent demand that petitioner refund State aid in the amount of \$594, 217.10. The Uniform Group was not the lowest bidder, but submitted the lowest bid that complied with the criteria set forth in the bid specification documents. The low bidder, Kids Place, submitted a complaint to the Department of Education alleging improprieties in the bidding process. Respondent contended that the petitioning Board violated *N.J.S.A. 18A:18A-15* – which requires that bid specifications must be drafted in a manner to encourage free, open and competitive bidding – when it, *inter alia*, listed the wrong style number for mesh shorts, which allegedly made it impossible for prospective bidders to provide the item, and when it allegedly called for a special order item.

The ALJ found, *inter alia*, that: the Department failed to prove by a preponderance of the evidence that the Board violated *N.J.S.A. 18A:18A-15*, as respondent based its arguments on a mistake of fact, a mistake of law, or both; the bid specifications were as definite, precise, and full as practicable when petitioner advertised for bids; and the award of the contract to The Uniform Group was proper, as it was the lowest responsible bidder. The ALJ concluded that the Board acted in compliance with the law.

Upon full review and consideration of the record, the Commissioner concurred with the ALJ's findings of fact and conclusions, and found that the facts in this matter do not support a finding that petitioner violated the school bidding laws. Accordingly, no refund of State aid from petitioner is warranted.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 12568-07
 AGENCY DKT. NO. 338-11/07

BOARD OF EDUCATION OF THE CITY :
 OF ELIZABETH, UNION COUNTY, :

PETITIONER, :

COMMISSIONER OF EDUCATION

V. :

DECISION

NEW JERSEY STATE DEPARTMENT
 OF EDUCATION, OFFICE OF
 COMPLIANCE INVESTIGATIONS, :

RESPONDENT. :

In this controversy, petitioner asks the Commissioner to set aside a January 2007 report wherein respondent 1) determined that petitioner had violated provisions of the Public School Contracts Law, and 2) demanded a state aid refund from petitioner in the amount of \$594,217.10. Upon his review of the record,¹ Initial Decision of the Office of Administrative Law (OAL), respondent's exceptions, and petitioner's reply thereto, the Commissioner concurs with the Administrative Law Judge (ALJ) that the facts do not support a determination that petitioner violated *N.J.S.A.* 18A:18A-15 in 2006 when it awarded a contract for school uniforms to The Uniform Group. It follows that no basis exists for respondent to demand a refund of State aid from petitioner.

In its exceptions, which were filed in accordance with the order granting a motion for leave to file them out of time, respondent asks the Commissioner to reject the Initial Decision

¹ Only one transcript from the OAL hearing was provided to the Commissioner. That transcript corresponds to the first day of the hearing, March 16, 2011, and includes the testimony of only two of the six witnesses who participated in the hearing, *i.e.*, Isaac Dweck, Vice President of Kids Place, and Karl Feltes, an investigator for respondent – but not the investigator who handled the inquiry into petitioner's 2006 uniform bid solicitation.

and offers two reasons for its request. First, respondent contends that the ALJ erroneously assigned the burden of proof to respondent. Second, respondent maintains that the ALJ overlooked relevant evidence and assumed facts not in evidence. Thus, respondent urges, the ALJ's legal analysis of the controversy was invalidated by its reliance on misinformation.

As to the first proposition, the Commissioner concludes that although the ALJ did appear to erroneously assign to respondent the burden of persuasion,² the facts as a whole support petitioner's claim that it did not violate the school bidding laws when it rejected the unresponsive Kids Place bid and accepted the higher responsive bid offered by The Uniform Group. Thus, notwithstanding the ALJ's misapplication of the burden of persuasion, petitioner made the showing necessary to sustain its case.

As to the broad allegation of erroneous fact-finding and legal analysis, respondent raises, for the most part, the same issues here that it raised below. First, it once again asserts that petitioner's bid specifications were impermissibly vague because an incorrect style number was used to identify the model of gym shorts that petitioner sought, and because Isaac Dweck, Vice President of Kids Place (Dweck), alleged that he could not find contact information for Style Plus, the named manufacturer of the full skort called for in the specifications.

Examination of the facts regarding the gym shorts reveals that an incorrect style number was indeed printed in the specifications, and that it was easily ascertainable that the incorrect number corresponded to a type of tank top, as opposed to shorts. In the case of such an obvious error, it cannot be said that a bidder is precluded from making an intelligent decision. The school bidding law contemplates errors in specifications and provides an avenue for the correction of such errors. More specifically, a bidder may seek clarification or

² Assignment of the burden of persuasion was effectuated by a pre-hearing order dated February 25, 2011, which respondent never appealed.

challenge a specification – in writing so that all bidders are equally apprised of the issue. *N.J.S.A. 18A:18A-15*. Dweck conceded that he had recognized that the style number was a mistake when he reviewed the specifications but never wrote to petitioner for clarification. (T190-91)³ Instead, he unilaterally offered cotton shorts.⁴ Thus, it was Dweck's failure to follow public bidding procedure – not petitioner's solicitation – that caused Kids Place's unresponsiveness to the specifications concerning gym shorts.

As to respondent's assertion that the portion of the bid calling for a full skort was vague – because Dweck complained that he could not contact the company listed in the specifications as the manufacturer – the Commissioner agrees with the ALJ that the record does not support such an allegation. Respondent's own investigator, Sonya Donalson, reported that she was able to reach Style Plus. (T58-59) Based upon her research, she determined that Dweck's allegations concerning the skort were "unsubstantiated." (Joint Exhibit J-21 at 6) Thus, any confusion about acquiring the skort should not be attributed to petitioner. And, as mentioned above, even if there had been ambiguity in the section of the specifications pertaining to the skort, *N.J.S.A. 18A:18A-15* provides an avenue for avoiding the invalidation of an entire bid due to one irregularity.

Another of respondent's reasons for challenging the ALJ's findings relates again to the above-mentioned full skort. Respondent appears to suggest that petitioner's specifications were unfair because they called for a skort that had been produced by Style Plus for the previous year's pilot uniform program – at the request of The Uniform Group.

³ T designates the transcript of the OAL hearing proceedings on March 16, 2011.

⁴ When asked why he provided cotton shorts instead of the mesh shorts requested in the specifications, Dweck answered "no reason." (T217-18)

As mentioned above, no finding of unfairness regarding the skort solicitation appeared in respondent's original investigative report. Respondent first raised the issue in its response to petitioner's first appeal of the investigative report. (Joint Exhibit 23 at 2) In the appeal denial, respondent observed that the specified skort was "not a catalog item," and opined that it was "not a traditional skort." (*Ibid.*) Further, respondent assumed that because The Uniform Group had supplied the full skort in the previous year, it held an unfair advantage over the other bidders. (*Ibid.*) After petitioner brought a second level appeal, respondent opined, in its appeal denial, that "the full skort was "not readily available over the internet . . . namely because [it] was not a catalog item nor was it a traditional skort." (Joint Exhibit 25 at 2) And respondent again assumed that The Uniform Group's procurement of the skort for the previous year's pilot program gave it an unfair advantage over other bidders. (*Ibid.*)

The Commissioner cannot accept respondent's conclusions because there are no grounds in the record to support them. While it is true that a petitioner bears the burden of producing evidence to support its allegations, it is also true that investigative conclusions must be grounded in fact – not assumptions. First, nothing in the record – aside from the opinion of respondent – supports the supposition that a full skort is a non-traditional skort. Second, while the Style Plus full skort may not have been a catalog item, that does not signify that it is unavailable. Third, there is no evidence in the record that The Uniform Group had an exclusive right to sell the Style Plus full skort – as Dweck assumed. (T144-45) Finally, while petitioner's solicitation identified specific brands, it also allowed for approved equivalents. (Joint Exhibit 2 at 2 and 9)

Further, it would be counter-intuitive to penalize petitioner for soliciting a bid item – *i.e.*, the Style Plus skort – that it had previously found satisfactory, when there is no proof

in the record that bidders other than The Uniform Group would have been precluded from ordering same.⁵ And there is also nothing in the record suggesting that Style Plus is the only manufacturer of full skorts. As referenced above, the bidders on petitioner's solicitation were expressly allowed to ask for permission to submit a substitute brand (so long as they did so in writing, pursuant to *N.J.S.A.* 18A:18A-15(d)). As the ALJ found, "[h]ad Kids Place submitted a full skort by another manufacturer, then [respondent] would have had a more persuasive argument." (Initial Decision at 27) In light of the foregoing, the Commissioner rejects respondent's contention that petitioner's specifications were impermissibly vague.

The second of respondent's reasons for attacking the ALJ's fact-finding and legal analysis relates to "the selection process." (Respondent's Exceptions at 21) Respondent contends that petitioner's selection of the blazer submitted by The Uniform Group was a departure from its own specifications, and thus a violation of the laws requiring free, open and competitive bidding. This contention rests on Dweck's allegation that the specifications called for dry-clean only blazers.

It is undisputed that the specifications do not mention cleaning instructions for the blazers. (T143; T166) Respondent's position rests on Dweck's recollection that Executive Apparel – the manufacturer named in the specifications – only manufactured dry-cleanable blazers in 2006. (T199-200) He produced no catalogues or labels to support this assertion, T186, and the ALJ consequently did not assign much weight to same.⁶ Additionally, Dweck admitted that he did not inspect the sample blazers that Uniform Group offered with its

⁵ Indeed, at the OAL hearing Dweck testified that if he had found Style Plus' telephone number, he would have called that company to ask if it could supply him with the specified skort. (T184)

⁶ In fact, respondent's witness – Investigator Karl Feltes – telephoned Executive Apparel to ascertain whether it had produced washable blazers in 2006. The answer Feltes received was that Executive Apparel might have produced washable blazers at that time, but they may not yet have been tested for durability. (T117-18)

bid and consequently did not know which model/style number Uniform Group submitted.

In light of the foregoing, there is no reason for the Commissioner to overturn the ALJ's determination that Dweck's testimony about the blazers was unreliable. *See, N.J.S.A. 52:14B-10(c); D.L. and Z.Y. on behalf of minor children, T.L. and K.L. v. Board of Education of the Princeton Regional School District*, 366 N.J. Super. 269, 273 (App. Div. 2004) (the Commissioner must accept the ALJ's credibility determinations unless the record blatantly contradicts same). As there is nothing else in the record that suggests that petitioner, in choosing washable blazers, deviated from its specifications, the Commissioner concurs with the ALJ's finding that no procedural violation of the bidding laws occurred in the selection of the blazers.

Respondent's third criticism of the ALJ's findings and analysis is that he failed to conclude that an unfair advantage was bestowed upon The Uniform Group, in violation of *N.J.S.A. 18A:18A-15(e)*. (Respondent's Exceptions at 26) This accusation appears to encompass a wide range of issues, some of which have already been addressed *supra*, and will not be readdressed.

The first issue relates to the testimony of petitioner's purchasing agent, Robert Jaspan, that – in an effort to publish a more specific bid than it had for the previous year's pilot project – he asked The Uniform Group for the manufacturers and style numbers of the garments which had been supplied in the pilot program, and with which petitioner had been satisfied. (Initial Decision at 7)⁷ Respondent alleges that petitioner "disseminat[ed] Uniform Group's deficient bid specifications," therewith creating a situation in which The Uniform Group

⁷ The record lacks a transcript of the testimony of petitioner's purchasing agent, Robert Jaspan. However, Jaspan's testimony was summarized by the ALJ in the Initial Decision, and found to have been "highly" credible. (Initial Decision at 6) As discussed above, the Commissioner may not overturn that credibility determination unless it is blatantly contrary to the record. *N.J.S.A. 52:14B-10(c); D.L. and Z.Y. on behalf of minor children, T.L. and K.L. v. Board of Education of the Princeton Regional School District*, 366 N.J. Super. 269, 273 (App. Div. 2004). Review of the instant record suggests no reason why the ALJ's credibility determination should be disturbed.

knew what petitioner wanted, but – because the specifications were allegedly erroneous and vague⁸ – other bidders could not know what was sought. (Respondent's Exceptions at 27)

At the outset, respondent points to nothing in the school bidding laws or regulations that bars a board of education from obtaining information from a former supplier about model numbers for goods which the board wishes to include in a subsequent solicitation.⁹ The information, of course, must be incorporated into the specifications in a manner that is clear and specific to everyone, so that the former supplier is not the sole possessor of the information. Examination of Joint Exhibit J-2 – petitioner's specifications – reveals that they were, in fact, clear and specific. As already discussed *supra*, the one typo regarding the mesh shorts was easily identifiable by anyone who checked the Augusta catalogue, and was curable by means of the clarification options that are incorporated in *N.J.S.A.* 18A:18A-15. And, respondent's allegations notwithstanding, the information provided in the specifications about the full skorts was sufficient for a bidder to identify and procure that item.

Respondent also suggests that because "Uniform Group presumably had an established relationship with each manufacturer listed in the bid specifications that other prospective bidders did not enjoy," petitioner was allowing The Uniform Group an unfair advantage. (Respondent's Exceptions at 28) The key word in this allegation by respondent is "presumably." Neither respondent nor the Commissioner may make determinations based upon speculation. Equally problematic is respondent's tacit inference that once a supplier forms a relationship with one vendor, it will not be eager to establish new business relationships with similarly situated vendors. Moreover, the Commissioner notes that the bidding laws do not –

⁸ For example, the already discussed style number error regarding the mesh gym shorts.

⁹ Indeed, respondent's witness, Investigator Karl Feltes, did not regard The Uniform Group's assistance to petitioner in drafting the specifications as a bidding violation. (T102)

and logically should not – bar a board from soliciting items that were previously procured simply because the previous supplier, who obviously is familiar with the items, might be among the bidders.

Another of respondent's allegations of unfair advantage relates to the fact that Deborah Brady, one of the three school principals who comprised the selection committee for the bid submissions, had previously met with The Uniform Group representatives to see samples and discuss same. Respondent contends that including Brady in the review committee gave The Uniform Group an unfair advantage, since she would have purportedly recognized which samples were submitted by The Uniform Group and which were not.

The Commissioner does not have a transcript of Brady's testimony, but the ALJ summarized it on page 12 of the Initial Decision. Brady apparently denied knowing – at the time the selection committee reviewed the bid samples – which vendor submitted which samples with its bid. The ALJ found her to be a credible witness. (Initial Decision at 9) Equally as significant is the fact that, once again, respondent rests its argument upon conjecture – namely, that Brady's agenda was not to pick the best garments for petitioner's students but rather to make sure that The Uniform Group got the contract. There is nothing in the record to support the latter scenario and the Commissioner therefore cannot agree that Brady's inclusion in the selection committee was an impediment to open, competitive bidding.

The last argument that respondent makes in support of its position that The Uniform Group was given an unfair advantage pertains not to petitioner's specifications, but to an error made by The Uniform Group in its bid. A significant disparity in the respective bidders' prices for girls tights led to the realization that The Uniform Group had mistakenly submitted as its rate for **one** pair of girls tights, the cost of a **3-pack** of tights. This error led to a

total bid price of \$431,517.90, instead of \$412,357.98, the latter of which figures would have been the total price if the correct rate for tights had been used. As the Kids Place bid was \$415,687.70, The Uniform Group's mistake converted it from lowest bidder to highest bidder.

No allegation is made that petitioner allowed The Uniform Group to modify its official bid and become the lowest bidder. Indeed respondent concedes that the bid was awarded to The Uniform Group at the higher, erroneous price. Rather, respondent urges that Jaspan's detection of the error and query to The Uniform Group about it signifies a special preference for The Uniform Group, and that the fact that petitioner ultimately paid the correct, lesser price for the tights somehow connotes preferential treatment. The Commissioner cannot agree.

Jaspan's close scrutiny of the submitted bids must be regarded as a proper execution of his responsibilities as purchasing agent for petitioner. While it appears undisputed that he asked The Uniform Group about the price for girls tights, there is no allegation that he allowed The Uniform Group to change the total bid price from the amount set forth in their bid papers on the day of the official bid opening.

Further, the Kids Place's bid was ultimately rejected not on the basis of price, but on the basis of unresponsiveness, or 'disadvantageousness,' as is permitted under *N.J.S.A. 18A:18A-37(a)*. The applicable law is well settled. After identifying the existence of a deviation, the issue is "whether a specific non-compliance constitutes a substantial [material] and hence non-waivable irregularity." *Township of River Vale v. R.J. Longo Construction Co., Inc. and Campoli and Son, Inc.*, 127 N.J. Super. 207, 216 (1974) (emphasis added). The test is:

[F]irst, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed **according to its specified requirements**, and second, whether it is of such a nature that its **waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders** or by

otherwise undermining the necessary common standard of competition. *River Vale, supra*, 127 N.J. Super. at 216. Emphasis added.)

If the test results in a determination that the deviation is material, and thus non-waivable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all. *In the Matter of the Protest of the Award of the On-Line Games Production and Operation Services Contract, Bid No. 95-X-20175*, 279 N.J. Super. 566, 595 (App. Div. 1995)

The record fully supports petitioner's assertion that Kids Place's submissions for multiple items – most notably the skort – were unresponsive to the specifications. As regards the skort, Anne Marie Remus – one of the principals on the selection committee – described the Kids Place half skort as a “deal breaker.” (Initial Decision at 10)¹⁰ The specifications called for a full skort, which looks like a skirt both in front and in back. Kids Place supplied a half skort – a garment that looks like a skirt in front and shorts in the back – which Remus knew the female students would not want to wear. (*Ibid.*) Petitioner was thus justified in concluding that Kids Place's intention to supply a half skort constituted a material deviation from the specifications, and was within its rights to reject Kids Place's bid.

Finally, the Commissioner does not find petitioner's ultimate payment of the correct price for the tights to be a violation of the bidding laws or an unfair practice. Once the bid was awarded – on legitimate bases – it would have been irresponsible of petitioner to waste the public's money by paying \$8 for tights that cost considerably less.

In summary, consideration of the record as a whole leads to two main conclusions. The first is that Kids Place's lack of success with petitioner's school uniform

¹⁰ Once again, no transcript of Remus' testimony was provided to the Commissioner, but the ALJ included a summary of same in the Initial Decision.

solicitation was due in great part to Dweck's ignorance of the public bidding laws.¹¹ He, for example, attempted to handle questions concerning the specifications by conducting *ex parte* conversations with purchasing agent Jaspan instead of submitting written questions about the various items requested in the bid solicitation. The school bidding laws, which are designed to insure that all bidders have equal access to all issues raised by individual bidders and all responses by the soliciting agency, do not permit representatives of public agencies to answer *ex parte* questions. *See, e.g.* N.J.S.A. 18A:18A-4.4(c). Further, the record indicates that Dweck did not diligently seek out the manufacturers of the solicited items and attempt to procure what was asked for in the specifications.

The second conclusion that the Commissioner is constrained to reach is that respondent's factual investigation was not well developed and its determination that petitioner violated bidding laws rested heavily on assumptions. Accordingly, the Commissioner concurs with the ALJ that 1) the facts do not support a finding that petitioner violated the school bidding laws, and 2) no refund of school funds is warranted. The petition is thus granted.

IT IS SO ORDERED.¹²


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/29/12

Date of Mailing: 3/29/12

¹¹ Dweck admitted that he had never submitted a public bid for the provision of school uniforms, was not familiar with public school contract law, did not retain a lawyer to help with the bid, and did not seek to educate himself about the applicable laws and regulations. (T173; T178-79)

¹² This decision may be appealed to the Appellate Division of the Superior Court pursuant to P.L. 2008, c. 36. (N.J.S.A. 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12568-07

AGENCY DKT. NO. 338-11/07

**BOARD OF EDUCATION OF THE
CITY OF ELIZABETH, UNION COUNTY,**

Petitioner,

v.

**NEW JERSEY STATE DEPARTMENT
OF EDUCATION, OFFICE OF
COMPLIANCE INVESTIGATION,**

Respondent.

Zulima V. Farber, Esq., and Joy N. Eakley, Esq., for petitioner (Lowenstein
Sandler, attorneys)

**Daniel F. Dryzga, Deputy Attorney General, and Joyce D. Williams, Deputy
Attorney General,** for respondent (Paula T. Dow, Attorney General of New
Jersey, attorney)

Record Closed: June 30, 2011

Decided: December 29, 2011

BEFORE **BARRY E. MOSCOWITZ, ALJ:**

STATEMENT OF THE CASE

In May 2006, the Board awarded a contract for school uniforms to the second-lowest bidder because the bid specifications required a full skirt and the lowest bidder submitted a half skirt. Should the Board still have awarded the contract to the lowest bidder? No. Under caselaw, a contract must be awarded not only to the lowest bidder but also to the bidder who complies with the specifications. Any material departure invalidates the non-conforming bid.

Under N.J.S.A. 18A:18A-15, specifications must be drafted to encourage free, open, and competitive bidding. In May 2006, the full skirt, which the specifications required as a reference or point of comparison, had been custom-made for the second-lowest bidder, but it was not an exclusive. Did the Board violate the statute? No. Under N.J.S.A. 18A:18A-15, a specification may require a brand name or equivalent to serve as a reference or point of comparison.

PROCEDURAL HISTORY

On May 2, 2006, the Elizabeth Board of Education (the Board) advertised for bids for school uniforms. Both Kids Place of New Jersey, Inc. (Kids Place) and The Uniform Group, Inc. (The Uniform Group) submitted bids. On June 15, 2006, the Board awarded the contract to The Uniform Group.

Ostensibly, the Board did not award the contract to Kids Place because the bid specifications required a full skirt and Kids Place submitted a half skirt.

Nevertheless, on August 8, 2006, Kids Place submitted a complaint to the New Jersey Department of Education, School Ethics Commission, alleging improprieties in the bidding process.

On August 16, 2006, the School Ethics Commission forwarded the complaint to the New Jersey Department of Education, Office of Compliance Investigations (the Department) because the allegations did not fall under the School Ethics Act.¹

On January 24, 2007, the Department issued its Investigative Report. In its report, the Department concluded that the Board violated N.J.S.A. 18A:18A-15 because the Board drafted specifications in a manner that discouraged "free, open, and competitive bidding." In particular, the Department determined that the Board discouraged free, open, and competitive bidding because the bid specifications included the wrong style number for a pair of shorts and that this deficiency gave The Uniform Group an advantage because The Uniform Group had helped the Board draft the specifications:

The bid speculations were not accurate or clear. The style number 136 for shorts manufactured by Augusta was incorrect and was actually the style number for reversible mini mesh league tanks. The specifications did not indicate if the district was requesting cotton or mesh shorts and since the specifications were incorrect, Kids Place could not determine the specific material the district was requesting. Both The Uniform Group and the purchasing agent confirmed that an incorrect style number was used when putting together the bid specifications. This hindered Kids Place from submitting appropriate short samples.

[(J-21) (EBOE 403).]

In addition, the Department determined that that the Board discouraged free, open, and competitive bidding because the bid specifications required a dry-clean-only blazer and the Board deviated from those specifications when it accepted a machine-washable blazer:

Kids Place provided dry clean only Executive Apparel 2000/4000 girl blazers and Executive Apparel 1000/3000 boy blazers as the specifications required. However, The Uniform Group submitted washable blazers contrary to what was requested on the specifications. Nevertheless, the

¹ The Office of Compliance Investigations (OCI) is now known as the Office of Fiscal Accountability and Compliance (OFAC).

district decided that the washable blazers were of better quality and therefore selected the samples submitted by The Uniform Group.

[(ibid.)]

As a result, the Department demanded the return of \$594,217.10 in State aid.

On March 30, 2007, the Board appealed this determination. On May 11, 2007, the Department denied the appeal, and on June 20, 2007, the Board appealed again. On August 9, 2007, the Department denied this second-level appeal and renewed its demand for the return of the State aid. On November 6, 2007, the Board appealed to the Office of Administrative Law.

On December 26, 2007, the Department transmitted the case to the Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On March 16 and March 17, 2011, I held the hearing. After the hearing, the parties submitted closing briefs. Upon their receipt, I closed the record.

FINDINGS OF FACT

Base upon the testimony the parties provided, and my assessment of its credibility, together with the documents submitted, and my assessment of their sufficiency, I **FIND** as follows:

I.

The Bid Specifications

In May 2006, the Board advertised for bids for school uniforms for the school year 2006-07 for the upper and lower academies of its high school and for schools 30 and 31 with the option to include additional schools.

The published advertisement instructed prospective bidders to contact its purchasing agent for the specifications of the uniform contract.

In response, the Board provided a bid package, which contained, among other things, bid specifications and instructions.

More specifically, the bid specifications, which were organized by grade and gender, provided prospective bidders with, among other information, the approximate quantity of each item, the quantity for each student, a description of each item, the manufacturer of each item, the style number of each item, and the color of each item.

Moreover, the specifications and instructions provided that all of the bids had to strictly conform to the specifications and descriptions:

All materials, supplies, or equipment bid on must strictly conform to the description and specification.

[(J-2) (EBOE 0036).]

Nevertheless, the specifications provided that bidders could substitute items where a special make was specified as long as they were just as good. Toward this end, bidders had to specify the make and number of the article they were substituting. If not, the bid would be interpreted to mean that the bidder intended to furnish the particular make specified in the specifications.

Finally, the Board had the right to accept or reject any substitutes:

Where a special make of any article is specified, bidders may quote prices on articles equally as good, in which case they must specify on the proposal the make and number of the article on which they are bidding, and failure to do so will be interpreted to mean that the bidder intends to furnish the particular make of article called for in these specifications.

The Board of Education reserves the right to accept or reject any or all makes of the different articles if, in its judgment, it is deemed best for the interest of the Board.

[(J-2) (EBOE 0036).]

The bid specifications, however, contained an error. For one item, the specifications listed the wrong style number. More specifically, the specifications described a pair of shorts as "Shorts (silk screened school logo, not heat sealed)," identified the manufacturer as "Augusta," and listed the style number as "136," when it should have listed the style number as "746."

The item manufactured by Augusta bearing style number 136 was a mesh tank top ("Reversible Mini Mesh League Tank") while the item manufactured by Augusta bearing style number 746 was a pair of mesh shorts ("Youth Micro Mesh Short").

Unfortunately, this error was repeated every time the item was listed in the specifications.

The Credible Witness

Robert Jaspan, who was the purchasing agent for the Board at the time, explained what happened. Significantly, Jaspan was a highly credible witness. Inexplicably, the Department never interviewed him during its investigation.

The Pilot Program

Jaspan testified that in December 2005, the Board had advertised for bids for school uniforms for a single school, School 29, as part of a pilot program, and The Uniform Group was awarded the contract. The pilot program, however, had been a disaster. It was the first time that the Board had put uniforms out for bid and they were delivered in bulk, not packaged by student. Moreover, the bid specifications had only included the approximate quantity and description of each item, not the manufacturer or style number.

Jaspan continued that it was the first time he had drafted bid specifications for school uniforms; that it was his job to take the bid specifications as they were given to him and incorporate them into the bid package; and that he had in fact taken the bid specifications as they were given to him and incorporated them into the bid package.

Incidentally, Kids Place was the only other entity to have submitted a bid for the pilot program in December 2005.

The Expanded Program

In April 2006, when the bidding process began again, Jaspan asked for help. Although he thought The Uniform Group had performed "well enough" in the pilot program, and "everyone was happy"; Jaspan wanted a "better bid" in the expanded program. In particular, Jaspan wanted to include the manufacturer and style numbers for each item. He also wanted the uniforms packaged by student.

Since the expanded program was going to include the same uniforms as the ones from the pilot program, Jaspan asked the sale representative from The Uniform Group, Janice Acheson, to provide him with the manufacturer and style numbers.

Jaspan admitted that he was not an expert in school uniforms and that it would have been very time consuming for him to have identified the manufacturer and style numbers without her help. Toward this end, Acheson emailed Jaspan the manufacturer and style numbers in a document entitled, "Bid Specs for Elizabeth School Uniforms," which included the manufacturer and style numbers for all the items to be included in the bid specifications. She also emailed him tips on measuring, fitting, and packaging in a document entitled, "Suggested Additions and/or Modifications for Terms and Conditions on Uniform Bid."

Acheson, however, made a mistake. Instead of listing the shorts manufactured by Augusta with style number 136, she listed the shorts manufactured by Augusta with style number 746, and neither she nor Jaspan noticed it. As a result, the mistake was carried over into the bid specifications for the expanded program in May 2006.

To be clear, no evidence—let alone an allegation—exists that this was done intentionally.

Significantly, this mistake remained undiscovered until the investigation in this case. In fact, none of the bidders made an issue of it, raised it as a concern, or asked the Board to clarify it during the bidding process. More significantly, Isaac Dweck, the vice president and representative of Kids Place who first complained about the bidding process, testified that he thought the style number was a mistake when he reviewed the bid specifications in May 2006 but acknowledged that he never made an issue of it, raised it as a concern, or asked the Board to clarify it. To the contrary, Dweck simply substituted cotton shorts for the mesh shorts in his bid.

The Bid Opening

The date set for the opening of the bids was May 16, 2006, and on that date, the Board received three bids: One was from Kids Place, totaling \$415,687.70; one was from The Uniform Group, totaling \$431,517.90; and one was from Flynn & O'Hara Uniforms, LLC, which could not be considered because its paperwork was not in order.

Jaspan, however, noticed that the price of the girls' tights in the bid The Uniform Group had submitted was much higher than the price of the girls' tights both Kids Place and Flynn & O'Hara had submitted in their bids. Given this irregularity, he called The Uniform Group to ask why. Upon review, The Uniform Group discovered that it had listed the price of a three-pack of girls' tights as the price of a single-pack of girls' tights.

On May 17, 2006, The Uniform Group sent Jaspan a letter memorializing this:

After reviewing the Student School Uniform BID that was submitted, it was determined that a calculation error was made on the girls' tights. The cost listed was \$8.00, which was really for 3 pairs. As a result, the ACTUAL UNIT COST will be \$2.66 each (3 pairs for \$8.00).

[(J-12.)]

If the price of the girls' tights had been corrected, then the bid The Uniform Group would have submitted would have totaled \$412,357.98, which would have been \$19,159.92 less than its original bid. It would have also been \$3,329.72 less than the bid Kids Place had submitted. But the Board did not award the contract based on the prices submitted; rather, the Board awarded the contract based on the samples submitted. More expansively, the Board awarded the contract based on the recommendation of the review committee, which had determined after careful consideration that the samples The Uniform Group had submitted had been more responsive and of higher quality than the samples Kids Place had submitted.

The Review Committee

The members of the review committee consisted of the three principals whose students were going to be required to wear the school uniforms: Anne Marie Remus (who was the principal of Elizabeth High School), Deborah Brady (who was the principal of School No. 30), and Michael Webb (who was the principal of School No. 31). All three testified and all three provided credible testimony. As with Jaspan, the Department did not interview any of them during its investigation.

Remus testified that the review committee met in Jaspan's office on May 16, 2006, the date the bids were opened, to review the samples. She stated that Jaspan gave them as much time as they needed to make their decision and that he told them to pick one bid over the other. In other words, she explained, they could not mix and match—or substitute samples from one bid with the other. And she emphasized that they did not know the identity of the bidders or which samples were submitted by which bidder.

Remus said that they took their review seriously; that the school uniforms were going to showcase the students in the gifted-and-talented program; and that they ultimately reached a consensus.

She even noted that they tried on some of the samples.

The Primary Concerns

The Girls' Skort

Remus testified that she reviewed the samples like she was shopping for her own children and stated that she was concerned with the girls' skort.

She explained that Kids Place had submitted a half skort, which meant it looked like a skirt from the front and a short from the back, while The Uniform Group had submitted a full skort, which meant it looked like a skirt from the front and the back.

The bid specifications, however, required a full skort. More specifically, the bid specifications described the skort as "Khaki Full Skort with Front and Back Partially Pleated Panels/Elastic Waist Back," identified the manufacturer as "Style Plus," and listed the style number as "SK275." Although this item was a specialty item, which Style Plus had custom-made for The Uniform Group in December 2005 for the pilot program, it was not exclusive to The Uniform Group. Indeed, no evidence exists that The Uniform Group had the exclusive right to make or sell them. Stated otherwise, no evidence exists that it was unavailable to the public—including Kids Place.

Remus said that she knew what the students liked; that she had promised the girls in advance that they would not look like "dorks"; and that the girls would not like the half skort. Remus made the point quite clear, though she did so delicately, that the girls, especially the larger ones, would be uncomfortable wearing the half skort. As a result, Remus asserted that the submission of the half skort was a "deal-breaker."

The Boys' Pant

Remus testified that she was also concerned with the boys' pant. She explained that Kids Place had submitted a boys' pant with an elastic waist while The Uniform Group submitted a boys' pant with a zipper. The bid specifications, however, had required neither an elastic waist nor a zipper. More specifically, the bid specifications

described the boys' pant as "Khaki Boys Flat Front Pants," identified the manufacturer as "Dickies," and listed the style number as "56-362/562."

Although the specifications required neither an elastic waist nor a zipper, the review committee preferred the zipper. "You're not going to tuck a shirt into an elastic pant," Remus exhorted. As a result, Remus asserted that the submission of the elastic pant was an "absolute-no."

The Secondary Concerns

With the girls' skirt a "deal-breaker" and the boys' pant an "absolute-no" for the review committee, all of their remaining concerns—their concern with the boys' and girls' short, the boys' and girls' white oxford shirt, and the boys' and the girls' blazer—were relegated to mere secondary concerns.

Remus explained that the short The Uniform Group had submitted was preferable to the one Kids Place had submitted because the one The Uniform Group had submitted was mesh while the one Kids Place had submitted was cotton, which was no longer in fashion.

Similarly, Remus explained that the white oxford shirt The Uniform Group had submitted was preferable to the one Kids Place had submitted because the one Kids Place had submitted had grey undertones and did not have that "sharp white snappy look."

Finally, Remus explained that the blazer The Uniform Group had submitted was preferable to the one Kids Place had submitted because the one The Uniform Group had submitted was machine-washable while the one Kids Place had submitted was dry-clean-only, which was more costly to maintain.

Nevertheless, Remus explained that the blazer was decidedly not a deal-breaker for the committee.

The Other Principals

Brady and Webb corroborated Remus's testimony. But they also mentioned some additional concerns or preferences of their own. These additional concerns or preferences notwithstanding, the girls' skirt and boys' pants remained their primary concerns.

Brady

Brady testified that she reviewed the samples like she was shopping for herself and stated that she preferred the girls' jumper The Uniform Group had submitted because it had adjustable buttons; that she preferred the boys' and girls' cardigan sweater The Uniform Group had submitted because it was thicker and less likely to pill; and that she preferred the polo shirt The Uniform Group had submitted because it was softer.

And though she did meet with The Uniform Group in March and April of 2006, Brady explained that she did so because The Uniform Group had supplied the school uniforms in the pilot program and she wanted to become familiar with the uniforms that her students were going to be required to wear in the expanded program.

Indeed Brady noted that there could not have been any conflict of interest between her and The Uniform Group when she reviewed the samples because Jaspán had not even asked The Uniform Group for help—let alone drafted or released the bid specifications—when she met with The Uniform Group to become familiar with the school uniforms that her students were going to be required to wear.

Moreover, she did not know the identity of the bidders or which samples they had submitted when she did review the samples.

Webb

Webb testified that he was more concerned with the packaging of the school uniforms than he was with the selecting of the school uniforms—but Webb continued that an issue for one was an issue for all and he recalled that the girls' skort and the boys' pant were their primary concerns.

The Additional Corroboration

In keeping with this testimony, Brady remembered that Webb was not as involved as she and Remus were in the selection of the school uniforms but that Webb had agreed with them that the boys' pant with the zipper was preferable to the boy's pant with the elastic waist.

Jaspan too remembered that the skort was the primary concern of the review committee and that everything else was merely a secondary concern of theirs.

II.

The Award

On May 25, 2006, Jaspan notified The Uniform Group in advance of formal Board approval that it was the successful bidder in the school uniform program because the next Board meeting was not for another three weeks and the students needed to be measured as soon as possible to avoid the measurement-and-fit issues that had plagued the Board earlier in the pilot program.

On June 15, 2006, the Board formally approved the award of the contract to The Uniform Group at its original bid price of \$431,517.90.

On July 7, 2006, the Board forwarded a written agreement to The Uniform Group with the original bid price of \$431,517.90.

And on July 17, 2006, the Board received a signed copy of agreement from The Uniform Group at its original bid price of \$431,517.90.

Although the Board awarded and entered into the contract with The Uniform Group at its original bid price of \$431,517.90, The Uniform Group only charged (and the Board only paid) the corrected amount of \$412,357.98 for the school uniforms.

The Complaint

Kids Place, which is headquartered in Elizabeth, is a chain of clothing stores that supplies, among other things, school uniforms to about 200 schools throughout New Jersey, both public and private, including Elizabeth.

Kids Place, however, had never participated in a public bid for school uniforms before—other than the pilot program in December 2005 and the expanded program in May 2006—and Dweck, who had been the vice-president of Kids Place for the past twenty-five years, had never participated in a public bid for school uniforms outside of these two programs either.

"The bidding process was new to me," he said.

Indeed Dweck acknowledged that he was unfamiliar with the Public Schools Contract Law; that he had not consulted with an attorney or anyone else who might have been familiar with the bidding process; and that he had otherwise failed to make any effort to educate himself about the law or the process in anticipation of participating in either of these programs.

As such, Dweck was unaware that any questions he had about the bidding process had to be put in writing before the bids were to be opened and conceded that the questions he did have about the bidding process in this case—including the questions he had about the skort and the short—were never put in writing before the bids were opened.

The Skort

Dweck was also unaware that specialty items, such as the girls' skort Style Plus had custom-made for The Uniform Group, were typically available to the public.

Dweck testified that he had attempted to contact Style Plus to ask about the girls' skort but could not find their contact information and had been unable to contact them.

Even more surprising from this long-time executive of an apparel company was his testimony that he never attempted to contact another manufacturer to ask about the availability of an equivalent skort.

In fact, Dweck testified that he did not even know what a full skort was.

Again, Dweck was unaware that any questions he had about the skort had to put in writing before the bids were to be opened.

The Short

Dweck testified that he ordinarily provided a mesh short to other schools but stated that he chose to provide Elizabeth with a cotton short instead for no reason whatsoever.

Once more, Dweck was unaware that any questions he had about the short had to be put in writing before the bids were opened.

His own unfamiliarity with the public bidding process for the school uniforms notwithstanding, Dweck submitted a complaint to New Jersey Department of Education, School Ethics Commission, alleging improprieties with the public bidding process for the school uniforms.

The Casus Belli

Dweck did not file his complaint with the Department as soon as he lost the bid in July 2006; instead, Dweck called Jaspan to ask him whether the Board had selected the school colors for the uniforms so he could stock them in his store.

Dweck testified that Jaspan told him he did not know and would have to get back to him.

But Dweck did not believe Jaspan did not know the school colors (even after Jaspan did get back to him and told him that he still did not know), threatened to go to the authorities, and still failed to put any complaints in writing (even after Jaspan advised him to do so in order for him to address it with the Board).

More significantly, Dweck made it clear that his genuine complaint was not about the bidding process but about the school colors:

Q: Did you have any other conversations with Mr. Jaspan after the Friday following the bid opening date?

A: Yes.

Q: When?

A: In July what had happened was a lot of the parents were coming in to us because they—we—we are the local—in downtown Elizabeth we are the local store. I mean, I have a store down there for 30 years. So basically they all buy uniforms through me and they were coming in to find out what the uniform was, what the colors, what's happening and so on and so forth, that they—they wanted to be able to—to purchase other product as opposed to the one that they're just getting free. So I had called him up to tell him that, you know, we don't know the colors. You have to give me the colors and he said, you know—at first he said, "Okay. Give me a couple of days. I'll get back to you," and he never responded.

So fast forward two, three, days, I was calling every day and he never go back to me. So finally one day I left a message. I said, you know, "This is a public school system and I'm entitled to know what colors

the—the schools are wearing,” and he said—I left a message and then he called me back and he told me when he called me, he says, “We really don’t know yet.” I said, “How can’t you know? It’s the middle of July. You have to know the school colors to—you know, to—to let me know to be prepared. I don’t want anything to do with what they do, but I still have to run a business.” And he says, “Okay. If you have any contentious something, put it in writing to me.” So I said, “What do you mean put it in writing?” He said, “Put whatever you want in writing to me and we’ll address it then.”

Q: And did you do that? Put it in writing to Mr. Jaspan?

A: No.

[(Tr. at pp. 160-61 (March 16, 2011).)]

Dweck continued that his complaint (again) was not about the bidding process but about the school colors—about Jaspan “stonewalling” him—and the effect not knowing could have had on his retail business:

Q: Why did you wait until August to complain about the 2006—the May bid?

A: Because what was happening here was I wasn’t getting any response. I—I—am the—I am the brick—I am the retailer that—that sells uniforms. I’ve been doing it for twenty-five years in Elizabeth and these people are walking in to me and—and I couldn’t get any response from the Board of Education. So I didn’t want to have anything to do with what they were doing. I just wanted to—you know, the right to sell a product in my establishment. That’s all I wanted and he wouldn’t give me the colors and he wouldn’t give me this and he wouldn’t give me that. He was like stonewalling me to everything that we were doing, everything.

[(Tr. at p. 165 (March 16, 2011).)]

In fact, Dweck maintained this belief even after he called the school principals himself and they too told him that they did not know their school colors yet either.

That is why the initial complaint Dweck filed with the Department does not contain any allegations about the skort and the short (alleged improprieties about the

bidding process before the bids were opened) but only allegations about the blazer and the tight (alleged improprieties about the bidding process after the bids were opened).

More specifically, Dweck alleged in his initial complaint that Executive Apparel did not make a machine-washable blazer in 2006 (even though he never saw the sample submitted) and that The Uniform Group was able to change the price of its bid (even though he never saw the contract awarded).

Indeed Dweck admitted as much on cross-examination when he testified that the skort and the short were not issues for him.

The Report

The investigative report concluded that the bidding process was deficient because the specifications included the wrong style number for the short and the review committee accepted a machine-washable blazer. According to the report, a bidder could not figure out the short and the specifications required a dry-clean-only blazer. Meanwhile, the report found the complaint about the skort to be unsubstantiated:

The allegation regarding the skorts manufactured by Style Plus was unsubstantiated. The description of the skorts provided in the specifications was adequate and the OCI investigator located the vendor on the Internet.

[(J-21) (EBOE 403).]

The Appeal

On appeal, the Department changed its position regarding the skort and determined that the listing of a custom-made skort as opposed to a catalog item made it impossible for another bidder to submit the skort.

III.

The Investigation

Karl Feltes, who has been working with the Department for the past sixteen years as a special investigator, testified on behalf of the Department. Feltes offered that he had also worked in law enforcement for the previous twenty-six years as an investigator, including investigations into organized crime, and was familiar with the Public School Contract Law. Yet Feltes acknowledged that he had no expertise when it came to school uniforms—or the apparel industry for that matter—and was not even the investigator in this case. As Feltes explained, he assigned the investigation to another investigator, Sonya Donalson, whom he did not supervise, and only conducted a peer review once or twice a month instead. Significantly, Donalson was no longer with the Department and unable to testify at the hearing.

Regardless, Donalson did not interview Remus or any of the other principals on the review committee. And since Feltes was not the investigator in this case, he did not interview anyone on the review committee either. He also did not interview Dweck or any of the other bidders in this case—and he did not interview Jaspan as previously stated.

Yet Feltes testified that this did not concern him. Feltes stated that he was only concerned with how the Board drafted its specifications, not how the review committee made its selection, and that he was concerned in particular with the specifications for the short and the skort. Feltes later amended his testimony to add that he was also concerned with the specification for the blazer—and the fact that Jaspan noticed The Uniform Group had made a mistake in the price of its tights.

In short, Feltes did his best to explain the determination the Department made in this case.

The Short

Feltes testified that he thought the Board discouraged free, open, and competitive bidding under the law because the Board listed the wrong style number for the Augusta short in its specifications. He did not think that the Board discouraged free, open, and competitive bidding because The Uniform Group helped draft the specifications. More specifically, Feltes thought that the incorrect listing of the style number for the Augusta short was a violation of the law because he believed Kids Place was unable to identify the short after it read the specifications.

Feltes, however, did not know if someone in the apparel industry could have figured out the correct style number if that person had tried. In fact, Feltes had no idea what measures Kids Place took to identify the correct style number and did not know that Kids Place never asked the Board in writing to correct it. Indeed, Feltes did not even know whether Augusta even made another pair of shorts.

The Skort

Feltes testified that he thought the Board discouraged free, open, and competitive bidding under the law because the Board required a custom-made skort in its specifications. More specifically, Feltes thought that this was a violation of the law because he believed that no bidder other than The Uniform Group could buy the full skort from Style Plus, that no manufacturer other than Style Plus could have made a full skort, and that no full skort existed anywhere else. Feltes, however, did not know whether a bidder other than The Uniform Group could buy the full skort from Style Plus or whether it was customary in the industry for another vendor to be able to do so. More significantly, Feltes did not know whether Style Plus even made another full skort or which skort Kids Place even submitted—a full skort or a half skort.

In addition, Feltes thought that the Board discouraged free, open, and competitive bidding under the law because Kids Place claimed that it could not contact Style Plus. Yet Donalson had reported that she was able to find Style Plus on the

Internet and contact it. And the investigative report found that the claim was unsubstantiated.

But Feltes testified that this did not matter. According to Feltes, the fact that the skort was a custom-made item and not a catalog item discouraged free, open, and competitive bidding. Indeed Feltes maintained that the mere listing of a custom-made item in a bid specification made it a violation of the law.

The Blazer

Feltes testified that he thought the Board discouraged free, open, and competitive bidding under the law because he believed the specifications required a dry-clean-only blazer and the Board deviated from the specifications when it chose a machine-washable blazer instead. The specifications, however, did not describe the girls' or boys' blazer as dry-clean-only. In fact, the specifications only described the girls' blazer as "Girl's 100% Polyester Blazer with Embroidered School Logo," identified the manufacturer as "Executive Apparel," and listed the style number as "2000/4000."

Similarly, the specifications only described the boys' blazer as "Boy's 100% Polyester Blazer with Embroidered School Logo," identified the manufacturer as "Executive Apparel," and listed the style number as "1000/3000."

Indeed, neither listing mentioned any care instructions. And common sense would suggest that a 100 percent polyester blazer did not have to be dry-cleaned and could be machine-washed instead. But Feltes relied upon the assertion by Dweck that Executive Apparel did not make a machine-washable blazer in 2006.

Meanwhile, Jaspan and the principals testified that the blazer The Uniform Group submitted with its bid was from Executive Apparel and that it was machine-washable.

Likewise, Jaspan and the principals testified that the blazer Kids Place submitted with its bid was from Executive Apparel but that it was dry-clean-only.

In anticipation of this, Dweck had testified that the blazer The Uniform Group had submitted with its bid must have been from a different manufacturer, Rifle, because Dweck asserted that only Rifle had manufactured a machine-washable blazer in 2006. But other than this assertion, the Department submitted no proof. In fact, Dweck acknowledged that the blazer he submitted at the hearing was not the blazer he submitted with his bid.

Indeed the Department could not even establish that this blazer was from 2006 as Dweck could not explain why the blazer was missing his inventory tag—which would have indicated the year it was made or at least the year in which Kids Place purchased it.

By the same token, the statement in the investigative report—that an investigator from the Department spoke with a representative from Executive Apparel who confirmed that Executive Apparel only made a dry-clean-only blazer in 2006—remained unreliable hearsay.

Regardless, Feltes testified that he did not know if Executive Apparel only made a dry-clean-only blazer in 2006 and not a machine-washable one as well.

The Tights

Feltes testified that he thought that the Board discouraged free, open, and competitive bidding under the law because he believed the Board allowed The Uniform Group to change the price of its bid after they were opened. The Board, however, had not allowed the Uniform Group to change the price. In fact, the Board awarded and entered into the contract with The Uniform Group at its original bid price of \$431,517.90. Nevertheless, Feltes thought it was unusual for Jspan to have noticed that The Uniform Group had made a mistake in the price of its tights.

The Substitutions

Feltes testified that if he had known that Kids Place had submitted substitutes for 40 percent of the items required in the specifications—and that the review committee had thought that these substitutes or equivalents were not as good as the items The Uniform Group had submitted—then he would have changed his mind about the investigation and the findings contained in it. His implication was that he would not have found against the Board. Either way, it did not matter because the review committee did not award the contract to The Uniform Group based on its preference for the items The Uniform Group had submitted.

To repeat, the review committee awarded the contract to The Uniform Group based on the fact that it submitted a full skirt while Kids Place submitted a half skirt. As such, it did not matter whether the blazer The Uniform Group submitted was manufactured by Executive Apparel or Rifle and it did not matter whether the blazer Kids Place submitted was dry-clean-only or machine-washable. Moreover, it did not matter whether the review committee compared the samples to the specifications or expressed its preference for one item over an equivalent.

CONCLUSIONS OF LAW

I.

A. The Department argues that the Board violated N.J.S.A. 18A:18A-15.

Bid specifications must be drafted in a manner to encourage “free, open, and competitive bidding.” N.J.S.A. 18A:18A-15. Toward this end, no specification may require any “brand name,” but it may require a “brand name or equivalent,” Ibid., which serves as a “reference or point of comparison,” N.J.A.C. 5:34-9.2(c). If the bidder submits an equivalent, then the bidder bears the responsibility of documenting the equivalence, and the failure to do so shall be grounds for rejection of the claim. Ibid.

The purchasing agent, however, must know that at least one equivalent exists. N.J.A.C. 5:34-9.2(b). If no equivalent exists, or if the nature of the brand name effectively restricts bidders to a single good, then the purchasing agent must consider that good to be proprietary. Ibid. A proprietary good is a specialty item that is made or marketed by a person who has the exclusive right to make or sell them. N.J.S.A. 18A:18A-2(cc).

If the bid specifications do require a proprietary good then its special need must be directly related to the performance of the contract. N.J.S.A. 18A:18A-15. The purchasing agent, however, must certify the reasons why the proprietary good is necessary to the performance of the contract. N.J.A.C. 5:34-9.1(b). And such a certification must be included as part of the bid documents. Ibid.

A bidder may even help draft the specifications. See, e.g., Bd. of Educ. of Lakewood v. Office of Compliance, EDU 4397-99, Initial Decision (January 21, 2000), <http://lawlibrary.rutgers.edu/oal/search.html>; see also, Longo Ass'n v. Bd. of Educ. of Pascack, 3 N.J.A.R. 66 (1981).

Nevertheless, any specification that knowingly excludes all prospective bidders but one—by reason of impossibility of performance for example—shall be null and void. N.J.S.A. 18A:18A-15. In that case, the bid specification must be re-advertised for the receipt of new bids. Ibid. Moreover, the contract upon which it is based must be set aside. Ibid.

In addition, any prospective bidder who wishes to challenge a bid specification must do so in writing, with the purchasing agent, no less than three business days before the bids are opened. Ibid. As such, a challenge filed after that time shall be considered void—having no impact on the local board of education or its award of the contract. Ibid. Indeed, the New Jersey Supreme Court has held that the identical provision in the Local Public Contracts Law, N.J.S.A. 40A:11-13, is intended as a statute of limitations. See Jen Electric v. County of Essex, 197 N.J. 627, 631 (2009).

Finally, an authorized agent may appoint a committee to assist in the evaluation of the proposals. N.J.A.C. 5:34-4.3(c)(2). Toward this end, committee members must be familiar with the goods or services requested. N.J.A.C. 5:34-4.3(c)(2)(i). But they may ask bidders any questions they have about their proposals—as long as the bidders do not use the opportunity to negotiate their contracts. See N.J.A.C. 5:34-4.3(c)(3).

In this case, the Department makes a number of arguments, some in the alternative, why the Board violated N.J.S.A. 18A:18A-15, or why the bid specifications were not drafted in a manner to encourage “free, open, and competitive bidding.”

The Department, however, misses the mark—as the Department bases its arguments on a mistake of fact, a mistake of law, or both.

1. The Department argues that the short was imaginary.

First, the Department argues that the Board violated N.J.S.A. 18A:18A-15 when it listed the wrong style number for the mesh short because doing so made it impossible for prospective bidders to provide it. The Department then extrapolates this singular mistake by multiplying it by the approximate quantities the Board requested. Stated otherwise, the Department argues that the Board requested 2,392 articles of imaginary clothing.

The rhetoric aside, the argument has no basis in fact. Indeed, a preponderance of the evidence does not exist that the listing of the wrong style number made the specification so vague that no prospective bidder could provide a mesh short. By his own admission, Dweck typically provides a mesh short, recognized the style number was incorrect, yet still provided a cotton short—for no reason. Therefore, I **CONCLUDE** that the Department has not proven by a preponderance of the evidence that the Board violated N.J.S.A. 18A:18A-15 when it listed the wrong style number for the mesh short.

2. The Department argues that the Board dismissed a bid challenge.

Second, the Department argues that the Board violated N.J.S.A. 18A:18A-15 when it did not correct the style number for the mesh short and provide the contact information for the full skort. Although the Department predicates its argument on the unsupported assertion that Jaspan did not know whether an equivalent mesh short or full skort existed; what the Department is really arguing is that Jaspan failed to answer a bid challenge. Stated otherwise, the Department argues that the Board dismissed a bid challenge when Dweck contacted Jaspan by telephone to inform him that he was having difficulty locating the short and the skort and Jaspan responded that Dweck could simply substitute them with equivalent items instead.

While the previous argument had no basis in fact, this one has no basis in law. Indeed, the Department cites no relevant authority for its extended argument. Meanwhile, under N.J.S.A. 18A:18A-15, Kids Place was obligated to challenge any and all specification in writing before the bids were opened. Dweck, by his own admission, failed to do so and Jaspan, who was without legally sufficient notice that the style number was incorrect, and that the contact information for Style Plus might have been unavailable, did not amend the specifications. Therefore, I **CONCLUDE** that the Department has not proven by a preponderance of the evidence that the Board violated N.J.S.A. 18A:18A-15 when it did not correct the style number for the short, or provide the contact information for the full skort.

3. The Department argues that the skort was proprietary.

Third, the Department argues that the Board violated N.J.S.A. 18A:18A-15 when it listed the full skort Style Plus had custom-made for The Uniform Group in a previous bid in its bid specifications because doing so made it impossible for prospective bidders to provide it. The Department then extrapolates this to mean that the Board effectively restricted bidders to that single good. Stated otherwise, the Department argues that the Board should have known that the custom-made skort was proprietary.

As a corollary, the Department argues that Jaspan should have certified why the custom-made skort was necessary to the performance of the contract and then made such a certification part of the bid documents.

In effect, the Department argues that Jaspan knew the specification excluded all prospective bidders but The Uniform Group; that the bid specifications should have been re-advertised; and that the contract the Board awarded to The Uniform Group should have been set aside.

The remedy aside, these arguments too have no basis in fact. Indeed, no evidence exists that the full skort Style Plus had custom-made for The Uniform Group in a previous bid was proprietary. More pointedly, no evidence exists that The Uniform Group had the exclusive right to make or sell the specialty item. By his own admission, Dweck never attempted to have such a skort made for Kids Place by any manufacturer, and according to its own investigator, the Department had no difficulty contacting Style Plus to ask it about the item. Moreover, Kids Place failed to submit a full skort by any manufacturer. Had Kids Place submitted a full skort by another manufacturer, then the Department would have had a more persuasive argument—but that would have made this a different case. Therefore, I **CONCLUDE** that the Department has not proven by a preponderance of the evidence that the Board violated N.J.S.A. 18A:18A-5 when it listed the full skort Style Plus had custom-made for The Uniform Group in a previous bid.

In addition, I **CONCLUDE** that Jaspan was not required to certify why the custom-made skort was necessary to the contract and then make such a certification part of the bid documents.

As such, I further **CONCLUDE** that the bid specifications need not have been re-advertised and the contract the Board awarded to The Uniform Group set aside.

4. The Department argues that the Board rigged the bid process.

Fourth, the Department argues that the Board violated N.J.S.A. 18A:18-15 when The Uniform Group provided the Board with the manufacturer and style numbers of the items listed in the bid specifications because no need existed for the Board to have this information. Yet Jaspan sought this information so the bid specifications would be fairer. Indeed, the bid specifications would have done just the opposite—discouraged free, open, and competitive bidding and effectively excluded all bidders but The Uniform Group—if the bid specifications had remained as non-descript as they had been in the pilot program.

The reason is that The Uniform Group, as the winning bidder in the pilot program, would have been the only bidder which would have known which garment would have been responsive to each item carried over from the pilot program—whether The Uniform Group had helped the Board draft the bid specifications in the expanded program or not.

For example, the full skort had simply been listed in the pilot program as “Khaki full skort, pleated front with elastic back” with no manufacturer or style number listed as a reference or point of comparison. Similarly, the mesh short had simply been listed in the pilot program as “Shorts” with no other description. Likewise, the boys’ pant had simply been listed in the pilot program as “Khaki Pants” with no manufacturer or style number listed as a reference or basis of comparison.

And by way of a final example, the socks had simply been listed in the pilot program as “Socks.”

No manufacturer, no style number, not even a color.

In fact the only information contained in the bid specifications for the pilot program for any of the items other than their terse descriptions was an approximation of the quantities needed.

These facts and circumstances notwithstanding, the Department stated in its decision denying the Board's second-level appeal that the Board was within its right to ask The Uniform Group for help in drafting the bid specifications in the first place:

The OFAC Report of Examination did not dispute that the Board was within its rights to solicit help from The Uniform Group to assist in the drafting of the bid specifications. Instead, the report revealed that The Uniform Group was the successful bidder of the 2005-06 (previous school year) school uniform contract and had assisted in purchasing agent in drafting bid specifications that were deficient and unclear which adversely affected the overall fairness of the bidding process That was not done in this case.

[(J-25) (EBOE 0195).]

Although the Department continued in its decision that it had denied the appeal because the bid specifications had been "deficient and unclear, which adversely affected the overall fairness of the bidding process," the bid specifications, as previously discussed, had not been deficient as a matter of fact and did not adversely affect the overall fairness of the bidding process as a matter of law.

Even Feltes testified that the Board did not violate the statute when it asked The Uniform Group to help draft the specifications.

Therefore, I **CONCLUDE** that the Department has not proven by a preponderance of the evidence that the Board violated N.J.S.A. 18A:18A-15 when it asked The Uniform Group for the manufacturer and style numbers of the items to be listed in the bid specifications.

B. The Department argues that the Board abused its discretion.

The rule that actions of local boards of education, which lie within their discretionary powers, may not be upset unless "patently arbitrary, without rational basis, or induced by improper motives," has long been well-established. See Kopera v. W. Orange BOE, 60 N.J. Super. 288, 294 (App. Div. 1960). As such, their factual determinations must be accepted if supported by substantial credible evidence. See

Thomas v. Bd. of Educ. of the Twp. of Morris, 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd o.b., 46 N.J. 581 (1966). Indeed, the State Department of Education cannot substitute its judgment for a local board of education. See Bd. of Educ. of E. Brunswick v. Twp. Council of E. Brunswick, 91 N.J. Super. 20, 25 (App. Div. 1966).

In this case, the Department makes another set of arguments why the Board violated N.J.S.A. 18A:18A-15, or how the Board discouraged “free, open, and competitive” bidding. These arguments, however, are really arguments that the Board abused its discretion. Either way, the Department misses the mark. Once again, the Department bases its arguments on a mistake of fact, a mistake of law, or both.

1. The Department argues that Brady was induced by improper motives.

First, the Department argues that the Board abused its discretion when it allowed Brady to meet with The Uniform Group to discuss school uniforms and preview garment samples. In essence, the Department argues that Brady was induced by improper motives. This argument, however, has no basis in fact. In fact, no evidence exists that her discussion of school uniforms and her preview of garment samples somehow predisposed Brady to favor The Uniform Group especially since Brady did not know which samples were submitted by which bidder.

Moreover, the Department is not even certain of its argument as it writes its argument in the conditional tense:

Ms. Brady also testified that during the meeting Uniform Group brought uniform garment examples and Ms. Brady discussed school colors during those meetings. Ms. Brady further testified that Robert Jaspan knew about Ms. Brady's meetings with the Uniform Group. Despite this knowledge, Mr. Jaspan still asked Ms. Brady to assist in selecting the winner of the uniform contract although he was aware that Ms. Brady had meetings with Uniform Group and could have been familiar with Uniform Group's uniform samples.

[(Dep't's Responsive Br. at pp. 27-28 (May 18, 2011) (emphasis added).]

Therefore, I **CONCLUDE** that the Board did not abuse its discretion when Brady met with The Uniform Group to discuss school uniforms and preview garment samples.

2. The Department argues that Jaspan was induced by improper motives.

Second, the Department argues that the Board abused its discretion when Jaspan did not provide the other bidders with the unspecified information Brady allegedly provided to The Uniform Group. In essence, the Department argues that Jaspan was induced by improper motives. This argument, however, has no basis in fact. Indeed, no evidence exists that Brady gave The Uniform Group any information—let alone information that would have given The Uniform Group a competitive advantage during the bidding process.

Again, Brady met with The Uniform Group to become more familiar with school uniforms—not the other way around—and she did so before Jaspan even drafted the bid specifications.

This argument also has no basis in law. Indeed, the Department cites no authority for its argument that the Board was somehow obligated to provide the other bidders with the information allegedly exchanged or discussed between Brady and The Uniform Group before Jaspan drafted the bid specifications. Meanwhile, committee members are obligated under N.J.A.C. 5:34-4.3(c)(2)(i) to become familiar with the goods and services requested. Therefore, I **CONCLUDE** that the Board did not abuse its discretion when Jaspan did not provide the other bidders with unspecified information Brady allegedly provided to The Uniform Group.

3. The Department argues that the selection of the blazer was arbitrary.

Third, the Department argues that the Board abused its discretion when the review committee selected the machine-washable blazer. In essence, the Department argues that its selection of the blazer—and by extension The Uniform Group—was arbitrary. This argument, however, has no basis in fact. In fact, the specifications do not describe a dry-clean-only blazer. Nor do they reference a dry-clean-only blazer.

Stated otherwise, a preponderance of the evidence does not exist that Executive Apparel only made a dry-clean-only blazer in 2006.

But even if Executive Apparel only made a dry-clean-only blazer in 2006, the review committee did not select The Uniform Group instead of Kids Place based on the blazer. As previously discussed, the committee based its selection on the skort. Again, The Uniform Group submitted a full skort while Kids Place submitted only a half skort. As such, any of the concerns surrounding any of the other items became merely secondary concerns. Therefore, I **CONCLUDE** that the Board did not abuse its discretion when the review committee selected the machine-washable blazer.

4. The Department argues that the questioning of the tights was arbitrary.

Fourth, the Department argues that the Board abused its discretion when Jaspan noticed that The Uniform Group had made a mistake in the price of its tights and questioned The Uniform Group about it. In essence, the Department argues that this questioning—and ultimate price correction—was arbitrary. This argument, however, has no basis in fact. In fact, Jaspan did not allow The Uniform Group to change the price of its tights and lower the price of its bid as the Board awarded and entered into the contract with The Uniform Group at its original bid price and not at its corrected price. Stated otherwise, he did not question The Uniform Group about the price of its tights to negotiate their price or the price of its bid—nor did The Uniform Group use the opportunity to negotiate the price of its tights or the price of its bid.

The argument also has no basis in law as members of a review committee are specifically authorized under N.J.A.C. 5:34-4.3(c)(3) to ask bidders any questions they might have about their proposals—as long as the bidders do not use the opportunity to negotiate their contracts.

Moreover, the Department cites no relevant authority for its proposition that the Board could not pay an amount less than the amount awarded—especially when the amount awarded contains an incorrect unit price resulting in an unintentionally inflated charge.

To be sure, there is a difference between lowering the price of a bid and correcting one. And surely the Department would not sanction the Board paying The Uniform Group three times the price for a pair of girls' tights when it knew the unit price for a pair of those tights was three times less. Besides, the Board did not base its award on price. It based its award on responsiveness—the submission of a full skort versus the submission of a half skort. Therefore, I **CONCLUDE** that the Board did not abuse its discretion when it questioned the unit price of the girls' tights and then paid only the corrected price.

II.

A. The award of the contract was proper.

Every contract for the provision or performance of any goods or services, the cost of which in the aggregate exceeds the bid threshold, shall be awarded only by resolution of the board of education to the lowest responsible bidder after public advertising for bids and bidding. N.J.S.A. 18A:18A-4(a).

In 2006, the contract the bid threshold was \$17,500. See N.J.S.A. 18A:18A-3(a).

Thus, the contract the Board awarded to The Uniform Group had to have been publically advertised for bids and bidding.

1. The Uniform Group was the lowest-responsible bidder.

Under the Public Schools Contract Law, every contract for the performance of any good or service shall be awarded only by resolution of the board of education to the "lowest responsible bidder" after public advertising for bids. N.J.S.A. 18A:18A-4(a).

The "lowest responsible bidder" means the bidder who offers the "lowest price," is "responsive" to the bid, and is "responsible." N.J.S.A. 18A:18A-2(t).

According to the statute, the "lowest price" means "the least possible amount that meets all requirements of the request," N.J.S.A. 18A:18A-2(s); "responsible" means "able to complete the contract in accordance with its requirements," N.J.S.A. 18A:18A-2(x); and "responsive" means "conforming in all material respects to the terms and conditions, specifications, legal requirements, and other provisions of the request," N.J.S.A. 18A:18A-2(y).

This means that the contract must be awarded to the lowest bidder who complies with the substantive and procedural requirements set forth in the specifications and that any material departure invalidates the non-conforming bid as well as any contract based on it. Meadowbrook Carting Co. v. Borough of Island Heights and Consol. Waste Serv., 138 N.J. 307, 313-14 (1994).

In this case, the bid Kids Place submitted was not responsive to the specifications because it did not include a full skort as the specifications required. Stated otherwise, it did not conform in all material respects to the request because the specifications required a full skort and Kids Place submitted a half skort. Meanwhile, the bid The Uniform Group submitted was responsive to the specifications because it did include a full skort and no evidence or even allegation exists that the bid The Uniform Group submitted was in any way unresponsive to the specifications. Therefore, I **CONCLUDE** that The Uniform Group was the lowest-responsible bidder as a matter of law.

2. The acceptance of the half skort would have been a material departure.

The requirement that a contract be awarded to the lowest responsible bidder notwithstanding, minor discrepancies and technical omissions can be waived. Meadowbrook, supra, 138 N.J. at 314. The test is one of materiality. Originally set forth by Judge Pressler in River Vale v. R.J. Longo Constr. Co., 127 N.J. Super. 207, 216 (Law Div. 1974), this test of materiality was later adopted by the New Jersey Supreme Court in Meadowbrook, supra, 138 N.J. at 315: (1) whether waiver would deprive the municipality of its assurance that the contract will be entered into, performed, and

guaranteed according to its requirements; and (2) whether waiver would adversely affect competitive bidding by giving an advantage to one bidder over the other or by undermining the common standards of competition.

In essence, the Department argues that the bid Kids Place submitted was responsive to the specifications because its submission of a half skort was not a material departure from the specifications but a minor discrepancy that the Board should have waived. Stated otherwise, the Department argues that the request for the full skort in the specifications—and the reference to the full skort Style Plus had custom-made for The Uniform Group in a previous bid—somehow gave an advantage to The Uniform Group in the expanded program. But no such evidence exists. Moreover, such an argument turns the test of materiality on its head and trivializes the importance of the full skort in the specifications.

Once more, no evidence exists that the full skort Style Plus had custom-made for The Uniform Group in a previous bid was an exclusive or proprietary item. Indeed, no evidence exists that The Uniform Group had the exclusive right to make or sell the skort.

In addition, no evidence exists that the skort was unavailable to the public just because it was not a catalog item. Indeed, this assertion was undermined by the fact that Kids Place submitted a half skort and not a full skort by another manufacturer.

Similarly, no evidence exists that Style Plus could not be contacted just because Dweck asserted that he had difficulty contacting it. Indeed, this assertion was undermined by the fact that Donalson reported no difficulty contacting Style Plus.

More significantly, the fact that the bid specifications did require a full skort was underscored by the members of the review committee who explained that they wanted full coverage for their female students—a full skort with pleated panels all the way around—in order to ameliorate any potential body-image issues.

To have waived that requirement then would not only have disadvantaged The Uniform Group (by giving a competitive advantage to Kids Place) but also the female students (by exposing them to the very body-image issues the review committee sought to avoid). As such, the Board maintained the common standards of competition—not undermined them—when it maintained the requirement that the skort be a full skort. Therefore, I **CONCLUDE** that the acceptance of the half skort would have been a material departure from the bid specifications.

3. The acceptance of a machine-washable blazer would not have been a material departure.

By contrast, if the specifications had required a dry-clean-only blazer, and the Board accepted a machine-washable blazer instead, then such a departure from the specifications would not have been a material one because the difference in care would have only been a minor discrepancy, which the Board could have waived. To argue otherwise would have been to require the students to have incurred greater costs for the care of their blazers. Therefore, I **CONCLUDE** that the acceptance of the machine-washable blazer would not have been a material departure from the bid specifications but a minor discrepancy, which could have been waived.

B. The bid specifications were as definite, precise, and full as practicable.

Bid specifications must be as definite, precise, and full as practicable. In other words, to invalidate an award for a deficiency, the irregularity must be substantial in nature. Again, the polestar is the effect on fair and competitive bidding. Indeed, this requirement—that an irregularity must be of a substantial nature—has been the standard for more than fifty years:

To conform with statutory requirements, N.J.S.A. 40:50-1, specifications in an invitation to bid “must be as definite, precise and full as practicable in view of the character of the work, the quality and quantity of the materials to be furnished.” Waszen v. Atlantic City, 137 N.J.L. 535, 537 (Sup. Ct. 1948), reversed on other grounds, 1 N.J. 272 (1949). The specifications must “furnish the same

information to all prospective bidders, so that there may be intelligent bidding." Phifer v. Bayonne, 105 N.J.L. 524, 525 (Sup. Ct. 1929). To invalidate an award for a deficiency in the specifications, "the irregularity must be of a substantial nature—such as will operate to affect fair and competitive bidding." Id. at 527.

[(James Petrozello Co. v. Chatham, 75 N.J. Super. 172, 178-79 (App. Div. 1962).]

In this case, the Department argues that the short and the skort were irregularities. But as previously discussed, the wrong style number for the short was not substantial and the listing of the Style Plus skort was not an irregularity. As such, neither the listing of the wrong style number nor the listing of the custom-made skort had an effect on fair and competitive bidding. Therefore, I **CONCLUDE** that the bid specifications were as definite, precise, and full as practicable when advertised.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the complaint against the Board be **DISMISSED**.

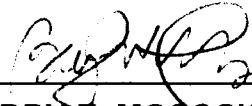
I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 29, 2011

DATE



BARRY E. MOSSOWITZ, ALJ

Date Received at Agency:

December 29, 2011

Date Mailed to Parties:
dr

12-30-11

APPENDIX

WITNESSES

For Petitioner:

Ann Marie Remus
Michael Webb
Deborah Brady
Robert Jaspan

For Respondent:

Karl Feltes
Isaac Dweck

EXHIBITS

Joint:

- J-1 Board of Education Advertisement for Bids dated April 25, 2006
- J-2 Specifications and Proposal for Supplies and Equipment, Proposal for School Student Uniforms, dated May 2006
- J-3 Email message from Janice Acheson to Jaspan enclosing "Suggested Additions and/or Modifications for Terms and Conditions on Uniform Bid" and "Bid Specs," dated May 1, 2006
- J-4 Specifications and Proposal for Supplies and Equipment, Proposal for School Student Uniforms, dated December 2005
- J-5 Printout from website of "Reversible Mini Mesh League Tank, Style 136," dated 2006
- J-6 Printout from website of "Youth Micro Mesh Short, Style 746," dated 2006
- J-7 Bid Opening Check List and Sign-In List dated May 16, 2006
- J-8 Bid from Flynn & O'Hara Uniforms, LLC dated May 15, 2006
- J-9 Bid from Kids Place of New Jersey, Inc. dated May 12, 2006
- J-10 Bid from The Uniform Group, LLC dated May 15, 2006

- J-11 Bid Opening Document Checklist dated May 16, 2006
- J-12 Letter from The Uniform Group to Jaspan dated May 17, 2006
- J-13 Letter from Jaspan to The Uniform Group dated May 25, 2006
- J-14 Minutes of Board Meeting and Report of Award of Contracts dated June 15, 2006
- J-15 Complaint against Jaspan and the Board by Dweck dated August 8, 2006
- J-16 Letter from the Department to the superintendent of schools, Elizabeth School District, dated September 7, 2006
- J-17 Fax from Sonya Donalson to Jaspan dated September 18, 2006
- J-18 Fax from Jaspan to Donalson dated September 18, 2006
- J-19 Memo from Jaspan to Donalson dated October 31, 2006
- J-20 Memo from Jaspan to the Department dated November 1, 2006
- J-21 Investigative Report by the Department dated January 24, 2007
- J-22 Letter from the Board to the Department dated March 30, 2007
- J-23 Letter from the Department to the Board dated May 11, 2007
- J-24 Letter from the Board to the Department dated June 20, 2007
- J-25 Letter from the Department to the Board dated August 9, 2007
- J-26 Stipulation of Facts dated March 14 and March 15, 2011

For Petitioner:

- P-1 Not in evidence
- P-2 Not in evidence
- P-3 Not in evidence
- P-4 Not in evidence
- P-5 Letter from Jaspan to The Uniform Group dated July 17, 2006
- P-6 Copies of entries from the daily calendar of Jaspan dated May 3 through May 25, 2006
- P-7 File notes from Sonya Donalson undated
- P-8 Letter from the Board to Donalson dated November 16, 2006

For Respondent:

- R-1 Letter from The Uniform Group to Style Plus undated
- R-2 Blazer from Executive Apparel

- R-3 Email message from Jaspan to Bruce Elfein, Jennifer Barrett, and Stephen Liddawi with copies to Brady, Remus, and Webb dated May 16, 2006
- R-4 Email message from Jaspan to Webb dated March 28, 2006
- R-5 Email message from Jaspan to Brady dated March 28, 2006
- R-6 Email message from Brady to Jaspan dated March 29, 2006
- R-7 Not in evidence
- R-8 Documents entitled "Soliciting Prices/Bids and Quotations" and "Contracts" from NJSBA School Policy Service for Elizabeth Public Schools undated
- R-9 Email message from Kelly Dugett to Jaspan dated February 27, 2006
- R-10 Amendment of Contract for Student Uniforms dated July 20, 2006

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
OFFICE OF COMPLIANCE INVESTIGATION
INVESTIGATIONS UNIT

ELIZABETH SCHOOL DISTRICT
SCHOOL UNIFORM – BIDDING VIOLATION

INVESTIGATIVE REPORT
JANUARY 2007

**STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
OFFICE OF COMPLIANCE INVESTIGATION
INVESTIGATIONS UNIT**

**REPORT OF EXAMINATION – JANUARY 2007
ELIZABETH SCHOOL DISTRICT – SCHOOL UNIFORM BIDDING REVIEW**

EXECUTIVE SUMMARY

The Office of Compliance Investigation (OCI) conducted a limited review of the Elizabeth School District's compliance with statute and code regarding school uniform contract awards for the 2005/2006 and 2006/2007 school years. The purpose of the review was to determine if the bidding process was in compliance with educational statute and code. The Examiner reviewed policies and procedures utilized to solicit and award the contracts.

To conduct the review, the OCI examiner interviewed the district's purchasing agent, the complainant, as well as other personnel thought to possess knowledge pertinent to the investigation. The examiner also reviewed board minutes, communications, bid proposals, invoices and various other documents pertaining to the school uniform contract awards.

The information and documentation provided indicated that the Elizabeth School District advertised for bids for the 2006/2007 school year wherein the successful bidder of the 2005/2006 school uniform contract, the Uniform Group, significantly assisted the district's purchasing agent in drafting bid specifications that were deficient and unclear. As the project advanced, the district's purchasing agent recommended the second lowest bidder for the award, the Uniform Group.

The manner in which the Elizabeth School District awarded a contract to the Uniform Group violated provisions of the Public School Contracts Law. The school district failed to provide sufficient bid specifications when soliciting bids for the 2006/2007 school uniform contract. The Uniform Group was put in a position of advantage because they were closely involved in the development of the deficient bid specifications, which adversely affected the overall fairness of the bidding process.

The investigation concludes that the Elizabeth School District improperly awarded a school uniform contract to the Uniform Group. A summary of events, conclusions and recommendations is contained in the remainder of this report.

ALLEGATION AND FINDINGS

The Elizabeth Board of Education compromised the bidding process by placing a bidder in a position of advantage and by drafting insufficient specifications contrary to N.J.S.A.18A:18A-15.

On May 2, 2006, Elizabeth School District advertised for a Request for Proposal (RFP) from bidders to provide school uniforms for schools 30, 31, 88 & 89 for the 2006/2007 school year with the option to include additional schools. Three bids were submitted: Kid's Place, the Uniform Group and Flynn & O'Hara. The bid opening date was on May 16, 2006 wherein Kid's Place submitted a bid of \$415,687.70, the Uniform Group submitted a bid of \$431,517.90, and Flynn & O'Hara Uniforms was disqualified because their paperwork was not in order. As a result of the disqualification of Flynn & O'Hara, the two qualifying bidders were under consideration for the school uniform contract pending the review of samples they had submitted to the district on May 15, 2006.

Prior to submitting the samples, the uniform coordinator at Kid's Place found discrepancies with the bid specifications. As such, the uniform coordinator contacted the district's purchasing agent for clarification. Namely, the specifications called for Augusta style #136 shorts. This item number was incorrectly indicated on the specifications. Moreover, the material was not mentioned. Another variant was that the uniform coordinator could not locate the skorts identified in the specifications as manufactured by Style Plus. The uniform coordinator stated that their company had been in business for over 20 years and had never heard of this school uniform manufacturer.

According to the uniform coordinator at Kid's Place, the district's purchasing agent declined to expound on the discrepancies which left Kid's Place at a disadvantage. The uniform coordinator was instructed by the district's purchasing agent to replace the items in question with their equivalent. However, the uniform coordinator argued that since the specifications were not accurate it was unlikely Kid's Place could present items of equivalent quality and therefore most likely would not have a fair opportunity to compete for the contract award. Nevertheless, Kid's Place did submit samples to the district as required and was distraught when they were informed that although they were the lowest bidder their samples were not acceptable and as a result they did not win the school uniform contract award.

On June 15, 2006, approximately a month after the review of the samples, the district awarded the contract to the Uniform Group, the second lowest bidder who was awarded the contract the previous year. This award was based on the recommendation of the purchasing agent. Although board minutes did not articulate and memorialize the reason for rejecting the lowest bidder, the purchasing agent told the investigator that the lowest bidder failed to provide appropriate samples. In particular, the purchasing agent stated that Kid's Place: a) failed to provide mesh gym shorts; they provided cotton shorts, b) failed to provide girl skorts without the split in the back; they provided girl skorts with the split in the back, and c) the blazers they submitted were marked dry clean only,

the Uniform Group's samples were machine washable. The purchasing agent concluded that the samples provided by Kid's Place failed to meet the requirements of the bid specifications.

However, based on the information and documentation provided to OCI, the examination identified the following discrepancies and violation:

- 1) The bid specifications were not accurate or clear. The style number 136 for shorts manufactured by Augusta was incorrect and was actually the style number for reversible mini mesh league tanks. The specifications did not indicate if the district was requesting cotton or mesh shorts and since the specifications were incorrect, Kid's Place could not determine the specific material the district was requesting. Both the Uniform Group and the purchasing agent confirmed that an incorrect style number was used when putting together the bid specifications. This hindered Kid's Place from submitting appropriate short samples.
- 2) Kid's Place provided dry clean only Executive Apparel 2000/4000 girl blazers and Executive Apparel 1000/3000 boy blazers as the specifications required. However, the Uniform Group submitted washable blazers contrary to what was requested on the specifications. Nevertheless, the district decided that the washable blazers were of a better quality and therefore selected the samples submitted by the Uniform Group.

Based on these findings, the OCI determines that Elizabeth School District failed to provide sufficient, fair and competitive bid specifications in accordance with the following statute:

N.J.S.A.18A:18A-15 states, "Any specifications for the provision or performance of goods or services shall be drafted in a manner to encourage free, open, and competitive bidding."

The allegation regarding the skorts manufactured by Style Plus was unsubstantiated. The description of the skorts provided in the specifications was adequate and the OCI investigator located the vendor on the Internet.

Conclusion:

The evidence supports that the district compromised the bidding process by failing to provide a non-biased and competitive bidding process which is in violation of statute N.J.S.A.18A:18A-15, therefore payments to the Uniform Group must be recovered.

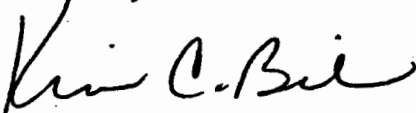
Pursuant to N.J.A.C. 6A:26-14.1, the Commissioner of Education is authorized to withhold or recover funds from any school that fails to obey the law, rules or directions of the Commissioner. The non-compliant payments in the matter under review total \$726,297.67. A percentage of this amount will be recovered.

Recommendation:

Elizabeth School District is directed to prepare a Corrective Action Plan (CAP) indicating the procedures it will implement to ensure future compliance with the above referenced statute. The identified violation requires a recovery of \$594,217.10. The Department of Education Division of Finance will notify the school as to the timing and method of recovery.

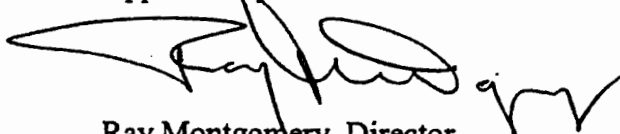
In the future the district should take appropriate actions to ensure all bid specifications are accurate and afford every vendor an equal opportunity to compete.

Submitted by:



Kim C. Belin, Manager
Investigations Unit

Approved by:



Ray Montgomery, Director
Office of Compliance Investigation

Investigator:

Sonya Donalson

SUPPORTING DOCUMENTS

Item	Exhibit
Specifications and Proposal (2006/2007 School Uniforms)	1
Correspondence from Purchasing Agent Acknowledging Wrong Item Number for Shorts	2
Calculation of Refundable State Aid	3

Exhibit 1

SPECIFICATIONS and PROPOSAL

For

SUPPLIES and EQUIPMENT



Proposal For SCHOOL STUDENT UNIFORMS

Name of Bidder _____

Address _____

BOARD OF EDUCATION

ELIZABETH, NEW JERSEY

BOARD OF EDUCATION
OFFICE OF THE SECRETARY-SCHOOL BUSINESS ADMINISTRATOR
500 NORTH BROAD STREET ELIZABETH, NEW JERSEY

MAY, 2006

SCHOOL UNIFORMS

PROPOSAL FORM

Note: Bidders must use form given below in submitting their proposals.

Date _____

Board of Education
500 North Broad Street
Elizabeth, New Jersey 07207

Gentlemen:

Having carefully examined the specifications the undersigned proposes to furnish and deliver School Student Uniforms, in accordance with attached specifications, for the sum of:

(\$ _____) dollars.

Respectfully submitted,

Phone: _____

(Name of Company)

Fax: _____

By, Signature: _____

Print Name: _____

SCHOOL UNIFORM BID MAY 2006

SERVICE REQUIRED

Sizes

- Variation of sizes, Regular, Slim, Husky, Half Sizes, Children & Adults.

For Students at School No. 31, South Elmora Avenue & EHS Upper & Lower Academy:

- Measurement and fitting with actual garments for each student must be accomplished by JUNE 16, 2006. Fittings will take place for School No. 31 students at school students are now attending, Shelly School No. 21, William Halloran School No. 22 and Reilly School No. 76. ✓
- Upper & Lower Academy Students are attending EHS, Pearl Street and Middle Schools at various locations.
- Or at a location designated by the Board.

For Students to be Chosen by Lottery for School No. 31, North Avenue:

- Measurement and fitting with actual garments for each student must be accomplished by JUNE 16, 2006. Students are now attending schools throughout the city. Fittings will take place at the school student is attending or a location designated by the Board. ✓

Packaging:

- Individual packaging alphabetically by grade.
- Delivered to individual schools.

Additional Uniforms

- Will be available to parents for purchase.

Follow up for New Students during the Year:

- Vendor to measure upon request or leave fitting sizes at school.
- Orders must be filled within 5 working days.

Late Delivery And Liquidated Damages:

- The Vendor must immediately advise the Purchasing Agent of any circumstance or event that could result in late delivery. If the Vendor cannot meet the contract completion date for the required delivery, the Vendor could be liable to the Elizabeth Board of Education, the sum of \$500.00 per work day that such delivery remains incomplete.

Corrections Of Deficiencies Upon Delivery:

Items received with deficiencies, i.e. missing buttons, rips, holes, broken zippers, must be returned to the vendor within 5 working days after being received by student.

Limited Warranty:

Within a period of 60 days after delivery, if any of the products is found to be defective in material and/or workmanship, the vendor shall, at its option, either repair or replace with a new or refurbished product. This decision whether to repair or replace will be made by the vendor.

VENDOR NAME

Approx. Quantity	Quantity For Each Student	ITEM	MANUFACTURER	STYLE#	COLOR	Unit Price	Extended Price
Grades 9-12 Boys – Upper & Lower Academy							
720	2	Khaki Boys Flat Front Pants	Dickies	56-362/562	Khaki		
720	2	Long Sleeve White Oxford Shirt	Dickies	KL920	White		
720	2	Short Sleeve White Oxford Shirt	Dickies	KS920	White		
360	1	Boys Pretied Neck Tie	S. Broome	90135	School Color		
1080	3	Khaki Crew Socks	Cobmex	CS400	Khaki		
360	1	Sweatshirt (silk screened school logo, not heat sealed)	Jerzee	562B	School Color		
360	1	Sweatpants (silkscreened school logo, not heat sealed)	Jerzee	973B	School Color		
720	2	T-Shirts (silk screened school logo, not heat sealed)	Jerzee	29B	White		
360	1	Shorts (silk screened school logo, not heat sealed)	Augusta	136	School Color		
Grades 1-3 Girls							
420	2	Khaki Grow With Me Jumper Emb	Cobmex	T9040	Khaki		
420	2	L/S Polo Emb	Port Authority	Y320	School Color		
420	2	S/S Polo Emb	Port Authority	Y500	School Color		
630	3	Khaki Cable Knit Knee Socks 100% High Bulk Acrylic	Cobmex	KS600U	Khaki		
630	3	Tights	Royal Park	682	School Color		
210	1	Sweatshirt (silk screened school logo, not heat sealed)	Jerzee	562B	School Color		
210	1	Sweatpants (silkscreened school logo, not heat sealed)	Jerzee	973B	School Color		
420	2	T-Shirts (silk screened school logo, not heat sealed)	Jerzee	29B	White		
210	1	Shorts (silk screened school logo, not heat sealed)	Augusta	136	School Color		
210	1	Cardigan Sweater (embroidered school logo, not heat sealed)	School Apparel	6300	School Color		
Grades 4-8 Girls							
1012	2	Khaki Full Skort with Front and Back Partially Pleated Panels/Elastic Waist Back	Style Plus	SK275	Khaki		
1012	2	Long Sleeve White Oxford Shirt	Dickies	KL920	White		
1012	2	Short Sleeve White Oxford Shirt	Dickies	KS920	White		
506	1	Criss Cross tie	S. Broome	90158	School Color		
1518	3	Khaki Cable Knit Knee Socks 100% High Bulk Acrylic	Cobmex	KS600U	Khaki		
1518	3	Tights	Royal Park	682	School Color		
506	1	Sweatshirt (silk screened school logo, not heat sealed)	Jerzee	562B	School Color		
506	1	Sweatpants (silkscreened school logo, not heat sealed)	Jerzee	973B	School Color		
1012	2	T-Shirts (silk screened school logo, not heat sealed)	Jerzee	29B	White		
506	1	Shorts (silk screened school logo, not heat sealed)	Augusta	136	School Color		
506	1	Cardigan Sweater (embroidered school logo, not heat sealed)	School Apparel	6300	School Color		

* Incorrect #
 ** Submitted correct item(s) Page 2

CHAPTER 33, LAWS OF 1977

AN ACT requiring corporate and partnership bidders for State, county, municipal or school district contracts to submit a list of the names and addresses of all stockholders owning 10% or more of their stock or 10% or more of the stock of their corporate stockholders or in the case of a partnership, the names and addresses of those partners owning a 10% or greater interest therein.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey

1. No corporation or partnership shall be awarded any contract nor shall any Agreement be entered into for the performance of work or the furnishing of any materials or supplies, the cost of which is to be paid with or out of any public funds, by the State, or any county, municipality or school district or any subsidiary or agency of the State, or of any county, municipality or school district, or by any authority, board, or commission which exercises governmental functions, unless prior to the receipt of the bid or accompanying the bid, of said corporation or said partnership, there is submitted a statement setting forth the names and addresses of all stockholders in the corporation or partnership who own 10% or more of its stock, of any class or of all individual partners in the partnership who own 10% or greater interest therein, as the case may be. If one or more such stockholder or partner is itself a corporation or partnership, the stockholders holding 10% or more of that corporation's stock, or the individual partners owing 10% or greater interest in that partnership, as the case may be, shall also be listed. The disclosure shall be continued until names and addresses of every non-corporate stockholder, and individual partner, exceeding the 10% ownership criteria established in this act, has been listed.

2. This act shall take effect immediately.

CERTIFICATION REQUIRED BY CHAPTER 33, LAWS OF 1977
(Approved March 8, 1977)

I certify that the following are the names and addresses of all persons or entities owning ten percent (10%) or more of the bidder or supplier or whose behalf this certification is filed:

Names

Address

NOTE: If any of the above entities is a corporation, then following are the names and addresses of all persons owning ten percent (10%) or more of that corporation:

Names

Address

I further certify that I will notify the Secretary of the Board of Education of any changes to the above list within ten (10) days of such change.

By: _____

Title: _____

The contractor or subcontractor agrees to inform in writing its appropriate recruitment agencies, including but not limited to, employment agencies, placement bureaus, colleges, universities, labor unions, that it does not discriminate on the basis of age, creed, color, national origin, ancestry, marital status, affectional or sexual orientation or sex, and that it will discontinue the use of any recruitment agency which engages in direct or indirect discriminatory practices.

The contractor or subcontractor agrees to revise any of its testing procedures, if necessary, to assure that all personal testing conforms with the principles of job-related testing, as established by the statutes and court decisions of the State of New Jersey and as established by applicable Federal law and applicable Federal Court decisions.

In conforming with the applicable employment goals, the contractor or subcontractor agrees to review all procedures relating to transfer, upgrading, downgrading and layoff to ensure that all such actions are taken without regard to age, creed, color, national origin, ancestry, marital status, affectional or sexual orientation or sex, consistent with the statutes and court decisions of the State of New Jersey, and applicable Federal law and applicable Federal court decisions.

The contractor and its subcontractors shall furnish such reports of other documents to the Division of Contract Compliance & EEO as may be requested by the Division from time to time in order to carry out the purposes of these regulations, and public agencies shall furnish such information as may be requested by the Division of Contract Compliance & EEO for conducting a compliance investigation pursuant to Subchapter 10 of the Administrative Code (N.J.A.C. 17:27).

All successful vendors must submit prior to award, one of the following:

1. A photo copy of their Federal Letter of Affirmative Action Plan Approval.
2. A photo copy of their Certificate of Employee Information Report.
3. A complete Affirmative Action Employee Information Report (AA 302).

Please return with other documents to:

Elizabeth Board of Education
500 North Broad Street
Elizabeth, New Jersey 07207
Attn: Robert Jaspán, Purchasing Agent

Unless this form is completed and signed by contractor, there will be no vouchers approved for payment.

SAMPLE CERTIFICATE OF EMPLOYEE INFORMATION REPORT

Certificate _____

CERTIFICATE OF EMPLOYEE INFORMATION REPORT

This is to certify that the contractor has been approved for the Employee Information Report pursuant to K.S.A.C. 12-27-1, et seq. and the State of Kansas has approved the report. This approval will remain in effect for the period of _____.

VOID

VOID



State Treasurer

AFFIRMATIVE ACTION EMPLOYEE INFORMATION REPORT

IMPORTANT: READ INSTRUCTIONS ON BACK OF FORM CAREFULLY BEFORE COMPLETING FORM. TYPE OR PRINT IN SHARP BALL POINT PEN. FAILURE TO PROPERLY COMPLETE THE ENTIRE FORM MAY DELAY ISSUANCE OF YOUR CERTIFICATE

SECTION A - COMPANY IDENTIFICATION

1. FID. NO OR SOCIAL SECURITY	2. TYPE OF BUSINESS ☐ 1. MFG. ☐ 2. SERVICE ☐ 3. WHOLESALE ☐ 4. RETAIL ☐ 5. OTHER	3. TOTAL NO. EMPLOYEES IN THE ENTIRE COMPANY
4. COMPANY NAME		
5. STREET	CITY	COUNTY STATE ZIP CODE
6. NAME OF PARENT OR AFFILIATED COMPANY (IF NONE, SO INDICATE)		CITY STATE ZIP CODE
7. DOES THE ENTIRE COMPANY HAVE A TOTAL OF AT LEAST 50 EMPLOYEES? YES ☐ NO ☐		
8. CHECK ONE: IS THE COMPANY: ☐ SINGLE-ESTABLISHMENT EMPLOYER ☐ MULTI-ESTABLISHMENT EMPLOYER		
9. IF MULTI-ESTABLISHMENT EMPLOYER, STATE THE NUMBER OF ESTABLISHMENTS IN N.J. 		
10. TOTAL NUMBER OF EMPLOYEES AT ESTABLISHMENT WHICH HAS BEEN AWARDED THE CONTRACT 		
11. PUBLIC AGENCY AWARDED CONTRACT	CITY	STATE ZIP CODE

OFFICIAL USE ONLY

DATE RECEIVED-MO/DAY/YR	ASSIGNED CERTIFICATION NUMBER
-------------------------	-------------------------------

SECTION B - EMPLOYMENT DATA

12. Report all permanent, temporary and part-time employees ON YOUR OWN PAYROLL. Enter the appropriate figures on all lines and in all columns: Where there are no employees in a particular category, enter a zero. Include ALL employees, not just those in minority categories, in columns 1, 2 & 3.

JOB CATEGORIES	ALL EMPLOYEES			MINORITY GROUP EMPLOYEES (Permanent)							
	Col. 1 TOTAL (Col. 2 & 3)	Col. 2 MALE	Col. 3 FEMALE	MALE				FEMALE			
				BLACK	HISPANIC	AMERICAN INDIAN	ASIAN	BLACK	HISPANIC	AMERICAN INDIAN	ASIAN
Officials and Managers											
Professionals											
Technicians											
Sales Workers											
Office and Clerical											
Craftworkers (Skilled)											
Operatives (Semi-skilled)											
Laborers (Unskilled)											
Service Workers											
TOTAL											
Total employment from Previous Report (If any)											

The data below shall NOT be included in the figures for the appropriate categories above.

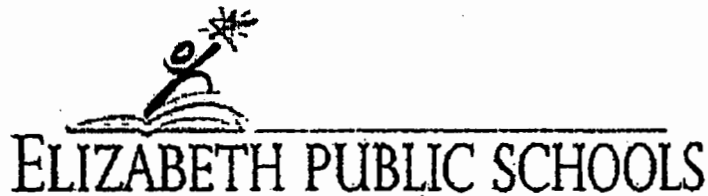
Temporary and Part-time Employees											
13. HOW WAS INFORMATION AS TO RACE OR ETHNIC GROUP IN SECTION B OBTAINED? ☐ 1. VISUAL SURVEY ☐ 2. EMPLOYMENT RECORD ☐ 3. OTHER (Specify)				15. IS THIS THE FIRST EMPLOYEE INFORMATION REPORT (AA-302) SUBMITTED? 1. YES ☐ 2. NO ☐				16. IF NO, DATE OF LAST REPORT SUBMITTED MO. DAY YEAR			
14. DATES OF PAYROLL PERIOD USED FROM: TO:											

SECTION C - SIGNATURE AND IDENTIFICATION

17. NAME OF PERSON COMPLETING FORM (Print or Type) (CONTRACTOR EEO OFFICER)	SIGNATURE	TITLE	DATE MO. DAY YEAR
18. ADDRESS (NO. & STREET)	(City)	(State)	(Zip Code) Phone (Area Code, No., Extension)

☐ Affirmative Action Office
 ☐ Public Agency
 ☐ Contractor

Exhibit 2



THINK • LEARN • ACHIEVE • CARE
500 North Broad Street
Elizabeth, New Jersey 07208

Robert Jaspan
Purchasing Agent

Phone: 908-436-5153
Fax: 908-436-5157

Memo

TO: Sonya Donaldson
Office of Compliance
Department of Education
Trenton, New Jersey 08625
FAX: 609-396-2032

From: Bob Jaspan
Date: October 31, 2006
RE: Uniform Bid

Enclosed information requested pertaining to the Uniform Bidding process:

I checked the State web site to see if there was a State Contract vendor for School Uniforms, I found none.

I wanted to put together a more specific bid proposal than went out for school #29 (enclosed), looked in Uniform Catalogs and received information from Uniform Group the vendor that supplied student uniforms for school #29. Augusta shorts, the wrong item number was listed, the number was for a mesh gym top, Style Plus, full Skort, style number was listed on specifications. (attached bid specs May 1, 2006)

Bid advertised May 2, 2006, bid opening May 16, 2006 to supply Uniforms for Schools #30, 31, 88 & 89. Bid packages sent to 16 vendors, listed on Board minutes. Samples were requested, specifications indicates as specified or approved equal.

Samples were inspected by school principals, it was their decision which vendor to use.

Uniform group was the lowest responsible bidder and was awarded the contract at the June 8, 2006 Board meeting.

ELIZABETH SCHOOL DISTRICT
CALCULATION OF REFUNDABLE STATE AID
FISCAL YEARS ENDED JUNE 2007

Exhibit 3

Total General Fund Revenue Budget for Fiscal Year Ended June, 30 2007 \$ 285,173,457

Less:

T.P.A.F. Pension Contribution	N/A	\$ -
T.P.A.F. Social Security Contribution	N/A	\$ -

Net General Fund Total Revenue Budget \$ 285,173,457

General Fund State Revenue Budget \$ 233,313,353

Less:

T.P.A.F. Pension Contribution	N/A	\$ -
T.P.A.F. Social Security Contribution	N/A	\$ -

Net General Fund State Revenue Budget \$ 233,313,353

Percent of Net General Fund State Revenue to Net General Fund Total Revenue 81.81454%

School Uniform Purchases Year to Date FY 2007

The Uniform Group - Summary:

<u>Schools</u>	<u>Amount</u>
School # 12	\$ 82,011.15
School # 13	\$ 51,738.62
School # 14	\$ 107,271.01
School # 16	\$ 48,882.84
School # 20	\$ 31,306.02
School # 30	\$ 127,686.79
School # 31	\$ 153,108.24
School # 88	\$ 38,760.33
School # 89	\$ 85,532.67
	<u>\$ 726,297.67</u>

Refundable State Aid FYE 2007 \$ 594,217.10

L.B., on behalf of minor children, J.K.B., L.B. and J.B.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her children were not eligible for a free public education in the Linden school district. Petitioner contended that her children had been transferred from Roselle public schools to Linden public schools in 2007 pursuant to the Unsafe Schools Choice Option under No Child Left Behind (NCLB). The Board asserted that petitioner's children were enrolled in its schools based on a 2007 joint custody order that granted residential custody of the children to C.P., a family friend who is domiciled in Linden, and that a residency investigation had established that the children are in fact living with petitioner in Roselle. The Board further contended that there are no documents reflecting the alleged Unsafe School Choice Option transfer, nor any record of an agreement between the Roselle and Linden districts pursuant to the education of petitioner's children.

The ALJ found, *inter alia*, that: the record is devoid of any credible evidence that the children were enrolled in Linden schools pursuant to the Unsafe School Choice Option, or that the children were enrolled on any basis other than the custody order; petitioner testified that the custody order had nothing to do with the children being enrolled in Linden public schools, but the school registration documents – which were signed by petitioner – on their face contradict this assertion; further, the section of the 2007 Linden registration forms which asks whether the child is being enrolled as the result of exercising the NCLB unsafe school choice option is crossed out; petitioner's arguments were not credible; neither the petitioner nor her husband lived in Linden during the time the children were enrolled in the Linden schools; the children did not reside in Linden during the time of their school enrollment; the petitioner and her children resided in Roselle during their enrollment in Linden schools; and no Board agreement or resolution exists relative to a 2007 transfer from Roselle to Linden pursuant to the Unsafe School Choice Option. The ALJ concluded that petitioner failed to prove by a preponderance of the credible evidence that her children were eligible for a free public education in Linden schools; accordingly, petitioner must reimburse the Board for tuition in the amount of \$76,223.40 for the period of her children's ineligible attendance in the district schools.

Upon full review and based on the ALJ's credibility determinations and the complete lack of any credible evidence to the contrary, the Commissioner concurred with the findings and conclusion of the ALJ and adopted the initial decision of the OAL as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 1271-12
AGENCY DKT. NO. 16-1/12

L.B., on behalf of minor children, J.K.B., L.B. and J.B.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions – filed on July 6, 2012 in response to an Initial Decision mailed on June 19, 2012 – were untimely pursuant to *N.J.A.C.* 1:1-18.4 and, therefore, these were not considered here.¹

Upon full consideration, the Commissioner is compelled to concur with the Administrative Law Judge's (ALJ) findings and conclusion – based on her credibility determinations in this matter² and the complete lack of any creditable evidence to the contrary – that petitioner has failed to sustain her burden of establishing that her children, J.K.B., L.B. and

¹ It is noted that at no time prior to the expiration of the regulatory timeline for the submission of exceptions did petitioner seek an extension of time within which to file exceptions.

² The ALJ having had the opportunity to assess the credibility of the various witnesses who appeared before her, and having made findings of fact based on their testimony, the standard governing the Commissioner's review is clear and unequivocal:

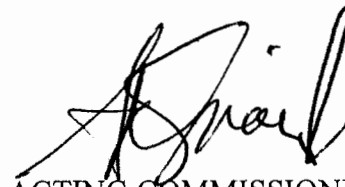
The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. (*N.J.S.A.* 52:14B-10(c)).

The Commissioner finds no basis whatsoever in the record to reject the ALJ's recitations of testimony, her determination of witness credibility or her fact finding analysis.

J.B. were entitled to a free public education in the Board of Education of the City of Linden's schools.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. Petitioner is hereby ordered to pay the Board a total of \$76,223.40 for her children's ineligible attendance in its schools (\$37,743 for the 2010-11 school year and \$38,480.40 for the 2011-12 school year). It is further ordered that the Police Report in this matter – P-6 – is hereby sealed. The instant petition of appeal is dismissed.

IT IS SO ORDERED.³



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/16/12

Date of Mailing: 7/17/12

³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

RECORD SEALED

OAL DKT. NO. EDU 01271-12

AGENCY DKT. NO. 16-1/12

L.B. ON BEHALF OF MINOR CHILDREN,

J.K.B., L.B. AND J.B.,¹

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY

OF LINDEN, UNION COUNTY,

Respondent.

L.B., pro se, and J.B.,² pro se, for petitioner

**Katherine A. Gilfillan, Esq., for respondent Board of Education of the City of
Linden, Union County (Weiner Lesniak, attorneys)**

Record Closed: March 15, 2012

Decided: June 18, 2012

BEFORE KELLY J. KIRK, ALJ:

¹ For confidentiality purposes and ease of reference, the children shall hereinafter be identified by fictitious names as follows: J.K.B. as John, L.B. as Lucy and J.B. as Joseph.

² Although the Petition was filed by L.B., request was made by L.B. at the hearing that her husband, J.B., be permitted to also proceed as a petitioner. There was no objection by the Board and the request was granted.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the action of the Board of Education of the City of Linden (Board), removing her three children from Linden public schools.

On January 9, 2012, petitioner filed a Pro Se Residency Appeal with the Department of Education. On January 11, 2012, and January 23, 2012, M. Kathleen Duncan, director, Bureau of Controversies and Disputes, Department of Education (Department), issued to petitioner letters relative to deficiencies in the filing and emergent relief. Additional documents were filed by petitioner with the Department on January 10, 2012, and a "Request for Relief Stay" was filed by petitioner with the Department on January 24, 2012. On January 24, 2012, the Department transmitted the case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the rules of procedure established by the Department of Education to hear and decide controversies and disputes arising under school laws, N.J.A.C. 6A:3-1.1 to -1.17. Jurisdiction is conferred under N.J.S.A. 18A:6-9. The case was filed at the Office of Administrative Law (OAL) on January 26, 2012.

Oral argument on the application for emergent relief was heard on February 2, 2012. By Order dated February 6, 2012, the application for emergency relief was granted, and it was ordered that the children attend Linden public schools during the pendency of the appeal, and ordered that the plenary hearing be scheduled for February 24, 2012. The Assistant Commissioner adopted the recommended Order granting emergent relief, and ordered that Linden immediately allow the attendance of John, Lucy and Joseph in its schools, and ordered that the matter proceed to a hearing on the merits. Due to the unavailability of the Board's witness, the hearing was rescheduled for February 27, 2012.

The Board filed its Answer with Affirmative Defenses on February 17, 2012. Petitioner served subpoenas upon Linden employees and Board members on February

22, 2012. The Board filed a motion to quash on February 24, 2012. The motion to quash was granted on March 9, 2012. I heard the matter on February 27, 2012, and March 9, 2012. The record closed on March 15, 2012, upon receipt of petitioner's response to the Board's certification.

TESTIMONY AND FACTUAL DISCUSSION

Preliminary Facts

I **FIND** the following preliminary facts:

Petitioner L.B. and her husband Jeffrey³ have three children, John, Lucy and Joseph (collectively "the family"). In 2005 the family moved to 227 Maple Street, Roselle, New Jersey. 227 Maple Street, Roselle, is owned by petitioner and Jeffrey.

On July 6, 2007, a Civil Action Complaint for Custody was filed in the Superior Court of New Jersey, Chancery Division – Family Part, Union County (Custody Complaint). (R-1.) Plaintiff C.P. filed for "custody of children (joint custody)." C.P. was a friend of the family. The Custody Complaint reflects C.P.'s address as 844 Main Street, Linden, New Jersey; Jeffrey's address as 724 Oak Street, Brooklyn, New York; L.B.'s address as 227 Maple Street, Roselle; and the children's addresses as 844 Main Street, Linden. 844 Main Street, Linden, is owned, in part, by C.P.

John and Lucy were enrolled in Linden public schools on July 11, 2007. Joseph was enrolled in Linden public schools on or about July 11, 2007.

On July 23, 2007, a Non-Dissolution Order for Temporary Custody and Visitation (Custody Order) was entered by the Honorable David J. Issenman, J.S.C. Per the Custody Order, C.P. was awarded residential custody of the three children.

³ For confidentiality purposes, petitioner's husband shall hereinafter be identified by a fictitious name.

Testimony

Petitioner testified on her own behalf. Rocco Tomazic, Superintendent of Schools, and Joann Hamilton, Supervisor of Pupil Personnel Services and Guidance, testified on behalf of respondent.

Petitioner stipulated that she and her husband did not reside in Linden, and that her three children, John, Lucy and Joseph, did not primarily reside in Linden. Petitioner is a teacher, and has at times been employed by the Roselle school district and by the Linden school district. Petitioner testified that in March 2007, Lucy was assaulted⁴ on Roselle public school grounds during school hours, and that after the end of the 2006–2007 school year, all three children were enrolled in Linden public schools pursuant to an Unsafe Schools Choice Option “transfer.” Petitioner denied that the children were enrolled in Linden pursuant to the Custody Order, and testified that the Custody Order had been entered after the children were enrolled in Linden, and that the Custody Order had not been submitted to the Board until 2009.

Rocco Tomazic has been employed by the Board as superintendent for the past three years, and from 2002 to 2008 he was the assistant superintendent. He became aware of the petitioner’s children in 2010 when, after a Board meeting, a Board member advised him that children had been observed walking from Roselle to Linden in Linden school uniforms. An investigation was commenced and it was determined that the children were petitioner’s children.

Tomazic testified about the State policy relative to the Unsafe School Choice Option of No Child Left Behind (NCLB), and about “persistently dangerous schools” and “victims of violent criminal offenses.” (R-28; R-29.) He explained that the Unsafe School Choice Option provides that a student who becomes the victim of a violent criminal offense, as determined by State law requirements, while at public school, would be allowed to attend a safe public school within the district. He further testified that,

⁴ Petitioner included a Police Report (P-6) with her submissions to the Commissioner, and with her exhibits at the hearing. Because the Police Report involves a minor, my order includes a requirement that the Police Report, consisting of three pages, be sealed.

although the law provides that it should be within the same district, if there were no safe school available within the district, it is possible that a student would be allowed to attend a public school outside of the district, pursuant to an agreement between the two districts, with one as the sending district, and the other as the receiving district. According to Tomazic, if such an agreement had been made between Linden and Roselle, it would have appeared on the Board agenda, and a Board vote and resolution would have been required. Tomazic was not made aware of any such item on the Board agenda while he was the assistant superintendent, and he has since verified that no such item appeared on the Board agenda, and that there had been no resolution relative to the alleged Unsafe School Choice Option agreement between Linden and Roselle.

Tomazic also testified that various documents, including C.P.'s deed and the Custody Complaint and Custody Order, were maintained in the children's school records, and that the deed would have been required for registration. Tomazic also testified about tuition rates and attendance.

JoAnn Hamilton has been employed by Linden since 1974. She is presently employed as the supervisor of Pupil Personnel Services and Guidance. In October 2010 she assumed the position of Supervisor of Attendance. She was not advised by the outgoing supervisor of any Unsafe School Choice Option "transfer" or agreement between Linden and Roselle. She commenced a residency investigation in 2010, but suspended it because she thought the children were attending Linden schools pursuant to the Custody Order and had dual residency. She thereafter re-initiated the residency investigation. Hamilton's file contained no documents reflecting the alleged Unsafe School Choice Option "transfer" or an agreement between Linden and Roselle.

Factual Discussion

A credibility determination requires an "over-all evaluation of the testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). For "testimony to be believed, it must not only proceed from the mouth of a credible witness,

but must be credible in itself.” Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954). It must be “such as the common experience and observation of mankind can approve as probable in the circumstances.” Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). “The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.) (citation omitted), certif. denied, 10 N.J. 316 (1952).

Petitioner testified that the custody order had nothing to do with the children being enrolled in Linden public schools, that it was entered by the judge after the children were enrolled, and that the custody order was not provided at the time of registration. However, the registration documents on their face belie this assertion. The registration documents, signed on July 7, 2007, reflect that C.P. was the children’s guardian, and that the children resided at 844 Main Street, Linden, which is C.P.’s address. (R-1; R-2; P-24; P-25.) Other documents signed by either petitioner or Jeffrey in September 2007 also reflect the 844 Main Street, Linden, address, and/or that C.P. was the children’s guardian. (P-17; P-18.) Further, the Linden school records include a copy of C.P.’s deed, the custody complaint and the custody order. (R-1; R-2.) Linden school records include the custody complaint, which reflects that it was filed on July 6, 2007, the day before the children were enrolled in Linden public schools. Petitioner also omitted from the Linden Public Schools Registration Forms the pages reflecting that the section about enrolling in school as a result of NCLB choice had been crossed out. (P-24; P-25.)

Based upon a review of the regulations, after due consideration of the extensive testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following additional facts:

Petitioner did not reside in Linden during the time John, Lucy and Joseph were enrolled in Linden schools. Jeffrey did not reside in Linden during the time John, Lucy and Joseph were enrolled in Linden schools. John, Lucy and Joseph did not reside in Linden during the time they were enrolled in Linden public schools. John, Lucy and

Joseph were enrolled in Linden public schools as a result of the custody complaint and custody agreement.

Linden school records reflect two addresses for the children, the 844 Main Street, Linden, address, and the 227 Maple Street, Roselle, address. As reflected in the Linden Public Schools Registration Forms, when petitioner registered the children in Linden, it was not "as a result of exercising [her] 'No Child Left Behind' choice option" for an unsafe school. (P-24; P-25; R-1; R-2.) As reflected in the Linden Public Schools Registration Forms, petitioner and Jeffrey repeatedly represented that the children's "permanent/home address" was 844 Main Street, Linden, and that the children resided with a guardian, C.P., and not with their mother or father.

No agreement exists between the Board and petitioner, Jeffrey or the three children. There was no item on the Board agenda and no Board resolution relative to the Unsafe School Choice Option or the children's 2007 "transfer" from Roselle to Linden.

CONCLUSIONS OF LAW

The Children's Entitlement to Attend the Linden Schools

Per the Board's December 20, 2011, letter, the Board voted to disenroll the children from Linden public schools pursuant to N.J.S.A. 18A:38-1 for failure to meet the residency requirements. Accordingly, the operative statute is N.J.S.A. 18A:38-1, which provides, in pertinent part, as follows:

Public schools shall be free to the following persons over five and under twenty years of age:

- a. Any person who is domiciled within the school district;
- b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by

such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the resident in writing of his right to contest the board's decision to the commissioner within 21 days. No child shall be denied admission during the pendency of the proceedings before the commissioner. In the event the child is currently enrolled in the district, the student shall not be removed from school during the 21-day period in which the resident may contest the board's decision nor during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local

district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the resident, parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner;

(2) If the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in

which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner;

. . . .

Petitioners argue that the residency statute is inapplicable to this matter because the children were transferred to Linden by Roselle pursuant to the Unsafe School Choice Option after Lucy was assaulted on the grounds of Roselle public schools. The Board conversely argues that this is strictly a residency case, and that the children had attended Linden public schools pursuant to the custody order, but an investigation revealed that the children did not reside in Linden.

There is no dispute that petitioner and her husband did not reside in Linden, and there is further no dispute that the children did not reside primarily with C.P. in Linden. Thus, this matter turns upon whether, notwithstanding the non-residency of the parents and children, the children are otherwise eligible to attend Linden public schools. In this regard, the record is devoid of any credible evidence that the children were enrolled in Linden public schools pursuant to the Unsafe School Choice Option, or that the children were enrolled in Linden public schools on any basis other than the custody order. Although it appears from documents in the record that petitioner may have had discussions with Roselle relative to an alleged assault of Lucy, and relative to the Unsafe School Choice Option, the record is also devoid of any evidence that Linden was involved in or apprised of those discussions. (P-42; P-43; P-44; P-47; P-50; P-51.) Additionally, those documents do not extend beyond June 14, 2007, and based upon a June 4, 2007, letter, ostensibly from Katie B. LaMar, director of Special Services for Roselle Public Schools, to L.B., it also appears that the matter was still unresolved. There was no board of education resolution presented for either Linden or Roselle relative to the alleged Unsafe School Choice Option "transfer." Tomazic credibly testified that he reviewed the past Board agendas and resolutions and determined that no such resolution existed in Linden, and even if petitioner had presented evidence of a Roselle resolution or agreement between petitioner and Roselle, petitioner's recourse would be against Roselle, not Linden.

Accordingly, I **CONCLUDE** that petitioner has failed to prove, by a preponderance of the evidence, that John, Lucy and Joseph were eligible for a free education in Linden.

The Board's Claim to Tuition

The Board stipulated at the hearing that tuition would be sought for the 2010–2011 and 2011–2012 school years. Where, as here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

N.J.S.A. 18A:38-1(b) likewise requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

The 2010-2011 School Year

Per Tomazic's testimony and the Board minutes of June 16, 2010, the tuition for the 2010–2011 school year was as follows:

Students in grades 6–8: \$13,461 per annum

Students in grades 9–12: \$12,141 per annum

Tomazic certified that John and Lucy were high school students for the entirety of the 2010–2011 school year, and Joseph was a middle school student for the entirety of the 2010–2011 school year. I **CONCLUDE** that the petitioner should pay to the Board tuition in the amount of **\$13,461** for Joseph's period of ineligible attendance in 2010–2011; tuition

in the amount of **\$12,141** for John's period of ineligible attendance in 2010–2011; and tuition in the amount of **\$12,141** for Lucy's period of ineligible attendance in 2010–2011. Accordingly, I **CONCLUDE** that the total tuition for 2010–2011 is **\$37,743**.

The 2011-2012 School Year

Additionally, per Tomazic's Certification, the tuition for the 2011–2012 school year was as follows:

Students in grades 6–8: \$14,410 per annum

Students in grades 9–12: \$13,415 per annum

Using the formula prescribed by the applicable regulation, the daily rate of tuition for students in grades 6-8 during the 2011-2012 school year is \$80.05 (\$14,410 divided by 180). The daily rate of tuition for students in grades 9-12 is \$74.50 (\$13,415 divided by 180). See: N.J.A.C. 6A:22-6.2(a).

Tomazic has certified that John and Lucy were high school students for the 2011–2012 school year, and Joseph was a middle school student for the 2011–2012 school year. Tomazic certified that the children were disenrolled effective January 20, 2012. They were formally reenrolled, per the order of the Commissioner, on February 7, 2012. Tomazic states that there are 180 days in the school year; the children thus were not enrolled for twelve of these days.⁵ The school calendar that accompanies Tomazic's certification notes that school will end on June 22, 2012. Since a final decision in this matter will not be rendered until after the close of the 2011-2012 school year, I **CONCLUDE** that the children attended the Linden schools during 2011-2012 for 168 days.

Accordingly, the children were ineligible for 168 days during the 2011–2012 school year. As such, I **CONCLUDE** that petitioner should pay to the Board tuition in the amount of **\$13,448.40** for Joseph's period of ineligible attendance in 2011–2012, tuition in

⁵ As of March 13, 2012, when Tomazic signed his certification, he notes the children attended school for 112 days.

the amount of **\$12,516** for John's period of ineligible attendance in 2011–2012, and tuition in the amount of **\$12,516** for Lucy's period of ineligible attendance in 2011–2012. Accordingly, I **CONCLUDE** that the total tuition owed for the 2011–2012 school year is **\$38,480.40**. Petitioner's contention that she should not be assessed tuition for the period from December 2011 until the children were re-enrolled pursuant to the Commissioner's decision on the emergent application is not persuasive. As Tomazic noted, the children were never formally removed from the Linden schools until January 20, 2012.

In light of the foregoing, I **CONCLUDE** that petitioner should pay to the Board tuition in the total amount of **\$76,223.40**, for her children's period of ineligible attendance during the 2010–2011 and 2011–2012 school years. I further **CONCLUDE** that the children should be disenrolled from the Linden public schools.

ORDER

It is **ORDERED** that petitioner's Petition of Appeal be and hereby is **DENIED**.

It is **ORDERED** that petitioner pay to the Board tuition in the amount of **\$76,223.40** for the period of ineligible attendance of her children in the Linden public schools during the 2010–2011 and 2011–2012 school years. It is further **ORDERED** that John, Lucy and Joseph should be disenrolled from the Linden public schools.

It is further **ORDERED** that the police report in evidence as P-6 is hereby **SEALED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

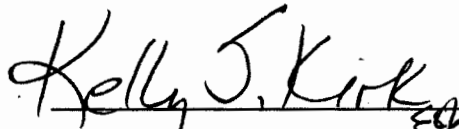
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

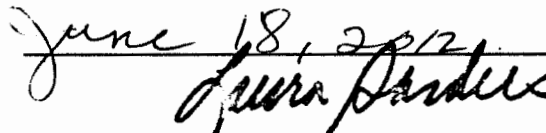
June 18, 2012

DATE



KELLY J. KIRK, ALJ

Date Received at Agency:



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:

JUN 19 2012

APPENDIX

LIST OF WITNESSES

For Petitioner:

L.B.

For Respondent:

Rocco Tomazic

JoAnn Hamilton

Exhibits in Evidence

For Petitioner:

- P-1 Linden High School Permanent Record Card
- P-2 Linden High School Permanent Record Card
- P-3 Not In Evidence
- P-4 Not In Evidence
- P-5 Not In Evidence
- P-6 Police Report – **SEALED** (3 pages)
- P-7 Receipt for Child Study Team Records
- P-8 Receipt for Child Study Team Records
- P-9 Not In Evidence
- P-10 Not In Evidence
- P-11 Not In Evidence
- P-12 Not In Evidence
- P-13 Not In Evidence
- P-14 Not In Evidence
- P-15 Not In Evidence
- P-16 Not In Evidence
- P-17 Authorization School/Health Records
- P-18 Authorization School/Health Records

- P-19 Request for Transfer of Student Records
- P-20 Not In Evidence
- P-21 Not In Evidence
- P-22 Not In Evidence
- P-23 Custody Order
- P-24 Linden Public Schools Registration Form
- P-25 Linden Public Schools Registration Form
- P-26 Not In Evidence
- P-27 Not In Evidence
- P-28 Memo from Joann Hamilton, dated March 16, 2011
- P-29 Not In Evidence
- P-30 Not In Evidence
- P-31 Not In Evidence
- P-32 Roselle Fire Department Record
- P-33 Roselle Police/Fire Department Reports
- P-34 Not In Evidence
- P-35 Not In Evidence
- P-36 Not In Evidence
- P-37 Not In Evidence
- P-38 Letter from L.B., dated September 20, 2011
- P-39 Not In Evidence
- P-40 Not In Evidence
- P-41 Not In Evidence
- P-42 Letter to L.B., dated May 14, 2007
- P-43 Letter from L.B., dated May 1, 2007
- P-44 Letter to L.B., dated May 17, 2007
- P-45 Not In Evidence
- P-46 Chase document
- P-47 Letter from L.B., dated May 7, 2007
- P-48 Not In Evidence
- P-49 Not In Evidence
- P-50 Letter from L.B., dated May 19, 2007
- P-51 Letter to L.B., dated June 4, 2007

- P-52 Not In Evidence
- P-53 Not In Evidence
- P-54 Not In Evidence
- P-55 Not In Evidence
- P-56 Not In Evidence
- P-57 Not In Evidence
- P-58 Not In Evidence
- P-59 Not In Evidence
- P-60 Not In Evidence
- P-61 Letter from L.B. to Tomazic, dated September 30, 2011
- P-62 Not In Evidence
- P-63 Fax from L.B. to Hamilton, dated March 29, 2011
- P-64 Letter from L.B., dated March 14, 2012

For Respondent:

- R-1 Initial Registration Information—L.B.
- R-2 Initial Registration Information—J.K.B.
- R-3 Not In Evidence
- R-4 Surveillance Report, dated October 27, 2010
- R-5 Notice of Initial Determination of Ineligibility, dated March 10, 2011
- R-6 Not In Evidence
- R-7 Memo from Hamilton, dated March 16, 2011
- R-8 Not In Evidence
- R-9 Draft e-mail from Hamilton, dated August 27, 2011
- R-10 Notes of Hamilton, dated September 15, 2011
- R-11 Notes of Hamilton, dated September 20, 2011
- R-12 Notice of Initial Determination of Ineligibility for Residency, dated September 21, 2011
- R-13 Notes of Hamilton, dated September 27, 2011
- R-14 Letter from L.B. to Tomazic, dated September 30, 2011
- R-15 Surveillance Report
- R-16 Notes of Hamilton, dated October 11, 2011
- R-17 Telephone Message Slip

- R-18 Letter from Hamilton, dated November 4, 2011
- R-19 Not In Evidence
- R-20 Not In Evidence
- R-21 Not In Evidence
- R-22 Not In Evidence
- R-23 Final Notice of Disenrollment, dated December 20, 2011
- R-24 Not In Evidence
- R-25 Linden Policy 5111 Admission and Linden Policy 5118 Non-Residents
- R-26 Not In Evidence
- R-27 Extracts of Linden Board Minutes dated June 16, 2010, and June 15, 2011
- R-28 Unsafe School Choice Option – State Policy, dated July 3, 2003
- R-29 Unsafe School Choice Option for 2011–2012
- R-30 Certification of Tomazic, dated March 13, 2012

WENDY J. EBERWEIN-O'DONNELL,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF WINSLOW,	:	
CAMDEN COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the decision of the respondent Board to terminate her employment as a tenured social worker through a reduction in force (RIF) at the end of the 2009-2010 school year. Petitioner contended that the Board continued to employ another social worker – Kimberly McDermott – who had less seniority, thereby violating her tenure rights under *N.J.S.A. 18A:1-1 et seq.* The Board asserted that petitioner surrendered her tenure and seniority rights by tendering her resignation from the school district in 2006. Petitioner rescinded her resignation shortly after she submitted it and before the effective date of the resignation, and the Board granted her request to rescind the resignation. Petitioner filed a motion for summary decision.

The ALJ found, *inter alia*, that: while a teaching staff member may not unilaterally rescind her resignation after the school board accepts the resignation, the teaching staff member and the school board nevertheless may mutually agree to rescind the resignation after the school board accepts the resignation; when the Board accepted petitioner's offer to rescind her resignation on August 7, 2006 – the effective date of petitioner's resignation – the parties thereby entered a mutual agreement to rescind the resignation; at the time of the mutually agreed-upon rescinding of the resignation, Kimberly McDermott was not yet employed by the Board as a social worker; when the parties agreed to rescind the resignation on August 7, 2006, the petitioner remained an employee of the school district with no break in service; accordingly, petitioner was continuously employed by the Board from September 1, 2005 to the date of the RIF in 2010 and had more seniority than McDermott, whose employment as a social worker with the Board did not begin until 2006. The ALJ concluded that petitioner should have been retained for the 2010-2011 school year instead of McDermott and granted her motion for summary decision.

Upon careful and independent review, the Commissioner concurred with the ALJ's findings and conclusions and, accordingly, adopted the Initial Decision of the OAL granting summary decision to petitioner. The Commissioner ordered the Board to compensate petitioner for all salary, benefits and emoluments, less mitigation, that she was entitled to for the 2010-2011 school year. Further, as the social worker position was abolished by the Board in a second RIF effective September 2011, petitioner is entitled to be placed on the preferred eligibility list in accordance with her seniority rights as of that date.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 9323-10
 AGENCY DKT. NO. 177-7/10

WENDY J. EBERWEIN-O'DONNELL,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF WINSLOW,	:	
CAMDEN COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and petitioner's reply thereto – submitted in accordance with the directives of *N.J.A.C. 1:1-18.4* – were fully considered by the Commissioner in reaching his determination herein.

The Board's exceptions mirror its arguments advanced before the Administrative Law Judge (ALJ) below. As it is determined that the ALJ fully considered and addressed such arguments in her decision, these will not be revisited here.

Upon full deliberation, the Commissioner concurs with the ALJ that summary decision is appropriately granted to petitioner as he is in full agreement – for the reasons comprehensively detailed in the Initial Decision – that the *mutual* agreement of rescission of petitioner's 2006 resignation did not cause a break in her service with the Board and, absent such break in service, petitioner did not forfeit her tenure and seniority rights at any point during the 2005-06 school year. As such, the Board's termination of petitioner from her social worker position through a RIF at the end of the 2009-10 school year – rather than Kimberly McDermott,

who had less seniority in that position – was a violation of petitioner’s tenure and seniority rights.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. The Winslow Board of Education is hereby directed to compensate petitioner for all salary, benefits, and emoluments, less mitigation, that she was entitled to for the 2010-11 school year absent her improper dismissal at the end of the 2009-10 school year. As the social worker position was abolished by the Board in a second RIF effective September 2011, petitioner is entitled to be placed on the preferred eligibility list in accordance with her seniority rights as of that date.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/16/12

Date of Mailing: 7/17/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 9323-10

AGENCY DKT. NO. 177-7/10

WENDY J. EBERWEIN-O'DONNELL,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF WINSLOW, CAMDEN
COUNTY,**

Respondent.

Keith Waldman, Esq., for petitioner (Selikoff & Cohen, attorneys)

Joan Kane-Josephson, Esq., for respondent (Parker, McCay, attorneys)

Record Closed: May 1, 2012

Decided: June 6, 2012

BEFORE **PATRICIA M. KERINS, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Wendy Eberwein-O'Donnell appeals the decision of the Winslow Township of Winslow Board of Education (Winslow) to terminate her employment as a tenured social worker, through a reduction-in-force (RIF) at the end of the 2009-2010

school year. She contends that Winslow continued to employ Kimberly McDermott as a social worker despite McDermott having less seniority, violating her rights under N.J.S.A. 18A:1-1 et seq.

On May 13, 2010, petitioner was notified by Winslow of its decision and on July 23, 2010, she filed a Petition of Appeal with the Commissioner of Education. On August 27, 2010, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. An Order was entered by the Administrative Law Judge (ALJ) then assigned to the case, ALJ Viscomi, giving notice to potential intervener McDermott, who then was granted the status of intervener. Effective September 2011, Winslow eliminated the position of social worker, the position then held by McDermott. On September 29, 2011, McDermott voluntarily withdrew from this matter and on October 4, 2011, petitioner filed an Amended Petition of Appeal. In March 2012, the matter was reassigned to me and Motions for Summary Decision were filed by the parties.

FACTUAL DISCUSSION

The relevant facts in this matter are not in dispute. Winslow employed Eberwein-O'Donnell as a social worker for the 2005-2006, 2006-2007, 2007-2008, 2008-2009, and 2009-2010 school years. Winslow approved her request for an unpaid medical leave of absence from May 30, 2006 to June 30, 2006. On July 6, 2006, she submitted a letter of resignation to Winslow. The effective date of the resignation was August 7, 2006 and on July 17, 2006, Winslow accepted the resignation. However, on July 20, 2006, petitioner wrote to Winslow asking to rescind her resignation and on August 7, 2006, Winslow granted her request.

Winslow also employed McDermott as a social worker. She was so employed for the 2006-2007, 2007-2008, 2008-2009, and 2009-2010 school years. In its first RIF in 2010, Winslow terminated Eberwein-O'Donnell rather than McDermott. It took the position that her actions to resign in the summer of 2006 had ended her employment with Winslow, along with her seniority in that position. Viewing both McDermott and Eberwein-O'Donnell as having the same seniority in the social worker position, Winslow

chose to retain McDermott, who also had tenure as a teacher. On September 1, 2011, in its second RIF, Winslow eliminated the social worker position, simultaneously transferring McDermott to a teaching position.

LEGAL DISCUSSION

The purpose of teaching staff tenure laws is “to aid in the establishment of a competent and efficient school system by affording teaching staff members ‘a measure of security in the ranks they hold after years of service.’” Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528-29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App.Div.1949)). Notwithstanding the tenure laws, a local board of education may reduce the number of teaching staff members for reasons of economy. N.J.S.A. 18A:28-9; Maywood Bd. of Educ. v. Maywood Educ. Assoc., 168 N.J. Super. 45, 55 (App. Div. 1979).

When such a reduction occurs, the board must “determine the seniority of the persons affected according to [regulatory] standards and shall notify each such person as to his seniority status.” N.J.S.A. 18A:28-11. Seniority “shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories,” and unpaid leaves of absences in excess of 30 days shall not count toward seniority. N.J.A.C. 6A:32-5.1(b); N.J.S.A. 18A:29-10. Seniority “provides a mechanism for ranking all *tenured* teaching staff members so that reductions among the tenured force can be effected in an equitable fashion and in accord with sound educational policies.” Capodilupo v. Bd. of Educ. of the Twp. of West Orange, 218 N.J. Super. 510, 514 (App. Div. 1987), certif. denied, 109 N.J. 514 (1987). Finally, if any teaching staff member is dismissed as a result of such reduction, commonly known as a reduction-in-force or RIF, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such

person shall be qualified and he shall be reemployed.¹ N.J.S.A. 18A:28-12; N.J.A.C. 6A:32-5.1(i).

According to N.J.S.A. 18A:28-8, a tenured teaching staff member who wishes “to relinquish his position shall give the employing board of education at least 60 days written notice of her intention.” The school laws do not address a teaching staff member’s decision to rescind her resignation; however, “[i]t is well-recognized that in the absence of statutory provisions dealing with the effect of resignations and their rescission or modification, principles of contract law are applicable.” Bloomfield Educ. Assn. v. Bd. of Educ. of the Twp. of Bloomfield, EDU 8308-01, Initial Decision (November 18, 2003), modified, Comm’r (December 29, 2003) <<http://lawlibrary.rutgers.edu/oal/search.html>> (citing Cutro v. Hazlet Twp. Bd. of Educ., 94 N.J.A.R. 2d (EDU) 402, modified, State Bd. of Educ., 97 N.J.A.R. 2d (EDU) 557).

A teaching staff member may withdraw her resignation before it is accepted by the school board. Kozak v. Bd. of Educ. of the Twp. of Waterford, 1976 S.L.D. 633. However, a school board’s acceptance of a teaching staff member’s offer of resignation terminates the teaching staff member’s employment, and a subsequent withdrawal is ineffectual after its acceptance. Cutro, supra (citing Andrews v. Lamb, 136 N.J.L. 548 (Sup. Ct. 1948). More specifically, a resignation effectively terminates “previous tenured employment with the Board on that date [of resignation] and bar[s] all service prior to such date from subsequently accruing to a new tenure entitlement.” Solomon v. Bd. of Educ. of the Princeton Reg’l Sch. Dist., 1977 S.L.D. 650, aff’d, State Bd. of Educ., 1977 S.L.D. 657. This is true “even if the period of resignation lasts for one day or for one year.” Misek v. Bd. of Educ. of the Twp. of Willingboro, 1980 S.L.D. 98, aff’d, Comm’r, 1980 S.L.D. 103, aff’d, State Bd. of Educ., 1980 S.L.D. 104.

In recognizing that principles of contract law apply to questions of resignation and rescission in school law matters, the Commissioner in Bloomfield, supra, determined that if a board of education accepts a teaching staff member’s resignation, each party is bound by the accepted terms of the resignation. Bloomfield, supra (citing F. Rupert

¹ As the court in Carpenito, supra, 322 N.J. Super. at 531 explained, “[s]eniority is a by-product of tenure and comes into play only if tenure rights are reduced by way of dismissal or reduction in tangible employment benefits.”

Belles v. Wayne Twp. Bd. of Educ., 1938 S.L.D. 556; Kozak, supra; Cutler v. Bd. of Educ. of the Twp. of Parsippany-Troy Hills, 1990 S.L.D. 725). Thus, a teaching staff member may not unilaterally rescind her resignation after the board accepts the resignation. Ibid.

While a teaching staff member may not unilaterally rescind her resignation after the school board accepts the resignation, the teaching staff member and the school board nevertheless may mutually agree to rescind the resignation after the school board accepts the resignation. Indeed, “[a] body having the power, and accepting a resignation, may, after such acceptance, revoke their action and consent to a withdrawal, if other rights have not arisen to be affected by such revocation.” Whitney v. Van Buskirk, 40 N.J.L. 463, 468 (Sup. Ct. 1878); see also Glab v. Bd. of Educ. of the Bor. of Belmar, 1975 S.L.D. 243, 247 (finding school board “has discretionary authority to rescind actions taken at earlier meetings where no vested interests accrue”). What thus occurs is “[a]n agreement of **rescission** . . . under which each party agrees to discharge all of the other party's remaining duties of performance under an existing contract.” Restatement of the Law, Second, Contracts, § 283(1).² Importantly, as the New Jersey Supreme Court stated in Cnty. of Morris v. Fauver, 153 N.J. 80 (1998), “[a]s a general rule, rescission ‘must be exercised in toto and is applied to the contract in its entirety with the result that what has been done is wholly undone and no contract provisions remain in force to bind either of the parties.’” Ibid (quoting M.J. Merickel v. Erickson Stores Corp., 255 Minn. 12 (1959)).

In this matter, both parties rescinded the resignation prior to and on its effective date. The Commissioner’s recognition that principles of contract law apply to resignations and rescissions in school law matters therefore provides an analytical framework for the facts at hand. When petitioner submitted her letter of resignation on

² As Comment (a) to § 283 explains, [t]he term ‘agreement of **rescission**’ is used in this Restatement to avoid confusion with the word ‘**rescission**,’ which courts sometimes use to refer to the exercise by one party of a power of avoidance.” Thus, a “rescission” is unilateral, while an “agreement of rescission” is bilateral, or mutual.

However, the bilateral agreement by petitioner and Winslow to rescind petitioner’s resignation, though an “agreement of rescission,” is mostly referred to herein merely as a “rescission.”

Also, in the case of an agreement of rescission, “[c]onsideration is provided by each party's discharge of the duties of the other.” Restatement, § 283.

July 6, 2006, she could have withdrawn it at any time before Winslow accepted it. However, petitioner forfeited her right to withdraw her resignation when Winslow accepted the resignation on July 17, 2006. However, when Winslow accepted petitioner's offer to rescind her resignation on August 7, 2006, the effective date of petitioner's resignation, the parties thereby entered a mutual agreement to rescind the resignation.

In light of Whitney and Glab, supra, Winslow could properly rescind the resignation by mutual agreement even though it had previously accepted the resignation as long as such a decision did not affect the vested rights of another party. See also, Fauver, supra, 153 N.J. at 95 (holding that "[i]n the absence of some vested derivative interest in another, a contract may be modified, abrogated or rescinded by . . . the contracting parties" (citation omitted)). As petitioner persuasively argues, McDermott did not have any vested interest that could be affected by the mutual rescission because McDermott had not yet begun her employment as a social worker with Winslow.

Since rescission generally "applie[s] to the contract in its entirety with the result that what has been done is wholly undone and no contract provisions remain in force to bind either of the parties," the effect of the rescission here was to wholly undo the resignation contract. Once the parties agreed to rescind the resignation, the parties returned to the positions they held before the resignation. Thus, Winslow remained petitioner's employer throughout August 7, 2006, and there was no break in petitioner's service as a social worker in Winslow's employ. In fact, petitioner actually worked on August 7, 2006. In the absence of a break in service, petitioner did not forfeit her tenure and seniority rights at any point during the 2005-2006 school year. As such, petitioner, a tenured social worker who was employed continuously by Winslow from September 1, 2005 to the date of the reduction-in-force in 2010, had more seniority as a social worker

than McDermott, whose employment began a year after that of petitioner. Petitioner therefore should have been retained for the 2010-2011 school year instead of McDermott.³

Based on the above, petitioner's motion for summary decision is **GRANTED**. Petitioner is entitled to all salary, benefits, and emoluments, less mitigation, that she would have received had she not been improperly dismissed at the end of the 2010-2011 school year. Further, as Winslow abolished the social worker position at the beginning of the 2011-2012 school year, petitioner is entitled to be placed on a preferred eligible list in accordance with her seniority rights. The Commissioner has previously ordered such remedies for tenured teaching staff members who were improperly dismissed. See, e.g., Trionfo v. Bd. of Educ. of the Bor. of Glassboro, EDU 2565-03, Initial Decision (April 28, 2004), adopted, Comm'r (August 19, 2004) <<http://lawlibrary.rutgers.edu/oal/search.html>>; Jarmond v. Bd. of Educ. of the City of Elizabeth, EDU 9107-08, Initial Decision (April 23, 2009), adopted, Comm'r (September 8, 2009) <<http://lawlibrary.rutgers.edu/oal/search.html>>.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

³ In its many briefs, Winslow did not address the effect of petitioner's leave of absence from May 30, 2006 to June 30, 2006 on her seniority rights. However, Winslow stated in its answer to the petition that petitioner is not entitled to seniority credit for the leave of absence, citing to N.J.A.C. 6A:32-5.1. Winslow has not argued anywhere that the leave of absence affected petitioner's right to tenure. As such, even if petitioner is not entitled to seniority credit for the leave of absence, she has more seniority as a social worker than McDermott.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/6/12
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency:

6/6/12

Date Mailed to Parties:

6/6/12

/lam/bal

#284-12

J.V. on behalf of minor child T.N.V., :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF :
WEST ORANGE, ESSEX COUNTY, :
RESPONDENT. :
_____ :

SYNOPSIS

Petitioner appealed the determination of the respondent Board that his daughter, T.N.V., was not eligible for a free public education in the West Orange school district during the 2011-2012 school year. Petitioner contended that he and his daughter are domiciled in West Orange with petitioner's parents, and produced documentation including a child support document, a federal student loan bill, and an independent business registration. The Board asserted that petitioner does not live in West Orange, but rather in East Orange with his girlfriend – as evidenced by a lengthy residency investigation.

The ALJ found that: based on the reports from the residency investigation, petitioner and his daughter were never observed leaving for school directly from the home of J.V.'s parents in West Orange; petitioner and his daughter were repeatedly observed leaving for school from a house in East Orange; the documents submitted by petitioner do not prove actual residency; petitioner failed to produce any proof of residency such as voter registration, licenses, or financial account information that might demonstrate a personal attachment to a specific location; and petitioner failed to offer an affidavit or sworn attestation of his and his daughter's residency. The ALJ concluded that the weight of evidence and testimony indicates that petitioner and his daughter resided in East Orange during the 2011-2012 school year, and accordingly ordered petitioner to reimburse the Board for tuition in the amount of \$84.09 per day for 183 days, or \$15,388.47.

Upon a full and independent review, the Commissioner concurred with the findings and conclusion of the ALJ concerning the disenrollment of T.N.V. from respondent's school district. However, the Commissioner modified the tuition calculation based on the Board's exhibit in the record stating that the school year consists of 180 days. Accordingly, the tuition owed was calculated at \$84.09 per day for 180 days, or \$15,136.20.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 16, 2012

OAL DKT. NO. EDU 2132-12
AGENCY DKT. NO. 373-12/11

J.V. on behalf of minor child T.N.V., :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF :
WEST ORANGE, ESSEX COUNTY, :
RESPONDENT. :
_____ :

The Commissioner has reviewed the record and the Initial Decision of the Office of Administrative Law (OAL) recommending that the petitioner's residency appeal be denied.¹ For the reasons identified by the Administrative Law Judge (ALJ), the Commissioner concludes that petitioner and his minor child were not domiciled in West Orange. Thus, the respondent Board appropriately disenrolled the child.

As to the amount of tuition due respondent, the single pertinent exhibit in the record states that the *per diem* tuition for T.N.V. was \$84.09, to be multiplied by 180 days – the total number of days of T.N.V.'s ineligible attendance. Thus, petitioner owes respondent tuition in the amount of \$15,136.20 for the 2011-2012 school year.

Accordingly, the petition is dismissed, petitioner's minor child is hereby disenrolled from respondent's school system, and petitioner is ordered to pay to respondent the aforementioned amount of back tuition.

IT IS SO ORDERED.²


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/16/12
Date of Mailing: 7/17/12

¹ Neither party has filed exceptions to the Initial Decision.

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 02132-12

AGENCY DKT. NO. 373-12/11

J.V. ON BEHALF OF T.N.V.,

Appellants,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF WEST ORANGE, ESSEX COUNTY,**

Respondent.

J.V., appellant, pro se

Stephen J. Christiano, Esq., representing respondent

Record Closed: April 17, 2012

Decided: May 25, 2012

BEFORE **SANDRA ANN ROBINSON, ALJ:**

STATEMENT OF THE CASE

On or about December 12, 2011, appellant, J.V., received a letter from respondent, West Orange Board of Education (BOE), that informed appellant that his daughter had been removed from the West Orange School District. A vote of the members of the BOE occurred at a meeting of the BOE on December 12, 2011, wherein it was determined that appellant's daughter did not reside in West Orange.

Appellant contested the determination and timely appealed to the Commissioner of Education.

Appellant presents evidence to establish his and his daughter's residency in West Orange. Respondent submits evidence that appellant and his daughter reside in East Orange and that tuition charges in the amount of \$15,388.47 are due to respondent for the entire 183 school days during the 2011/2012 school year (SY) on which the student was ineligible to attend school in West Orange.

PROCEDURAL HISTORY

The Department of Education Bureau of Controversies and Disputes transmitted this case to the Office of Administrative Law (OAL) on February 17, 2012, for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14 F-1 et seq. A hearing commenced on March 29, 2012, and on the same date testimony was completed. The record remained open until the close of business on April 17, 2012, to enable appellant to supplement the record with copies of the document he referenced to support his and his daughter's residency argument. Specifically, the submission included: Child Support Cooperation Requirement, Federal Student Aid Loan Bill, Independent Business Registration, and West Orange Library Correspondence. The documents were submitted and the record closed on April 17, 2012.

ISSUES

Do appellant and his daughter reside in West Orange, New Jersey? If residency is not established, what is the amount of the tuition reimbursement due to respondent from appellant for the 2011/2012 SY?

SUMMARY OF TESTIMONY

Gerard Drappi, investigator for West Orange Board of Education, testified,

I am a residency investigator for West Orange schools. Prior to this employment I was a police officer for thirty years. I was a Detective Sergeant in charge of detectives during me last six years.

On September 15, 2011, I received a Residency Verification Request to check on the residency of this student, based on a statement by the student to the teacher, "I live far away and I take the bus with my father."

Appellant's daughter, T.N.V., is in kindergarten. School starts at 8:45 a.m. Her school registration indicates she resides on Fitzrandolph Road in West Orange, which is a home owned by appellant's mother. Prior to the BOE meeting on December 12, 2011, I watched the Fitzrandolph Road house from 7 a.m. to 8:45 a.m. and I never saw appellant and his daughter leave the Fitzrandolph Road residence. Between September 2011 and March 2012 I never saw appellant's daughter exit the Fitzrandolph Road property. On September 20 and 21, 2011, Tuesday and Wednesday, the first two days of my investigation, appellant's daughter was observed entering the Fitzrandolph house at 8:03am and 8:07am, respectively. On September 20th appellant's daughter left seventeen minutes after arriving and was driven to school. On September 21st there was no observation of when appellant's daughter was driven to school.

My investigations and written Investigative Report reveals that appellant, his daughter and his girlfriend reside on Hillyer Street in East Orange in the girlfriend's apartment. Commencing on September 20, 2011 and ending on March 22, 2012, the areas and addresses on Fitzrandolph Road, West Orange and Hillyer Street, East Orange were monitored by me and Investigators Zawacki and Zarro. In total thirty-six monitoring of the areas were completed. The details of the monitoring are outlined in the Investigative Report, which I prepared. I have seen the daughter with appellant on Hillyer Street. I have seen them leave at the same time from Hillyer Street. I have seen them leave in the same vehicle each day bearing license plate number NJ Registration X53-BHR. The vehicle was sometimes driven by a female who drove appellant's daughter to school and let her out near the corner and walked her to the Redwood School. If the arrival time was later, the female would stop closer to the school before getting out and walking the student to the school. I am presenting a log and photo's that I took at the Hillyer Street property.

I have never seen appellant and his daughter leave the Fitzrandolph Road home.

J.V., appellant, testified,

My mother and father own a house in West Orange. My father works in New York and comes home to West Orange on weekends. My brothers, a nephew, my daughter and I live in my parents West Orange home. My daughter stays at Fitzrandolph Road some school nights and weekends.

I have a girlfriend that I visit on Hillyer Street in East Orange. There is no lease for Hillyer Street, the apartment is rented by my girlfriend. My daughter goes wherever I go. I do not catch the bus with my daughter. You do not have any pictures of my daughter on a bus. I have too much to worry about. I lost a child this morning, I lost a son. I am only twenty-seven years old. I want to do something positive. I am a member of the West Orange Country Club, of the West Orange Library. I have financial aid documents that show my residency and a child support paper that indicates my West Orange address. I also have an Independent Business Owner Registration Agreement that shows my address in West Orange. Neighbors will tell you that I live in West Orange.

I am employed as a superintendent for a residential building and I exterminate.

FINDINGS OF FACT

Based on the law, the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. The West Orange Board of Education had good cause to request a residency investigation when appellant's daughter told her teacher that she lives along way from the school and takes the big bus with her father;
2. The investigation of residency entailed thirty-six monitorings of the two areas and addresses where appellant and his daughter could reside – Hillyer Street, East Orange and Fritzrandolph Road, West Orange. On no occasion during the thirty-

six monitorings did the investigators observe appellant and his daughter leaving from the Fitzrandolph Road home;

3. On a number of occasions the investigators observed appellant and his daughter leaving from the Hillyer Street home. The investigators observed on numerous occasions appellant's daughter coming to school in an automobile, bearing the same license plate number. The automobile stops at the corner by the school if school has not started or the vehicle stops closer to the school if the appellant's daughter is already late for school. The driver is always appellant or a woman. Appellant or the woman always exit the vehicle and walk the student to the school door;
4. Appellant's testimony is credible that his daughter may spend some weekends at the Fitzrandolph Road home where her grandparents, the appellant's parents, reside;
5. Appellant's testimony about his daughter sleeping at the Fitzrandolph Road home on some school nights is not supported by the facts and is incredible;
6. The documents appellant submitted to support his argument that he and his daughter reside at the Fitzrandolph Road home are insignificant because they do not prove actual residency. Appellant confirmed during testimony that the Fitzrandolph Road home is owned by his parents so he had no property tax bills, deeds, leases or mortgages. Nor did appellant offer into evidence voter registrations, licenses, permits, or financial account information; that is, bills, cancelled checks, insurance claims or payments, or other evidence of expenditures demonstrating personal attachment to a particular location. Nor did appellant offer an affidavit or sworn attestation of his and his daughter's residency;
7. At all times during the residency investigation appellant and his daughter were observed at or leaving the Hillyer Street property, in East Orange. Out of thirty-

six monitorings during the investigation appellant and his daughter were never observed leaving for school directly from the Fitzrandolph property in West Orange, New Jersey.

LEGAL DISCUSSION

A student is eligible to attend a school free of charge if the student is domiciled within the school district. A student is domiciled in the school district when he or she is living with a parent or legal guardian whose permanent home is located within the district. A home is permanent when the parent or guardian intends to return to it after being absent from the home and has no present intent of moving from the home, notwithstanding the existence of homes or residences elsewhere. N.J.A.C. 6A:22-3.1(a)(1). Domicile may also be defined as a residence. N.J.S.A. 18A:1-1.

Consideration in proving residency for purposes of establishing eligibility for school district placement is found at N.J.A.C. 6A:22-3.4(a),

(a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:

1. Property tax bills, deeds, contracts of sale, leases, mortgages, signed letters from landlords and other evidence of property ownership, tenancy or residency;

2. Voter registrations, licenses, permits, financial account information, utility bills, delivery receipts, and other evidence of personal attachment to a particular location;

...

4. Receipts, bills, cancelled checks, insurance claims or payments, and other evidence of expenditures demonstrating personal attachment to a particular location, or, where applicable, to support of the student;

...

6. Affidavits, certifications and sworn attestations pertaining to statutory criteria for school attendance, from the parent, guardian, person keeping an "affidavit student," adult

student, person(s) with whom a family is living, or others as appropriate;

...

8. Any other business record or document issued by a governmental entity.

(b) A district board of education may accept forms of documentation not listed in (a) above, and shall not exclude from consideration any documentation or information presented by a person seeking to enroll a student.

(c) A district board of education shall consider the totality of information and documentation offered by an applicant, and shall not deny enrollment based on failure to provide a particular form of documentation, or a particular subset of documents, without regard to other evidence presented.

N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a) sets forth the right of a student to a free public education, which in pertinent parts states:

Public schools shall be free to the following persons over five and under 20 years of age:

a. Any person who is domiciled within the school district[.]

...

(a) A student over five and under 20 years of age pursuant to N.J.S.A. 18A:38-1, or such younger or older student as is otherwise entitled by law to free public education, is eligible to attend school in a school district if the student is domiciled within the district.

CONCLUSION

Based on all of the foregoing, I **CONCLUDE** that the weight of the evidence, which includes portions of appellant's testimony, indicates that during the 2011/2012 SY, appellant and his daughter has resided on Hillyer Street in East Orange, New Jersey.

It is further **ORDERED** that the West Orange Board of Education be entitled to tuition reimbursement from appellant J.V. for the 2011/2012 SY in the amount of:

\$15,388.47 for 183 days in the 2011/2012 SY at a per diem rate of \$84.09.

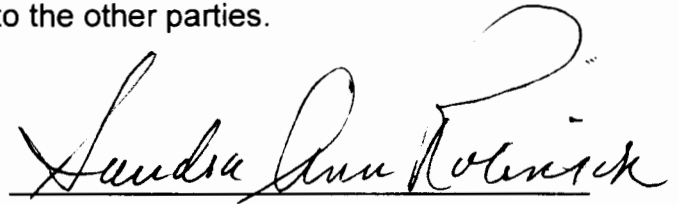
I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 25, 2012

DATE



SANDRA ANN ROBINSON, ALJ

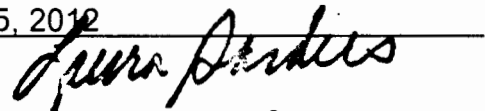
Date Received at Agency:

May 25, 2012

Date Mailed to Parties:

MAY 29 2012

lr


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Appellant:

J.V., appellant

For Respondent:

Gerard Drappi, Investigator

EXHIBITS

For Appellant:

- A-1 Child Support Cooperation Requirement, dated June 8, 2010
- A-2 Federal Student Aid Loan Bill, dated October 14, 2011
- A-3 Independent Business Registration (no date)
- A-4 West Orange Library Correspondence (no date for first request to return book)

For Respondent:

- R-1 Investigative Summary dates September 8, 2011, to March 27, 2012
- R-2 Removal Letter from respondent to appellant, dated December 12, 2011
- R-3 Request For Residency Verification
- R-4 Certified mail envelope to appellant returned to respondent, dates in December 2011
- R-5 Photo log:
 - 1. NJ Registration X53-BHR exiting driveway at 124 Hillyer Street, East Orange, dated March 22, 2012
 - 2. NJ Registration X53-BHR backing into street from driveway at 124 Hillyer Street, East Orange, dated March 22, 2012
 - 3. NJ Registration X53-BHR leaving 124 Hillyer Street, East Orange, dated March 22, 2012

4. NJ Registration X53-BHR with female driver. Appellant was not in the vehicle, dated March 22, 2012
5. NJ Registration X53-BHR with female driver, dated March 22, 2012
6. 124 Hillyer Street, East Orange, dated March 20, 2012
7. Appellant in front of 124 Hillyer Street, East Orange, dated March 20, 2012
8. Appellant with his brother in front of 124 Hillyer Street, East Orange, dated March 20, 2012

R-6 Tuition Calculation

#285-12

OAL DKT. NO. EDU 10489-11
 AGENCY DKT. NO. 215-8/11

FARZIN KHIABANI, :

PETITIONER, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE CITY :
 OF ELIZABETH, UNION COUNTY, :

RESPONDENT. :

The record of this matter, the proposed Settlement Agreement and General Release, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


 ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/16/12

Date of Mailing: 7/17/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10489-11

AGENCY DKT. NO. 215-8/11

FARZIN KHIABANI,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY

OF ELIZABETH, UNION COUNTY,

Respondent.

Adam M. Epstein, Esq., for petitioner (Caruso, Smith, Edell, Picini, P.C.,
attorneys)

Karen A. Murray, Esq., for respondent

Record Closed: June 1, 2012

Decided: June 5, 2012

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on September 2, 2011, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled on December 5, 2012. Prior to the date of hearing the parties settled the matter. The attached Settlement Agreement and Board Resolution were submitted on June 1, 2012, indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 5, 2012
DATE

Date Received at Agency:

Date Mailed to Parties:
dr

JUN - 7 2012

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Steven P. D'Amico
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

CARUSO SMITH EDELL PICINI, P.C.
60 Route 46 East
Fairfield, NJ 07004
(973) 667-6000
Attorneys for: Petitioner, Farzin Khiabani

Farzin Khiabani

v.

Elizabeth Board of Education

Before the Commissioner of Education
OAL Docket No.: EDU 10489-2011-N

**SETTLEMENT AGREEMENT AND
GENERAL RELEASE**

This Settlement Agreement and General Release is made by and between the Elizabeth Board of Education (the "Board") whose administrative offices are located at 500 North Broad Street, Elizabeth, New Jersey 07207 and Farzin Khiabani ("Khiabani"), whose address is 117 Palisade Road, Elizabeth, New Jersey 07208. In consideration of mutual promises and undertakings contained in this Settlement Agreement and General Release and for good and valuable consideration the receipt of which is hereby acknowledge, the undersigned parties state:

WHEREAS, on February 8, 2011, Khiabani was employed as a bus driver by the Board; and

WHEREAS, on February 8, 2011, a quasi-criminal Complaint was issued against Khiabani for certain acts alleged to have occurred while Khiabani was in the employ of the Board.; and

WHEREAS, on March 29, 2011, the Elizabeth Municipal Court dismissed the above-referenced quasi-criminal Complaint against Khiabani;

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Khiabani's defense counsel forwarded a demand letter to the Board, on or about June 8, 2011, seeking reimbursement from the Board for Khiabani's

attorney's fees and costs associated with Khiabani's legal defense relative to Elizabeth Municipal Court Complaint, Summons No. K131129;

WHEREAS, Khiabani subsequently filed the Petition at issue demanding reimbursement from the Board in the amount of \$6,943.33;

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Settlement Agreement and General Release in order to avoid the need for further litigation; and

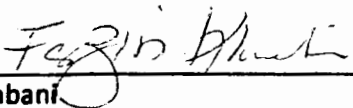
NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Two Thousand Five Hundred Dollars **(\$2,500.00)** as full and complete indemnification of the attorney's fees and costs incurred by Khiabani in relation to the Elizabeth Municipal Court Complaint, Summons No. K131129. The Board shall make this payment payable to Caruso Smith Edell Picini P.C., and shall send it directly to Khiabani's legal counsel, Caruso Smith Edell Picini P.C. whose offices are located at 60 Route 46 East Fairfield, NJ 07004.
2. For and in consideration of the Indemnification set forth in Paragraph One (1) above, Khiabani and his heirs, executors, administrators, successors and assigns, hereby forever release and discharge the Elizabeth Board of Education, its members, successors and assigns and all of its or their past or future members, officers, agents, employees, administrators, attorneys, fiduciaries, successors and assigns (whether acting as agents for the Board, its affiliates or its related entities or in their individual capacities) from any and all claims, demands, causes of action, fees and liabilities of any kind whatsoever (upon any legal or equitable theory, whether contractual, common-law, statutory, federal, state, local, or otherwise), whether known or unknown, which Khiabani ever had, now has or hereafter may have against the Board by reason of any actual or alleged act, omission, transaction, practice, conduct, occurrence or other matter relating to any and all allegations contained in the Petition entitled Farzin Khiabani v. Elizabeth Board of Education, and bearing OAL Docket No.: EDU 10489-2011-N.

3. The parties agree that if any of the provisions, terms, clauses, waivers and releases of claims and rights contained in this Settlement Agreement and General Release are declared illegal, unenforceable, or ineffective in a legal forum of competent jurisdiction, such provisions, terms, clauses, waivers and releases of claims or rights shall be modified, if possible, in order to achieve, to the extent possible, the intentions of the parties. If any such provisions, terms, clauses, waivers and releases of claims and rights contained in this Settlement Agreement and General Release cannot be modified, the remaining provisions, terms, clauses, waivers and releases of claims and rights contained in this Agreement shall remain in full force and effect.
4. This Settlement Agreement and General Release set forth the entire terms between the parties, and fully supersede any and all prior Agreements or understanding between them pertaining to the subject matter thereof.
5. Nothing contained in this Settlement Agreement and General Release constitutes an admission of any wrongdoing by either party and neither party shall be considered to be a prevailing party in this matter.
6. All terms of this Settlement Agreement and General Release are deemed material. The parties agree that this Settlement Agreement and General Release may not be altered, amended, modified, superseded, canceled or terminated except by an express written Agreement duly executed by all the parties or their attorneys on their behalf, which makes specific reference to this Settlement Agreement and General Release.
7. Khiabani agrees that he has been fully and fairly represented by legal counsel throughout this proceeding.
8. This Settlement Agreement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

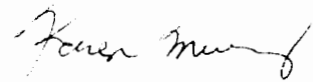
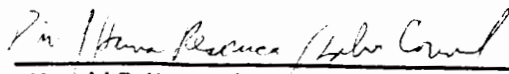
9. This Settlement Agreement and General Release is an agreement that shall be construed in accordance with the laws of the State of New Jersey.

10. All parties hereby agree that the terms of this Settlement Agreement and General Release are binding upon all parties, their heirs and their assigns.



Farzin Khiabani

Dated:

Harold E. Kennedy, Jr.
Business Administrator/Board Secretary
ELIZABETH BOARD OF EDUCATION
Dated:

Marie Munn
Board President
ELIZABETH BOARD OF EDUCATION
Dated:

C
O
P
Y

10k

BOARD OF EDUCATION

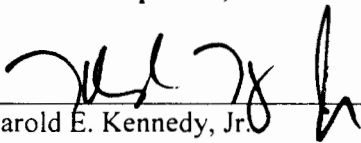
RESOLUTION

WHEREAS, the Elizabeth Board of Education and Farzin Khiabani have discussed a resolution of OAL Docket No. EDU-10489-2011-N; and

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreement on file in the Office of the School Business Administrator/Board Secretary.

TRUE COPY APPROVED AND ADOPTED AT
THE ELIZABETH BOARD OF EDUCATION MEETING
HELD ON April 19, 2012



Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

Elizabeth, New Jersey
April 19, 2012

11-219

OAL DKT. NO. EDU 0785-12
AGENCY DKT. NO. 346-11/11

M.D. and D.A, on behalf of minor child, E.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF CLIFTON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter and an advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of the notification sent to the parties by the OAL on June 18, 2012 – providing petitioner thirteen days to submit an explanation for such nonappearance – have been reviewed. There being no explanation filed, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.¹

IT IS SO ORDERED.²


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/16/12

Date of Mailing: 7/17/12

¹ It is noted that, by letter dated June 12, 2012 to the Administrative Law Judge, the Board withdrew its counterclaim for tuition in this residency matter.

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

M.D. and D.A, on behalf of minor child, E.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF CLIFTON, PASSAIC COUNTY,	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioners filed a *pro se* residency appeal on behalf of E.B. in November 2011. A hearing at the Office of Administrative Law (OAL) was scheduled for June 13, 2012, but petitioners failed to appear despite having received appropriate notice and provided no explanation for their nonappearance. Having received no explanation from petitioners for their failure to appear, the OAL returned the file to the Commissioner.

There being no explanation filed, the Commissioner dismissed the petition with prejudice, further noting that the file included a letter dated June 12, 2012 from the Board attorney to the administrative law judge withdrawing the Board's counterclaim for tuition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 7591-12
AGENCY DKT. NO. 157-5/12

VINCENT GUARINI,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
OCEAN COUNTY VOCATIONAL	:	
SCHOOL DISTRICT, OCEAN COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge that – because petitioner failed to appear at the June 11, 2012 hearing in this matter, after having received due notice of such hearing – this matter is appropriately dismissed for failure to prosecute.

Accordingly, the recommended decision of the OAL is adopted and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/16/12

Date of Mailing: 7/17/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36 N.J.S.A. 18A:6-9.1*).

VINCENT GUARINI,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
OCEAN COUNTY VOCATIONAL	:	
SCHOOL DISTRICT, OCEAN COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

On May 30, 2012, the petitioner filed a request for emergent relief with regard to the respondent Board's refusal to allow him to participate in an awards ceremony scheduled for June 13, 2012, on the grounds that petitioner had accumulated more than nineteen absent days due to illness. The case was scheduled for hearing on June 11, 2012. Petitioner received appropriate notice of the hearing, but failed to appear and offered no explanation for his non-appearance. Accordingly, the ALJ dismissed the petition with prejudice.

Upon review of the file, the Commissioner concurred with the ALJ that this matter is appropriately dismissed for failure to prosecute. Accordingly, the Commissioner dismissed the within appeal.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 7591-12

AGENCY DKT. NO. 157-5/12

V.G.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
OCEAN COUNTY VOCATIONAL
SCHOOL DISTRICT, OCEAN COUNTY,**
Respondent.

No appearance by or on behalf of V.G.

Robert C. Shea, Esq., for respondent (R.C. Shea and Associates, attorneys)

Record Closed: June 14, 2012

Decided: June 14, 2012

BEFORE LAURA SANDERS, Acting Director and Chief ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Vincent Guarini sought emergent relief with regard to the Ocean County Technical Vocational School's refusal to allow him to participate in the awards ceremony scheduled for June 13, 2012, on grounds that he accumulated more than

nineteen absent days due to illness. Petitioner contends that the action is unfair, as more than fifty percent of his absences were properly documented in the form of a doctor's note, phone call from a parent, or hospital discharge form.

The Petitioner filed with the Commissioner of the Department of Education (the Department) on May 30, 2012. The Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on June 7, 2012. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. It was scheduled for hearing at 9 a.m. on Monday, June 11, 2012.

Given the limited amount of time before the awards ceremony, the OAL followed its usual practice of contacting the parties by telephone. On June 7, 2012, at 1:45 p.m., Deputy Clerk Sandra Hlatky called the first phone number supplied by the Petitioner and spoke at length with a person who identified himself as Petitioner's grandfather. She also left a lengthy message at the second number provided by Petitioner. On June 8, 2012, a gentleman who identified himself as Mr. Guarini contacted the OAL and confirmed receipt of the message scheduling the hearing. (See attached certifications.)

On June 11, 2012, the board attorney and school officials appeared at the OAL on time, but petitioner did not appear. At 9:30 a.m. the OAL began trying to reach the petitioner, again contacting the two phone numbers it had for petitioner, again reaching the Petitioner's grandfather but not succeeding in locating the petitioner. At 10 a.m., the board's representatives were allowed to leave. The OAL held the file; however, even today, after the ceremony date, no contact from the petitioner has come.

Therefore, the petition is hereby **DISMISSED** with **PREJUDICE** for failure to appear and pursue the matter.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 14, 2012
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency:

June 15, 2012

Date Mailed to Parties:

6/18/12

/caa



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
Mercerville, NJ 08619
(609) 689-4028
Fax (609) 689-4070

Vincent Guarini

v.

Ocean County Vocational School Board of Education

EDU 7591-12

Nicole Roberts, of full age, certifies and says:

1. I am an employee of the Office of Administrative Law, working in the Trenton Clerk's office.
2. In that capacity, on 6/8/12 I took a telephone call for Sandy Hlatky from a gentleman who identified himself as Mr. Guarini who said he was responding to a voice mail asking him to confirm receipt of a message with regard to the scheduling of his hearing on Monday 6/11/12. He indicated that he didn't know if Sandy needed to speak to him further.
3. I advised Sandy that he was on the phone confirming receipt of the message and asked if she needed to speak to him. After she said she didn't, I advised him of that, he thanked me and ended the call.

I certify that the forgoing statements made by me are true. I understand that if any of the forgoing statements are willfully false, I am subject to punishment.

A handwritten signature in black ink, appearing to read "Nicole Roberts", written over a horizontal line.

Nicole Roberts



State of New Jersey

DEPARTMENT OF EDUCATION

PO Box 500

TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHRISTOPHER D. CERF
Acting Commissioner

July 19, 2012

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The Courts of Red Bank
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Detzky & Hunter
33 North Bridge Street
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Alfred F. Maurice, Esq.
Court Plaza South-East Wing
21 Main Street
Hackensack, NJ 07601

DEBBIE LYNN FITZGERALD V. BOE OF THE CITY OF ASBURY PARK, MONMOUTH CO. AND JANETTE MOEN, CATHLEEN CLOSHOSEY, KRISTINA FIORE & DANA AURICHIO, INTERVENORS AND KIMBERLEY SCOTT V. BOE OF THE CITY OF ASBURY PARK, MONMOUTH CO. AND JANETTE MOEN, CATHLEEN CLOSHOSEY, KRISTINA FIORE & DANA AURICHIO, INTERVENORS AND MARGARET WATKINS V. BOE OF THE CITY OF ASBURY PARK, MONMOUTH CO. AND JANETTE MOEN, CATHLEEN CLOSHOSEY, KRISTINA FIORE & DANA AURICHIO, INTERVENORS AND SUSAN GRIMM V. BOE OF THE CITY OF ASBURY PARK, MONMOUTH CO. AND JANETTE MOEN, CATHLEEN CLOSHOSEY, KRISTINA FIORE & DANA AURICHIO, INTERVENORS (CONSOLIDATED), OAL DKT. NOS. EDU 9198-10, 9204-10, 9225-10 & 9227-10

Dear Counsel:

The Motion – filed on July 13, 2012 by Alfred Maurice, Esq. on behalf of petitioner Debbie Lynn Fitzgerald – to Extend Time for the Filing of Exceptions in the above-captioned matter to July 25, 2012 and the Board's July 16, 2012 response stating that it has no objection to the motion have been reviewed. Counsel's Motion to Extend Time for the Filing of Exceptions to July 25, 2012 is hereby granted. The filing date for any reply exceptions in connection with this matter is extended until Wednesday, August 1, 2012.

Sincerely,

Christopher D. Cerf
Acting Commissioner of Education

CDC/MKD/MH
VIA FACSIMILE & REGULAR MAIL
c: Jeff S. Masin, Administrative Law Judge

Faxed & Mailed 7/20/12

www.nj.gov/education

STEPHEN TROYANOVICH,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
NEW JERSEY STATE JUVENILE	:	
JUSTICE COMMISSION,	:	
	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner contended that he was improperly laid off as the result of a 2010 reduction in force (RIF). Petitioner asserted that he had achieved tenure and therefore should not have been subject to layoff. The respondent, New Jersey State Juvenile Justice Commission (JJC) argued that since the petitioner filed for retirement benefits after receiving notice of the RIF, but before the layoff was to take effect, the issue was moot.

The ALJ found, *inter alia*, that: petitioner was employed by the Department of Corrections (NJDOC) from 1974 until 2001, progressing from the position of teacher to Supervisor of Education Programs, the position from which he resigned on August 10, 2001; petitioner's resignation in 2001 from his former tenured, supervisory position with NJDOC to take the position of Education Director with the JJC constituted a "break in service" pursuant to *N.J.A.C.* 10A:15-2.1 and *N.J.A.C.* 13:102-1.3; a break in service results in the forfeiture of previously held tenure; petitioner voluntarily forfeited his tenure rights, including any seniority, when he resigned from NJDOC; petitioner went on to earn tenure in the position of Education Specialist 1 with JJC; however, petitioner's seniority at the time of the 2010 RIF was limited to the time he had served in the tenurable position of Education Specialist 1 with the JJC, which must be counted from June 2002 – the date when he assumed that position; of the five employees retained by JJC in the Educational Specialist 1 title at the time of the RIF, all had greater seniority than petitioner; and, accordingly, no tenure violation occurred. The ALJ concluded that petitioner's within appeal should be dismissed, and the issue of petitioner's retirement resignation need not be addressed.

Upon careful and independent review – and finding petitioner's exceptions to the Initial Decision to be without merit – the Deputy Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, concurred with the ALJ's findings and conclusions, and dismissed the petition. In so doing, the Deputy Commissioner found that: petitioner forfeited any tenure he had accrued at the NJDOC when he left that agency in 2001; petitioner began to accrue tenure with the JJC in June 2002 when he commenced the position of Education Program Specialist 1; and at the time of the RIF, there were five other employees working under this title at the JJC with seniority greater than petitioner's. Accordingly, no tenure violations were perpetrated and petitioner is not entitled to be reinstated.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 2755-11
 AGENCY DKT. NO. 21-1/11

STEPHEN TROYANOVICH,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
NEW JERSEY STATE JUVENILE	:	
JUSTICE COMMISSION,	:	
	:	
RESPONDENT.	:	
_____	:	

Petitioner seeks an order reinstating him to the position of Educational Program Specialist 1 with the respondent Juvenile Justice Commission, from which he was removed as the result of a reduction in force (RIF). Upon review of the record, the Initial Decision of the Office of Administrative Law (OAL), and the parties' exceptions thereto, the Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33 – concludes that the Administrative Law Judge (ALJ) correctly determined that petitioner failed to prove entitlement to reinstatement.

The ALJ's conclusion rested upon his determination that petitioner's departure in 2001 from his former tenured, supervisory position with the New Jersey Department of Corrections (NJDOC) to take the position of Education Director with respondent constituted a "break in service" pursuant to *N.J.A.C.* 10A:15-2.1 and *N.J.A.C.* 13:102-1.3. Such a break in service results in the forfeiture of previously held tenure. *See, N.J.A.C.* 10A:15-2.1; *N.J.A.C.* 13:102-2.1 Thus, the result of adopting the ALJ's determination would be that petitioner's seniority for purposes of respondent's November 2010 RIF would be limited to the

time he had served in tenurable positions with respondent. Under those circumstances, his seniority would be less than that of the five employees who were retained when four Education Specialist 1 positions were abolished by respondent, and he would not be entitled to reinstatement.

The primary argument in petitioner's exceptions is that no "break in service" occurred because in 2001 petitioner "seamlessly" moved from one State position to another State position that required similar qualifications and responsibilities. (Petitioner's Exceptions at 2-4) The Deputy Commissioner disagrees.

Tenure is earned by virtue of service in a particular position which is, necessarily, in a particular school district or State agency. Like each school district in New Jersey, each co-equal State agency hires its own teachers and educational administrators. While co-equal State agencies are all creatures of the administrative arm of the State and all receive funds from the public fisc, so are local school districts all recipients of State funding and subject to oversight by the State Department of Education. Yet there is no authority that binds one local school district to another district's employment decision. It is the same for State agencies – a fact which is reflected, for example, in the existence of separate regulations governing teaching staff members in the Department of Corrections *vis-a-vis* the Juvenile Justice Commission of the Department of Law and Public Safety.

In other words, when petitioner accepted employment with a separate State agency, the tenure/seniority clock was reset. In determining entitlement to positions remaining after a RIF, respondent is not required to count the years of service that an employee has provided to a different agency.

In his second exception, petitioner parses out the definition of “break in service” as it appears in *N.J.A.C.* 10A:15-1.3 and *N.J.A.C.* 13:102-1.3. He posits that he did not leave his ‘tenured’ position at the NJDOC to enter a career service, unclassified service, non-tenured service or Senior Executive Service position, and that consequently there was no break in service.

At the outset, the Deputy Commissioner notes that the four classes of positions identified in *N.J.A.C.* 10A:15-1.3 and *N.J.A.C.* 13:102-1.3 are examples. The regulation states that a break in service occurs when an employee leaves a tenured position for any purpose. As to the examples of “purposes” set forth in the above referenced regulations, there appears to be no disagreement among the parties that petitioner did not leave the NJDOC to enter a Senior Executive Service or career service position. However, it appears that petitioner did leave the NJDOC to take an unclassified position since, pursuant to *N.J.S.A.* 11A:3-4(e), educators in the public schools and State institutions are unclassified employees.

But petitioner maintains that, notwithstanding the unclassified nature of the Director of Education position that he took in the Juvenile Justice Commission upon leaving the NJDOC, the move may not be considered a break in service because that Education Director position was tenurable. He comes to this conclusion by comparing the performance assessment duties of tenured administrators in school districts with the responsibilities that *N.J.A.C.* 13:102-2.3 imposes upon the above referenced Education Director position, and declaring them identical.

The argument fails for multiple reasons. First, the responsibilities set forth in *N.J.A.C.* 13:102-2.3 do not constitute the entirety of respondent’s Education Director job. Second even assuming *arguendo* that respondent’s Education Director position is tenurable, it is

still unclassified, and leaving a tenured position for an unclassified position constitutes a break in service according to the express language of *N.J.A.C.* 10A:15-2.1 and *N.J.A.C.* 13:102-1.3. In fact, as mentioned above, both *N.J.A.C.* 13:102-1.3 and *N.J.A.C.* 10A:15-2.1 expressly state that leaving a tenured position for any purpose is a break in service.

Third, *N.J.S.A.* 18A:60-1 expressly excludes the Education Director position from those protected by tenure. Thus, petitioner left a supervisory position with tenure at the NJDOC to take an unclassified, expressly non-tenurable position at the Juvenile Justice Commission – a clear break in service under the above cited regulations.

To counter the language of *N.J.S.A.* 18A:60-1, petitioner urges in his third exception that the exclusion of “Education Director” from the tenurable positions identified in *N.J.S.A.* 18A:60-1 does not pertain to his position because *N.J.S.A.* 18A:60-1 was enacted when the Juvenile Justice Commission was part of the NJDOC. Petitioner reasons that since the Juvenile Justice Commission was previously a subdivision of the NJDOC, Director of Education of the Juvenile Justice Commission is a much lower level position than the Director of Education position contemplated by our legislators when they passed *N.J.S.A.* 18A:60-1. This argument cannot stand, as it must be presumed that our legislature would have – in the last fifteen or more years since the Juvenile Justice Commission was removed from the NJDOC – amended *N.J.S.A.* 18A:60-1 if it believed that the Commission’s Director of Education position should not be included in the exemption from tenure imposed upon Education Director positions in the NJDOC and other State agencies. *See, e.g., In re Petition for Referendum on City of Trenton Ordinance 09-02*, 201 *N.J.* 349, 359 (2010) (noting that the Legislature is presumed to be knowledgeable about its previous enactments).

Petitioner's fourth exception is also without merit. In it he suggests that respondent's RIF should be deemed a nullity because respondent did not consult with the Department of Education about it. However, *N.J.A.C.* 13:102-2.5 gives respondent the right to reduce the number of its educators when there is a reduction in student participation in its educational programs, just as *N.J.S.A.* 18A:28-9 allows school districts to do. Nor has petitioner cited any authority to the contrary.

In summary, by virtue of petitioner's departure from his tenured position at the NJDOC, he forfeited any tenure he may have accrued at the NJDOC. His tenure with respondent began in June of 2002 when he commenced the tenurable position of Education Program Specialist 1. At the time of respondent's RIF, there were five other Education Program Specialists with seniority greater than petitioner's, which precluded him from claiming one of the five remaining Educational Program Specialist positions. No tenure violations were perpetrated and petitioner is not entitled to be reinstated.

Accordingly, the petition is hereby dismissed.

IT IS SO ORDERED.¹


DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 7/19/12

Date of Mailing: 7/20/12

¹ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2755-11

AGENCY DKT. NO. 21-1/11

STEPHEN TROYANOVICH,

Petitioner,

v.

NEW JERSEY STATE JUVENILE

JUSTICE COMMISSION,

Respondent.

Stephen B. Hunter, Esq., for petitioner (Detzky and Hunter, attorneys)

Erin M. Green, Deputy Attorney General, for petitioner (Jeffrey S. Chiesa,
Attorney General of New Jersey, attorney)

Record Closed: April 26, 2012

Decided: June 4, 2012

BEFORE DONALD J. STEIN, ALJ:

STATEMENT OF THE CASE

Stephen Troyanovich (petitioner) asserts that he was improperly laid off, effective January 1, 2011. The petitioner asserts that he should not have been subject to the layoff since he had achieved tenure. The New Jersey State Juvenile Justice Commission (respondent) argues that since the petitioner filed for retirement benefits

after receiving notice of the layoff, but before the layoff was to take effect, the issue is moot.

PROCEDURAL HISTORY

On January 25, 2011, petitioner filed a Petition of Appeal as to the proposed layoff. On March 4, 2011, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. On November 17, 2012, both parties' motions for summary decision were denied. On February 27, 2012, the matter was heard in the OAL (Trenton). The parties requested two weeks to submit written closings. On April 26, 2012, the closings were received, and the record closed on that date.

STATEMENT OF FACTS

STEPHEN TROYANOVICH

Stephen Troyanovich holds a master's degree in Correctional Education, a permanent teaching certificate and an educational supervisory certification.

His first position with the State of New Jersey was a teacher intern selected through the New Jersey Core Correction projection under Department of Education (DOE). He served in that capacity from June 1973 to May 1974. He was assigned to a correctional facility in New Jersey (State), where he worked full time and went to school full time. At the completion of the internship, he received his certifications and master's degree.

From May 1974 to April 1977, he was employed by the State as a teacher in the Department of Corrections Youth Center (now Wagner) where he taught English and other instructional contents.

In April 1977, he became the program director until April 1982 at the same facility. In April 1982, at the same facility, he became the Assistant Supervisor of all

vocational programs. At these positions, he was required to have a permanent teaching certificate and a supervisory education certificate.

In April 1983, he moved to the Southern State Correctional Facility and was promoted to the Director of Education and was responsible for all educational programming. The same two certifications were required.

In August 2001, he accepted a promotion as Director of Education 1 at the JJC. His civil service title was Director 1, Education. From June 2003 until July 2005, he became the Education Youth advocate. The civil service title was Educational Program Specialist 1. In July 2005, he returned to the JJC as an Educational Program Specialist 1. He worked in that position until January 2011. He was required to hold a teaching certificate and supervisory certification since 1981.

He became aware of Article 29 of the Collective Bargaining Act (CBA), which meant that his entire state service meant nothing. He had more state service than anyone in his department, which had over 200 people.

He testified that his retirement was not voluntary, he received documents that he would be laid off if he did not retire. He had no choice.

He admitted that he was never notified that he had received tenure. Once he obtained tenure, he thought he would have it in all state positions. At the JJC as an education program specialist, he thought he had more seniority based upon total state service.

MICHELE SHAPIRO

Michele Shapiro is employed as a Manager 2 of Human Resources at the JJC. Her duties include overseeing the operations of the JJC, and she would oversee and calculate seniority in the case of layoffs.

In 2010, the JJC decided to implement a RIF, which was approved by the Civil Service Commission and the Employee Relations Office of the Governor. She determined that the petitioner held an unclassified position. She then applied the provisions of Article 29 of the CBA which determines the seniority based upon the title in job category. Educational Program Specialist 1, 2, and 3 are in the same category. Seniority was determined pursuant to the CBA to be the time served in the titled category.

According to the Educational Seniority List (R-2), the petitioner's date of hire in that title was June 2002. The latest hiring date of the top individuals not targeted was November 4, 2000.

She had no contact with the DOE and the issue of tenure pursuant to New Jersey statutes was never brought to her attention.

She admitted although the Director I is a much higher position, the salary ranges for the Director I and the Educational Program Specialist are similar. She testified that they are equivalent positions.

FINDINGS OF FACT

The facts are not in dispute. Petitioner was employed by the DOC beginning in July 1973 as a teacher/intern, then began regular employment for the DOC as a teacher in 1974 and progressing to the position of Supervisor of Education Programs from which he resigned on August 10, 2001. During this time petitioner acquired a standard instructional certificate with endorsement in English issued by the State Board of Examiners in June 1974, and a standard administrative certificate with endorsement as Supervisor issued in April 1982. He acquired tenure with the DOC in 1977 under his instructional certificate and under his administrative certificate in 1985.

Petitioner resigned from his position as Supervisor of Education, effective August 10, 2001, and accepted an unclassified appointment with Civil Service title Director 1, Education and working title of Director of Education at the JJC within the Department of

Law and Public Safety, effective August 13, 2001. This position required an administrative certificate, but since he held the position less than twelve months, he did not acquire tenure. He served in the position until June 2002 when he accepted a voluntary demotion to the Civil Service position of Education Program Specialist 1 with a working title of "Education Youth Advocate." As this position required an instructional certificate and he remained in it until January 2011, he acquired tenure under this certificate with the JJC.

On November 1, 2010, the JJC notified petitioner that he would be subject to a RIF effective on January 1, 2011. However, on December 14, 2010, petitioner submitted an application to retire, effective January 1, 2011. Petitioner contends that he made the decision to retire only to preserve his pension benefits and that the filing was forced and did not represent a voluntary decision on his part. He contends that his retirement actions are a separate issue that arose from his effort to mitigate his damages while concurrently pursuing this appeal contesting his initial selection for layoff.

On January 19, 2011, petitioner's application for retirement was approved by the Board of Trustees of the Division of Pensions and Benefits. On January 25, 2011, petitioner filed a Petition of Appeal with the Commissioner of Education alleging that he was improperly laid-off by the respondent and sought to be reinstated.

CONCLUSIONS OF LAW

Teachers and other certified professional educators of the DOC are tenured in New Jersey under the State and County College Tenure Act ("tenure statute"), N.J.S.A. 18A:60-1 to -15. The tenure statute is intended to provide job security during good behavior and efficiency for the teachers and other certified professional educators employed in State institutions within the Department of Corrections. N.J.S.A. 18A:60-1.1. The DOC has adopted the New Jersey State Board of Examiners (BOE) certificate system by awarding tenure only to individuals required to "possess appropriate educational certification issued by the New Jersey State Board of Examiners as a

condition of employment and not otherwise included in the New Jersey Department of Personnel career service.” N.J.A.C. 10A:15-1.2. Individuals who meet the requirements set forth at N.J.A.C. 10A:15-1.2 “shall be eligible for tenure after the expiration of continuous employment for three consecutive years in tenure eligible assignments with satisfactory evaluations within the scope of a specific standard certificate.” N.J.A.C. 10A:15-2.2.

Petitioner has established that he possesses a standard instructional certificate with endorsement in English issued in June 1974 and a standard administrative certificate with endorsement as Supervisor issued in April 1982. Petitioner has also established that he initially obtained tenure within the DOC in 1977 due to possession of appropriate educational certification and the expiration of continuous employment for three consecutive years in assignments not otherwise included in the New Jersey Department of Personnel career service.

Once tenure is acquired by an employee, the tenure rights extend only to assignments within the scope of the certificate under which the employee earned tenure. If, however, the employee experiences a break in service, he or she will forfeit tenure rights. N.J.A.C. 10A:15-2.1. While there is no judicial precedent applying N.J.A.C. 10A:15-2.1 to DOC employees, the regulation mirrors the same principle for tenure of teachers employed by local school boards. See Nelson v. Board of Education, 148 N.J. 358, 366 (1997) (citing Ellicott v. Bd. of Educ., 251 N.J. Super. 342, 348 (App. Div. 1991)). Tenure is achieved in a specific position, and the scope of the tenured position is initially limited by the certificate the teaching staff member must hold to satisfy the prerequisite of qualifications for his or her employment. The Court in Nelson held that, except for those positions specifically enumerated in the corresponding statute and regulations, “an educator who has attained tenure by virtue of the requisite service in a specific position will have tenure with respect to all positions under the particular certificate.” Ibid. (citing Dennery v. Bd. of Educ., 131 N.J. 626, 634 (1993)). Applied to the instant matter, petitioner acquired tenure in the DOC in positions requiring an instructional certificate with English endorsement or administrative certificate with Supervisor endorsement.

Even when conferred by statute, tenure and reemployment rights are not absolute and may be voluntarily waived. O'Toole v. Forestal, 211 N.J. Super. 394, 402 (App. Div. 1986), cert. denied 107 N.J. 123 (1987) (tenure waived by refusal of reemployment following dismissal in a reduction in force). Accord, Lange v. Bd. of Educ. of Audubon, 26 N.J. Super. 83, 88 (App. Div. 1953) (tenure waived when employee under tenure leaves position to accept one which carries no tenure). Similar to the teacher in Lange, petitioner resigned from the DOC on August 10, 2001 and accepted a new position as Director of Education with the Juvenile Justice Commission within the Department of Law and Public Safety. Since his tenure was with the DOC, the petitioner's resignation constitutes a break in service as defined by the DOC to mean "resigning or leaving a tenured position for any purpose including to enter a career service, unclassified service, non-tenured or Senior Executive Service position." N.J.A.C. 10A:15-1.3. Here, petitioner resigned his tenured position with the DOC to accept an unclassified appointment in the JJC as Director of Education with a Civil Service title of Director I, Education.

The tenure laws provide not only for the creation of rights of tenure, but also how they may be lost. Under the plain language of N.J.A.C. 10A:15-2.1, once an employee experiences a break in service, he or she will forfeit tenure rights. While the regulation provides no conditions on the break in service to be valid, New Jersey case law has long held that the resignation or waiver of tenure rights by a tenured employee must be voluntary and intentional to be effective. Rieder v. Caldwell-West Caldwell Bd. of Ed., EDU 7609-97, Initial Decision, (Jan. 22, 1999), adopted, Comm'r. (March 10, 1999), aff'd, St. Bd. (July 7, 1999) <<http://lawlibrary.rutgers.edu/collections/oal/search.html>>. A waiver requires a clear, unequivocal and decisive act by a party. Here, petitioner has not argued that his resignation from the DOC was anything but voluntary and intentional. A plain reading of the circumstances and his resignation letter indicate that petitioner left the DOC to pursue a career advancement as evidenced by a promotion, expanded job duties, and a salary increase.

By resigning from the DOC, petitioner voluntarily and intentionally waived his tenure rights with that agency. However, like the DOC, petitioner was eligible to earn tenure at the JJC under the tenure statute. N.J.A.C. 13:102-1.1. Also like the DOC, the

JJC adopted the BOE certificate system by awarding tenure only to individuals required to possess appropriate educational certification issued by the New Jersey State Board of Examiners as a condition of employment and not otherwise included in the New Jersey Department of Personnel career service. N.J.A.C. 13:102-1.2. Individuals who meet the requirements set forth at N.J.A.C. 13:102-1.2 shall be eligible for tenure after the expiration of continuous employment for three consecutive years in tenure eligible assignments within the scope of a specific standard certificate.” N.J.A.C. 13:102-2.2.

Petitioner’s first position with the JJC, as Director of Education, required an administrative certificate with endorsement as Supervisor but he did not serve for three consecutive years to acquire tenure under this certificate. Instead, on June 1, 2002, petitioner accepted a voluntary demotion to a Civil Service Title of Education Program Specialist I, which required an instructional certificate. Petitioner served in this position until January 2011, thereby serving for at least three consecutive years to acquire tenure under his instructional certificate within the JJC. Tenure is not transferable between certificates. Dennerly v. Bd. of Educ., 131 N.J. 626, 635-6 (1993) (reversing the Appellate Division’s holding that the transfer of tenure between certificates is analogous to transferring tenure between endorsements, stating that such a holding would render meaningless the requirement “that there be actual service in a position under a certificate to gain tenure under that certificate”). In conclusion, petitioner’s tenure eligibility is with the JJC, within the Department of Law and Public Safety, and limited to positions that require an instructional certificate because that is the only certificate under which he worked the requisite period of time.

There is no evidence of conduct by the JJC attempting to violate the spirit of the tenure law. Instead, petitioner unilaterally and voluntarily waived his previous tenure status with the DOC by his resignation and acceptance of employment with the JJC. Therefore, this type of waiver does not violate public policy. The purpose of the tenure statute is to prevent employers from abusing their superior bargaining power over education staff members in contract negotiations and to protect such employees from dismissal for “unfounded, flimsy or political reasons.” Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 73 (1982). Petitioner was not deprived of that protection at any time prior to

his decision to voluntarily resign and terminate his employment relationship with the DOC and begin employment with the JJC.

Petitioner's rights to tenure and reemployment in case of a RIF are governed by N.J.A.C. 13:102-2.5. Under this regulation, the JJC has the authority to eliminate a position, even when held by a tenured staff member, when the reduction is due to natural diminution of the number of students participating in the educational program or programs. N.J.A.C. 13:102-2.5(a). Individuals can be protected from being "rified" on the basis of seniority, where the employee having the least number of years of service shall be dismissed in preference to those having longer terms of service. N.J.A.C. 13:102-2.5(b). N.J.A.C. 6A:32-5.1 sets forth the standards for determining seniority. The JJC adopted the tenure standards for determining seniority that are applicable to teachers employed by local school boards.

Applying the rules applicable to local school boards, seniority is determined according to the number of academic or calendar years of employment, or a fraction thereof, in a school district in specific categories. N.J.A.C. 6A:32-5.1(b). Whenever any individual's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. Id. at § (i). If he has insufficient seniority for employment in the same category, he shall revert to the category in which he held employment prior to employment in the same category and shall be placed, and remain, upon the preferred eligible list of the category from which he reverted until a vacancy occurs in such category to which his seniority entitles him. Ibid. See also, N.J.A.C. 6A:32-5.1(j) and (k).

The pertinent regulations also set forth the specific applicable categories. N.J.A.C. 6A:32-5.1(l). Seniority categories are not necessarily synonymous with position titles. Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239, 242 (App. Div. 1987) held that seniority is measured by years of employment in specific job categories which are normally narrower than the subject fields which are endorsed on teachers' certificates. The regulation establishing categories of employment do not have a provision for "Education Specialist I" or any other unrecognized title. See N.J.A.C. 6A:32-5.1(l). In such a situation, the seniority regulations provide that when the job title

is not described in the regulation, the holder shall be placed in a category in accordance with the duties performed and not by title. Whenever the title of any employment is not found in the certification rules or in these rules, the holder of the employment shall be classified as nearly as may be according to the duties performed, pursuant to the provisions of N.J.A.C. 6A:9, Professional Licensure and Standards. N.J.A.C. 6A:32-5.1(g).

Therefore, in determining petitioner's entitlement to a position, it is necessary to examine petitioner's job title and job description. It has been found that:

When deciding competing tenure and seniority claims, courts "look to the substance rather than the form." Viemeister v. Prospect Park Bd. of Ed., 5 N.J. Super. 214, 218 (App. Div. 1949). Thus, the nature of the work done, not the title, is "the crucial factor." Quinlan v. North Bergen Bd. of Ed., 73 N.J. Super. 40, 48 (App. Div. 1962). "The duties performed, rather than the title of the position or job description, are controlling." Christie v. East Orange Bd. of Ed., 1985 S.L.D. (Comm'r 1985), slip. op. at 14. ... Seniority regulations codify this approach by clarifying that "where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with the duties performed and not by title." [N.J.A.C. 6A:32-5.1(g)].

[Kornberg v. Bd. of Ed. of Twp. of North Bergen, 92 N.J.A.R.2d (EDU) 120, 121].

Petitioner acquired tenure from respondent under the civil service position of Education Specialist I. The duties of this position varied according with assignments. From June 2002 to July 2005, petitioner served as liaison between the Office of Education at the JJC and the JJC Parole and Transitional Services. Petitioner was responsible for the education programming of all JJC juveniles on parole. From July 2005 to January 2011, petitioner was involved in various curriculum activities, curriculum development assessment, also program development and planning, training, development of training programming and one of his major areas of responsibility was career, technical education.

In his petition, the petitioner has only identified entitlement to an Education Specialist I position. Based upon an analysis of his job duties from 2002 - 2011, petitioner was primarily involved in educational programming in both of his assignments, thus placing all of petitioner's experience in the category of Education Specialist I is logical. Because petitioner's employment has been in this same category during his tenurable time with respondent, petitioner has 3,006 days of service credited to his Education Specialist I category from June 1, 2002, to January 1, 2011. Petitioner's creditable service in the Education Specialist I category must be counted beginning in June 2002 because he did not acquire tenure under his administrative certificate to earn any seniority to the Director of Education position that he occupied from July 2001 to June 2002.

Furthermore, contrary to petitioner's contention, his time served in the DOC prior to July 2001 cannot be included because he voluntarily forfeited his tenure rights, including any seniority, when he resigned from the DOC. Despite the regulation forfeiting all tenure rights within the DOC upon a voluntary resignation to pursue an unclassified position, petitioner contends that all of his State service should be counted toward his seniority. However, like a teacher who leaves a school district, and unlike a career service position, petitioner forfeited his seniority from his time with the DOC pursuant to N.J.A.C. 10A:15-1.3.

Even if the JJC wanted to credit petitioner's time with the DOC, it would be prohibited from doing so by law because credit for seniority can only be included from the time period leading to tenure. Lachman v. Cherry Hill Bd. of Educ., 1985 S.L.D. 1756, aff'd in part, rev'd in part Comm'r, 1985 S.L.D. 1766 (involving a teacher who forfeited her seniority credit by voluntarily resigning from all employment in the district). In Lachman, the petitioner expressed the belief that years of prior service would count for seniority purposes because of information received from the administrative assistant for personnel who had advised her on two occasions that if she resigned and returned to the district, all prior service would count for salary placement and seniority credit. The Commissioner determined that Lachman followed the advice of the administrative assistant at her own peril, and that seniority credit may only be accorded pursuant to

statute and code. Thus, even if a board were willing or guaranteed to recognize all prior service in the district for seniority purposes, the granting of credit for any service not leading to tenure would be prohibited by law. Ibid.

Therefore, in the present matter, respondent is prohibited from including previous service credit for service not leading to tenure with the respondent. Next, applying the principles set forth in N.J.A.C. 6A:32-5.1 to calculate the petitioner's seniority with respondent, his claim to any Education Specialist 1 position is subject to any fellow employees with superior claims to those positions. Respondent has identified a total of nine Education Specialist positions prior to the RIF, with four positions to be abolished. Of the five employees retained, all had greater seniority than petitioner, with the least seniority being 3,580 days. Petitioner has not identified any evidence or contested that the retained employees were improperly included in his category of Education Specialist. Thus, it must be concluded that all employees had similar job duties and were properly categorized, therefore petitioner has no entitlement to any of the remaining positions. Consequently, no tenure violation has occurred and petitioner's claim should be dismissed.

Since no tenure violation has occurred, the issue of petitioner's resignation need not be addressed.

CONCLUSION

Petitioner, despite establishing his tenure status with the DOC, forfeited his rights when he voluntarily resigned from the agency to pursue an unclassified position with respondent. Petitioner reacquired tenure with respondent but was properly selected for layoff when his seniority, beginning with his commencement in the category of Education Specialist 1, was less than that of other employees retained in the same category. Therefore, no tenure violation has occurred and the petition should be dismissed.

DECISION AND ORDER

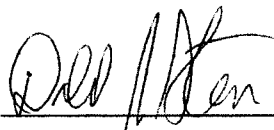
Based on the foregoing, it is hereby **ORDERED** that the petition of appeal be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

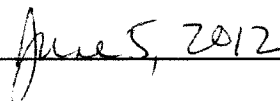
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

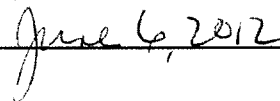
June 4, 2012
DATE


DONALD J. STEIN, ALJ

Date Received at Agency:



Date Mailed to Parties:



cmo

APPENDIX
WITNESSES

For Petitioner:

Stephen Troyanovich

For Respondent:

Michelle Shapiro

EXHIBITS

For Petitioner:

P-1 Certification of petitioner

For Respondent:

R-1 Letter to petitioner, dated November 10, 2010



State of New Jersey

DEPARTMENT OF EDUCATION

PO Box 500

TRENTON, NJ 08625-0500

July 26, 2012

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHRISTOPHER D. CERF
Acting Commissioner

VIA FAX AND REGULAR MAIL

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RE: Regis Academy Charter School v. New Jersey Department of Education,
Agency Docket #191-7/12.

Dear Counsel:

I have reviewed the materials filed in connection with the Regis Academy Charter School's (Regis Academy) Motion for a Stay of the Commissioner's July 6, 2012 decision denying its application for a charter,¹ and find as follows.²

At the outset, I remind the parties that the purpose of issuing stays is to preserve the *status quo* in situations where declining to do so would irreparably harm litigants who are likely to succeed on the merits of their claims. *See, e.g. University of Texas et al. v. Camenisch*, 451 U.S. 390, 395 (1981). It is well settled that stays may only be granted 1) where they are necessary to prevent irreparable harm, 2) where the legal rights underlying the movants' claims are settled, 3) where the movants demonstrate a likelihood of success on the merits and 4) where the relative hardship to the parties favors granting the movants such relief. *Crowe v. DeGioia*, 90 N.J. 126, 132-134 (1982). Pursuant to *N.J.A.C. 6A:3-1.6(b)*, litigants seeking stays must make a showing that all four of those standards are satisfied.

¹ As there is no provision in the regulations for an applicant to file an amended motion for a stay after the respondent has replied to the initial motion for a stay, I will treat Regis Academy's July 25, 2012 submission as a reply brief.

² The record of the within matter has been reviewed by the Assistant Commissioner, to whom the matter has been delegated pursuant to *N.J.S.A. 18A:4-34*.

In the matter before me, however, Regis Academy does not ask for maintenance of the *status quo*. Rather, it asks to be allowed to open a charter school without having satisfied all of the regulatory prerequisites to earning a charter. Granting such a request would change the *status quo*, and bestow upon Regis Academy its ultimate goal by way of a procedure designed to confer temporary relief. Nor do Regis Academy's papers contain facts and arguments that would satisfy the above-identified standards that are used to measure the appropriateness of preliminary injunctions.³

By way of example, Regis Academy's articulation of the nature of the irreparable harm that it believes would ensue if it were required to satisfy all regulatory requirements before being granted a charter is primarily financial, *i.e.* the loss of the funds it expended in seeking charter status. As Regis Academy itself acknowledges in its brief, such monetary damages do not qualify as irreparable harm. The balance of the harm alleged by Regis Academy to be irreparable is the fact that the prospective students and teachers will have to enroll in or, respectively, find employment in other schools. I do not find this point persuasive, as the students have ample time to enroll in their respective home districts and the teachers have more time now to seek other employment than they would if a grant of injunctive relief delayed the implementation of the Commissioner's final decision.

Second, Regis Academy has not satisfactorily explained how it can succeed on the merits of its appeal of the denial of its application for a charter. In light of its failure to submit a valid and accurate lease by the regulatory deadline (*see, N.J.A.C. 6A:11-2.1(l)*) of June 30, 2012 – thereby failing to show its preparedness for opening a school – the Commissioner considers it unlikely that the Appellate Division will find the denial of the charter to be arbitrary, capricious or unreasonable.

Third, in contrast to Regis Academy's failure to make an adequate showing regarding how it might be irreparably harmed by maintenance of the status quo, counsel for both the Department of Education and the Cherry Hill Board of Education have described the disruption to students and local districts and the burden to local taxpayers that could result from changing the *status quo* and bestowing charter status on an entity which has not shown that it has secured a facility and which consequently cannot guarantee that it will be able to timely open a school for the students who have enrolled to attend. In addition, the granting of the relief sought by Regis Academy would negatively impact the Commissioner by forcing him to approve a charter school application where the statutory and regulatory requirements have not been met.

In light of the foregoing it is clear that Regis Academy has not met the standards – set forth in *N.J.A.C. 6A:3-1.6(b)* and *Crowe v. DeGioia, supra* – for measuring the need for emergent relief.

Nor do I view as meritorious Regis Academy's assertion that it was constitutionally entitled to a hearing before the Commissioner's final decision denying its application for a charter. It is well settled that charter school applicants are not entitled to same, as such decisions are quasi-legislative in nature. *In re Grant of Charter Sch. App. Of Englewood on the Palisades Charter Sch.*, 320 *N.J. Super.* 174, 235-236 (App. Div. 1999). Nor does the absence of a hearing deprive Regis Academy of due process, since denial of its request for a charter implicates a sought-after privilege, rather than a liberty interest or vested property right. *Doe v. Poritz*, 142 *N.J.* 1, 99 (1995) (We examine procedural due process questions in two steps: the first asks whether there exists a

³ Regis Academy's initial motion papers failed to address the *Crowe* factors. It belatedly addressed them in its July 25, 2012 "Amended Motion for a Stay."

liberty or property interest which has been interfered with by the State, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972); the second examines whether the procedures attendant upon that deprivation [if any] were constitutionally sufficient, *Hewitt v. Helms*, 459 U.S. 460, 472 (1983)).

For its position that it was entitled to a hearing, Regis Academy appears to rely heavily on letters dated November 1, 2011 and November 7, 2011 from a Deputy Attorney General to counsel for the Cherry Hill and Voorhees Boards of Education, which letters referred to the Commissioner's September 30, 2011 preliminary approval of Regis Academy's charter application as a "final" decision and advised that any appeal therefrom must be filed with the Appellate Division of Superior Court. *See*, Exhibit C, annexed to Regis Academy's motion brief. Regrettably, the letters were incorrect.

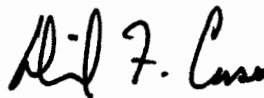
At the time of the Commissioner's September 30, 2011 correspondence the Commissioner's final decision had clearly not yet been made. His letter expressly stated:

This approval is contingent upon receipt of outstanding documentation not included in your application, successful participation in the preparedness process and compliance with applicable state and federal regulations.

Since the charter school application process is quasi-legislative, it is questionable as to whether the Commissioner's interim action was appealable. But if such an appeal is possible it must properly be directed to the Appellate Division and brought by means of a motion for an interlocutory appeal. In the final analysis, however, this procedural issue became academic when jurisdiction of the matter was returned to the Commissioner in May of this year.

After considering all the documentation related to Regis Academy's charter application, the Commissioner, through Assistant Commissioner Evo Popoff, issued a final decision denying same. The reasons were articulated in Mr. Popoff's July 6, 2012 letter. While the merits of this final decision may be appealed to the Superior Court, Appellate Division, the emergent relief requested by Regis Academy is inappropriate – for the reasons articulated *supra*. Accordingly, Regis Academy's application for a stay of the July 6, 2012 decision is hereby DENIED.⁴

Sincerely,



David F. Corso
Assistant Commissioner

c: County Superintendent
; State Law Library

Faxed & Mailed 7/27/12

⁴ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.

MARC ZYDIAK, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF TRUSTEES OF THE : DECISION

PLEASANTECH ACADEMY CHARTER :

SCHOOL AND KATHY McDAVID, :

CHIEF SCHOOL ADMINISTRATOR, :

RESPONDENTS. :

SYNOPSIS

Petitioner – who was tenured as a director/supervisor at respondent charter school – contended that the decision of the school’s Board of Trustees to eliminate his position as Administrative Assistant to the Chief School Administrator was a violation of his tenure and seniority rights. Petitioner held seven different positions with respondent between September 2005 and June 30, 2011, when the school abolished his final position of Administrative Assistant to the Chief School Administrator. Petitioner also served as supervisor of special education from May 2010 to March 2011. Petitioner claimed that in addition to the supervisory positions he held during his employment, he also regularly served as a substitute principal, and he claimed tenure rights as a principal. Respondent Board asserted that petitioner’s position was abolished for financial reasons, that petitioner had never been employed as a principal, and that he was not qualified for re-employment in the position of supervisor of special education.

The ALJ found, *inter alia*, that: petitioner was tenured under his administrative certificate as a supervisor and director; although petitioner was entitled to tenure credit while he was acting as principal during vacancies, his service in this capacity fell well short of the attainment of tenure rights as a principal; petitioner served as supervisor of special education from May 2010 until March 2011, and was qualified as a supervisor in that capacity; respondent advertised internally that it was hiring a supervisor almost immediately after terminating petitioner, but failed to offer petitioner re-employment as a supervisor or director; a non-tenured staff member was assigned and compensated to fill the position of supervisor of curriculum, a position that petitioner previously held; petitioner was a tenured supervisor/director, and was therefore entitled to assert tenure rights over a non-tenured staff member working in a title for which petitioner is qualified; petitioner was purposefully excluded from notification regarding the supervisory position that was internally advertised in July 2011; and, pursuant to *N.J.S.A. 18A:28-12*, respondent’s assignment of a non-tenured staff member to perform the duties and functions of a curriculum supervisor circumvented and violated petitioner’s tenure rights. Accordingly, the ALJ ordered that petitioner be reinstated as a supervisor/director with respondent charter school, together with retroactive salary, benefits and emoluments.

Upon comprehensive review, the Commissioner concurred with the ALJ’s findings and conclusions, and adopted the Initial Decision as the final decision in this matter. In so deciding, the Commissioner noted that in light of the fact that the respondent charter school is no longer operating, the Board cannot reinstate the petitioner; however, the Board remains obligated to provide the petitioner with retroactive salary, benefits and emoluments as ordered by the ALJ.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 30, 2012

OAL DKT. NO. EDU 09501-11
 AGENCY DKT. NO. 216-8/11

MARC ZYDIAC,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF TRUSTEES OF THE	:	DECISION
PLEASANTECH ACADEMY CHARTER	:	
SCHOOL AND KATHY McDAVID,	:	
CHIEF SCHOOL ADMINISTRATOR,	:	
	:	
RESPONDENTS.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the PleasanTech Academy Board of Trustees (Board).

In this case, the petitioner, Marc Zydiak, challenged the Board's decision to terminate his employment and abolish his supervisor position in 2011. The Administrative Law Judge (ALJ) found that the petitioner did not accrue tenure rights as a principal; however the petitioner was tenured as a director/supervisor and as a result the petitioner was entitled to a supervisor position. Additionally, the ALJ found that the petitioner was entitled to retroactive salary, benefits and emoluments.

The Board did not file exceptions challenging the ALJ's determinations with respect to the petitioner's tenure as a supervisor and his entitlement to a position. Instead the Board took exception to the ALJ's conclusion that the Board's job offer to the petitioner following the hearing was part of ongoing settlement discussions, and that the petitioner's refusal to except the offer does not constitute abandonment. The Board maintains that after the hearing it offered the petitioner the position of Supervisor of Curriculum and Instruction, and since the

petitioner turned down that offer he had effectively abandoned his tenure and seniority rights. The Board also takes exception to the ALJ's determination that the petitioner is entitled to full retroactive salary, benefits and emoluments. The Board contends that the petitioner has been employed by the Atlantic County Institute of Technology since his separation, and – as a result – his retroactive salary, benefits and emoluments should be subject to mitigation.

Upon a comprehensive review of the record in this matter,¹ the Commissioner concurs with the ALJ, for the reasons discussed on page 13 – 19 of the Initial Decision, that the petitioner does not have tenure as a principal. The Commissioner is also in accord with the ALJ's determination that the petitioner obtained tenure as a supervisor. Although the Board contends that it terminated petitioner's employment because it eliminated the petitioner's position, the evidence revealed that – following petitioner's termination – a non-tenured teacher had been assigned the duties of supervisor of curriculum, which was a position formerly held by the petitioner. Further, the Board posted other supervisory positions following petitioner's termination that the petitioner was also entitled to based upon his tenure as a supervisor.² Therefore, when the Board terminated the petitioner's employment, it circumvented and violated petitioner's tenure rights.³

With respect to the abandonment argument advanced in the Board's exceptions, the Commissioner is not persuaded by the Board's contention that the petitioner abandoned his position because he failed to accept his position back under the circumstances conveyed by the

¹ The record did not include transcripts from the hearing conducted at the OAL on November 18, 2011, December 6, 2011, January 18, 2012, January 31, 2012 and February 23, 2012.

² It is not clear from the record whether the Board ever actually filled any additional supervisor positions.

³ The majority of the evidence in connection with the Board's decisions regarding petitioner's termination was witness testimony or the certification of Kathy McDavid who was not able to testify because of illness. The ALJ found that the Board's only witness Verna Forman was less than credible concerning her recollection of why petitioner was terminated and why he was not rehired. It should be noted that in the absence of the hearing transcripts, it is difficult to discern the Board's decision making process with respect to the petitioner's employment and its plan for other supervisor positions at the charter school.

Board. The Board made the same abandonment argument before the ALJ in its post hearing submission. The ALJ found that the April 23, 2012 letter from the Board offering the petitioner the position of Supervisor of Curriculum and Instruction was a part of settlement discussions and was not offered into evidence during the hearing, and as a result he found that the documents had no evidential bearing on the case. Notably, the April 23, 2012 offer letter was provided to the petitioner well after the final hearing date of February 23, 2012, and a mere three days before the Board submitted its post hearing submission. Additionally, it is not clear from the record whether there were conditions related to the offer or how the issue of retroactive salary and benefits would be resolved. As a result, the Commissioner finds no reason to disturb the ALJ's determination with respect to the Board's abandonment claim.

In its exceptions, the Board also argues for the first time, that the recommended award of retroactive salary, benefits and emoluments should be subject to mitigation. It is well established that mitigation is an affirmative defense and the initial burden of proving the appropriateness of its application rests with the employer. *Goodman v. London Metals Exchange, Inc.*, 86 N.J. 19, 32 (1981). There is nothing in the record to suggest that the Board presented any evidence of petitioner's employment or even remotely mentioned mitigation below. Certainly, the affirmative defense of mitigation cannot be brought for the first time after the record has closed.

Moreover, the Board simply attached to its exceptions an excerpt from the Atlantic County Institute of Technology's website that lists the petitioner in the science department. First, N.J.A.C. 1:1-18.3 provides that evidence not presented at the hearing shall not be submitted as part of the exceptions or referenced in the exceptions. Furthermore even if it were to be considered, a print-out attached to the Board's exceptions does not prove that the petitioner is employed nor does it provide the requisite details surrounding the employment that

are essential for a mitigation analysis, i.e. if and when he actually started. As such, without any admissible evidence supporting mitigation or the introduction of the defense at the OAL, the Commissioner finds that the Board failed to prove that the retroactive salary, benefits and emoluments should be subject to mitigation.

Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter.⁴

IT IS SO ORDERED.⁵



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/30/12

Date of Mailing: 7/31/12

⁴ In light of the fact that PleasanTech Academy Charter School is no longer operating, the Board cannot reinstate the petitioner; however, the Board shall remain obligated to provide the petitioner with retroactive salary, benefits and emoluments.

⁵ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9501-11

AGENCY DKT. NO. 216-8/11

MARC ZYDIAK,

Petitioner,

v.

**BOARD OF TRUSTEES OF THE
PLEASANTECH ACADEMY CHARTER
SCHOOL AND KATHY McDAVID,
CHIEF SCHOOL ADMINISTRATOR,
Respondents.**

Marc Zydiak, petitioner, pro se

**Stephen M. Bacigalupo, II Esq., for respondents (Schwartz, Simon, Edelstein &
Celso, attorneys)**

Record closed: April 30, 2012

Decided: June 14, 2012

BEFORE **W. TODD MILLER, ALJ:**

STATEMENT OF THE CASE

On August 4, 2011, Marc Zydiak (petitioner) filed an action with the Commissioner of Education (Commissioner) seeking a determination that the Board of Trustees of the PleasanTech Academy Charter School's (PACS, District or Board)

decision to “non-renew” and abolish petitioner’s position in 2011 was, among other claims¹, a violation of his tenure rights. For the reasons discussed below, petitioner’s relief is **GRANTED**, in part.

¹ Petitioner’s complaint contains the following prayer for relief:

1. that the Commissioner declares that petitioner is a tenured employee for respondent Board,
2. that Commissioner finds respondents McDavid and Board were arbitrary, capricious, unreasonable and acted in bad faith when they abolished petitioner’s position as an Administrative Assistant to the District Superintendent – Chief School Administrator
3. in view of respondents’ bad faith with regard to their alleged abolishment of petitioner’s position, that the Commissioner order reinstatement of petitioner to the improperly-abolished position of Assistant to the District Superintendent
4. in the alternative or in addition, that the Commissioner declares that petitioner’s seniority status shall be accurately calculated based on the duties petitioner performed over the six years of his employment with respondent Board,
5. that Commissioner find respondents McDavid and Board were arbitrary, capricious, unreasonable and acted in bad faith when they denied petitioner’s statutory right of tenure and the right to be rehired based upon his earned seniority,
6. that the Commissioner compel respondent Board to fully account for all its administrative positions, by job titles, by certifications required, by duties performed and full reasons and justifications for any positions abolished to reveal which position(s) petitioner is entitled by virtue of his tenure and seniority,
7. that Commissioner order respondents immediately rehire petitioner in a position which the Commissioner determines is fair and equitable, based on petitioner’s tenured status and considering respondents’ multiple examples of acting arbitrarily, capriciously, unreasonably and with acts of bad faith at petitioner’s great expense,
8. that, if necessary, petitioner be reinstated by displacing a non-tenured employee of respondent Board in a position petitioner has earned by virtue of his tenure,
9. that Commissioner order respondent Board to pay petitioner back salary, including but not limited to petitioner’s New Jersey pension and fringe benefits, providing petitioner with full retroactive credit as a member of the New Jersey Teachers Pension and Annuity Fund for time and days lost between respondents’ non-rehire of petitioner and the court-ordered rehire of petitioner,
10. that Commissioner find respondent Board acted in bad faith by ignoring petitioner’s request for payout of his earned but unused sick days and vacation days guaranteed by contract and order respondent Board to immediately pay petitioner for all monies due thereby,
11. that Commissioner order respondent Board pay petitioner prejudgment interest equal to the average rate of return, to the nearest one half percent, for the corresponding preceding fiscal year terminating on June 30, of the State of New Jersey Cash Management Fund (State accounts) as reported by the Division of Investment in the Department of the Treasury,
12. In the alternative, that Commissioner find respondents, in requiring that petitioner perform duties outside of his contracted job titles, had entered into an implied contract to compensate petitioner, and were unjustly enriched by requiring petitioner to perform these extra-title duties without compensation for the six years petitioner was employed by respondent, and order respondents compensate petitioner in full for performing these job duties outside of his job titles at a rate which the Commissioner determines to be fair and equitable,
13. an award of such other relief which the Commissioner may deem equitable and just.

PROCEDURAL HISTORY

The commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case, where it was filed on August 11, 2011. See, N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. A request for emergent relief was submitted with the petition. The emergent motion was denied by an order issued on August 17, 2011.

Hearings were conducted on the following dates: August 16, 2011, November 18, 2011, December 6, 2011, December 15, 2011, January 18, 2012, January 31, 2012, and February 23, 2012. The record closed on April 30, 2012, upon receipt of closing briefs.

On April 10, 2012, petitioner filed a request to amend his complaint because Kathy McDavid passed away in or around April 2012. McDavid was named as a respondent in her capacity as chief school administrator. (P-1). Petitioner sought to amend his complaint by adding the Estate of Kathy McDavid. Petitioner's motion to amend the complaint is **DENIED**. McDavid was not named in her individual capacity, in the original action. Moreover, the dispute between petitioner and McDavid relates to official actions executed by McDavid, while serving as the chief school administrator. This Initial Decision makes no findings of fact or conclusions of law against McDavid, individually.

STATEMENT OF FACTS

Marc Zydiak was employed by PACS on September 1, 2005. PACS is a small charter school providing an education for children in kindergarten through eighth grade. Its enrollment consists of about 500 students. PACS's classrooms were split between two buildings (building one and building two; or Ptech one and Ptech two). This became an important distinction for petitioner.

As a small charter school, PACS only filled a minimal number of administrative positions. They are: chief school administrator (CSA) (superintendent); administrative

assistant to the chief school administrator (AACSA); two assistant school administrators (ASA) (principals); business administrator; director of curriculum and director of special education (P-14). Again these titles were distributed between two buildings. It was not uncommon for the small group of administrative staff to "substitute," or fill in, if someone was absent from the one of the buildings.

The positions officially held by petitioner during the 2005-2011 timeframe were as follows:

Supervisor/Curriculum Coordinator	9/1/05 to 7/30/06
Supervisor of Curriculum and Instruction	9/1/06 to 6/30/07
Director of Curriculum	7/2/07 to 6/30/08
Director of Curriculum	7/1/08 to 6/30/09
Supervisor	7/1/09 to 7/30/09
Supervising of Planning, Research & Evaluation	7/1/09 to 6/30/10
Administrative Assistant to the District Superintendent	7/1/10 to 6/30/11

(P-1)

Petitioner possesses the following endorsements under his administrative certification:

Teacher of Science (May 1976)
Principal/ Supervisor (October 1979)
Business Administrator (November 1984)
Affirmative Action – Next Phase (February 6, 1986)
Supervisory Management, successful completions of Levels 1, 2 and 3 of New Jersey Certified Public Manager Program (December 1986)

(See P-1; petition with supporting exhibits).

Petitioner was issued a principal/supervisor [administrative] certification in October 1979. (P-1:B2.) Petitioner testified that he was tenured as a supervisor because he had been with the district for over six years and held supervisory positions

for at least three years. See, N.J.S.A. 18A:28-6. This assertion was not contested² by the PACS.

Petitioner's most recent job title with PACS was AACSA (2010-2011). He held that title from July 1, 2010, until he was terminated on May 13, 2011. Petitioner was not granted tenure as an AACSA because he only held the title for one year. Petitioner was also the supervisor of special education from May 2010 to March 2011. Petitioner's title for the preceding (2009-2010) school year was supervisor of planning, research, and evaluation.

By letter dated May 13, 2011, Kathy McDavid³, the CSA, notified petitioner that his contract would not be renewed ("non-renewed") for the 2011-2012 school year. On May 16, 2011, petitioner requested reasons for the decision. McDavid explained it was because petitioner's position as AACSA was being abolished. (H-6; P-1:H6-H10; P-2; P-4). But McDavid expounded upon her reasons for "non-renewing" petitioner in an August 2011 certification. Therein she states, in part:

8. At no time was petitioner employed as a Principal. In addition, he was never employed in any "acting" position, nor did I ever seek county approval to have him serve in such capacity. Any assumption of "principal duties" was limited to temporary coverage caused by the absence of the actual principal.

9. At the end of the 2010-2011 school year, it became clear that the School needed to reorganize its organizational structure in light of its special education population's needs.

10. Because of special education needs, I could not justify the continued existence of a non-special education

² Petitioner and the PACS had settlement discussions numerous times during the course of the hearings. Counsel for the PACS attached to its April 27, 2012, closing brief, minutes from February 2012, board meeting authorizing that petitioner be rehired. Also attached was an April 23, 2012, letter offering petitioner his position back as supervisor of curriculum and instruction. The PACS urges that petitioner's refusal to accept his job back is tantamount to job abandonment. I DISAGREE. These documents were not offered into evidence during the hearing as they contain settlement discussions. Settlement discussions are not admissible. Evid. R. 408. And I cannot make a determination based upon inadmissible evidence. Moreover, as petitioner correctly points out, the letters did not resolve any issues of back pay or other benefits. Therefore, these documents have no evidential bearing on this case.

³ McDavid was the CSA from September 2009 to June 30, 2011. McDavid was unable to testify due to illness and she eventually passed away in 2012.

supervisory position in addition to creating a special education geared position. **As I did not believe Petitioner to be qualified for a special education director or supervisor position, I decided to non-renew Petitioner as the Administrative Assistant to the Chief School Administrator in order to cut costs needed to cover the new special educational supervisory position. Accordingly, I determined to abolish the Administrative Assistant position for the 2011-2012 school year.**

11. Although Petitioner was sent and (sic) Open Public Meetings notice, my decision to non-renew him was never discussed at the May 12, 2011 board of trustees meeting.

12. During the May 12, 2011 Board of Trustee meeting the Board of Trustees voted on my recommendations to renew staff certain members, as is required. However, the Board held no discussion relating to those personnel actions.

13. Similarly, the Board did not discuss my decision to non-renew petitioner. In order to comply with the statutory notice requirements for non-renewals, I notified him of my decision on or about May 13, 2011.

14. Petitioner requested a statement of reasons for his non-renewal. I notified Petitioner, in writing, that the reason for his non-renewal was that his position was to be abolished effective June 30, 2011.

15. Petitioner appeared before the Board on June 28, 2011 for a *Donaldson* hearing. Petitioner was informed that he was permitted to make a presentation to the board of trustees, but that his appearance was not a question and answer session. He requested that his employment be restored and left the meeting.

16. The following day, Petitioner was notified that the Board upheld the decision to non-renew his contract because the position had been abolished.

17. In the interest of resolving all outstanding payroll issues by June 30, 2011, which was to be my last day at the School, I requested that Petitioner sign an accounting of his unused leave balances. Petitioner reminded me that he had not yet appeared for his *Donaldson* hearing and did not wish to sign off on the accounting.

18. I later apologized to Petitioner for asking him to come in before the *Donaldson* hearing and clarified that I simply

made the request so that I could have everything completed before my last day of employment.

Verna Forman replaced McDavid as the CSA effective July 1, 2011. Forman submitted a certification dated August 12, 2011, on the same topic. Forman's certification provides, in part:

2. For the 2010-2011 school year, Petitioner was employed as the Administrative Assistant to the Chief School Administrator. Petitioner's position was abolished and he was non-renewed for the 2011-2012 school year.

3. At the end of the 2010-2011 school year, the School was forced to close its second building. This required the School to reassess its needs, as all of its employees would now be located in one building.

4. As a result, the previously posted "supervisor" position is no longer needed and will not be filled.

5. For the 2011-2012 academic year, the only anticipated supervisory position that will exist is for special education. The position reiterates the obvious requirement that the individual hold supervisory certification and have a special education background.

6. The position has been posted, but the job description and precise duties of the new positions are still under consideration and have not yet been fully developed.

7. The job description will further detail the requirements of this position. Specifically, this position is intended to provide oversight of the Child Study Team and case management, as well as oversight of the special education teaching staff members.

8. Based on the records maintained by the District, Petitioner does not possess the requisite special education endorsements required to perform the duties of the new created position. See Exhibit A.

On June 28, 2011, the board's agenda contained a motion to advertise for a special education supervisor and a technology coordinator. (P-1:G8-5)

On July 26, 2011, the board approved a request (by motion) to internally advertise for a supervisor's position for the 2011-2012 school year. (P-35). On July 27, 2011, PACS posted the advertisement. (P-7). The internal posting stated:

We are hiring for the following position:

Supervisor

- Supervisor certification, 5 yrs. Supervisor experience in the education field, excellent communication skills, experience in writing curriculum, data analysis.

Interested applicants may submit a letter of interest, resume and copy of certifications and references in person or via email to:

Verna Dennis-Forman, Interim Chief School Administrator

(P-7).

An interview committee was formed and Forman was part of the committee. Indeed, Foreman's certification, at ¶5 states, that for the 2011-2012 academic year, the only anticipated supervisory position that will exist is for special education. Therefore, PACS was hiring qualified individuals in the (administrative) supervisor's category.

The advertisement makes no mention of a special education position or the requirement of special education credentials. Petitioner was not informed of the internal advertisement. Nor was he offered the chance to fill the position.

On August 31, 2011, the board (by motion) formally abolished petitioner's position of administrative assistant to the district superintendent (a/k/a chief school administrator). (P-3).

Kim Smitelli, a teacher or tech support staff member, filled the duties of supervisor or director of curriculum, adjunct to her other duties, for the 2011-2012 school year (Answers to petitioner's interrogatories # 26 (P-5); See also, demonstrative evidence based upon the testimony of Verna Forman). (P-9). Smitelli was paid an

additional \$30.00 per hour to facilitate⁴ the social studies, math, and science curriculum. (P-1;G8-2). No proof was offered that the position of director of curriculum was abolished in 2011-2012. And by all accounts, Smitelli was not tenured. Petitioner testified his tenure rights were violated when Smitelli occupied the position of curriculum coordinator, director, or supervisor.

Petitioner also claims he regularly served in the capacity as a ("substitute") principal for the period 2005-2011. Therefore his termination in 2011 was in violation of his tenure rights as principal. The PACS required two building principals because it occupied two separate building locations. The PACS presented evidence that petitioner was never appointed as principal, and never actually served acting principal or interim principal. (McDavid certification and Forman testimony). Nor did the board appoint petitioner in such capacity.

When the designated principal was absent from either building (not on the property, on vacation, official leave, ill, at a seminar, in training or otherwise), he was a de facto principal, as a matter of fact and law. Petitioner testified that he accumulated tenure rights over time while a serving as a de facto principal.

Petitioner asserts the he was the de facto or "substitute" principal as follows:

1. 2006-2007 school year – Ten (10) days
2. 2007-2008 school year- Forty-One (41) days
3. 2008-2009 school year- Forty-Nine (49) days
4. 2009-2010 school year- Eighty-Nine (89) days
5. 2010-2011 school year – One-Hundred-Twenty-Two (122) days

(P-1)

Petitioner completed and filed annual reports, suspended or expelled pupils, held fire drills, filed monthly reports with the trustees, prepared budgets, held managerial type meetings with staff and parents, attended board meetings, all of which petitioner

⁴ Facilitate is defined as -- to make easier : help bring about. <www.merriam-webster.com>. Rather that state that Smitelli was directing the curriculum, the board used a subterfuge and substituted "facilitate."

claims are duties of a school principal⁵. See Petition, ¶¶ 17, 18. Petitioner documented numerous examples of this type of activity. (P-1; P-32; P-33; P-37 and P-39). The PACS does not dispute that petitioner intermittently performed some of these functions, albeit in his capacity as a supervisor or director.

Petitioner substituted as principal only when the properly designated principal was away from the building. Many staff members “filled in” or “substituted” for administrative staff members during temporary absences. The PACS strongly disputes the legal impact of substitute service and its impact upon tenure, if any.

FINDINGS OF FACTS

1. Petitioner was employed by the PACS as the administrative assistant to the chief school administrator for the 2010-2011 school year. He was also the director or supervisor of the special education department from May 2010 to March 2011.

2. Petitioner was terminated on May 13, 2011.

3. Petitioner was tenured under his administrative certificate as a supervisor and director.

4. The PACS advertised (internally) that it was hiring a supervisor, almost immediately after petitioner was terminated.

5. Petitioner was purposely or negligently not offered re-employment as a supervisor or director.

6. Kim Smitelli, a non-tenured staff member, was assigned and compensated to fill the position of supervisor of curriculum, a position that petitioner previously held. This title was not abolished.

⁵ Citing N.J.S.A. 18A:25-5, 18A:37-4, 18A:40-7 and 18A:41-1.

7. On August 31, 2011, the PACS abolished petitioner's position as administrative assistant to the chief school administrator for the 2011-2012 school year.

8. Petitioner filled in or substituted as principal from 2005 to 2011 when the building principal was absent.

9. Petitioner was not appointed as interim principal or full time principal from 2005-2011.

CREDIBILITY

I found the testimony of petitioner to be mostly self-serving but credible to the extent that his tenure rights as a supervisor were violated. Petitioner preceded pro se and was clearly frustrated. Petitioner generated numerous self-serving documents, records, notes, and charts. He offered an overabundance of grievances making it difficult to sort out the material issues relevant to tenure arguments. But the denial of his tenure rights was adequately documented by the official actions and records of the district.

Verna Forman was less than credible as it relates her recollection of why petitioner was terminated and why he was not rehired. Forman testified/certified that petitioner's position was abolished by the board before August 2011, when it was not. Forman sought a replacement for petitioner by internally posting an advertisement in July 2011, which is contrary to the tenure laws. Forman was not sure if petitioner was tenured as a supervisor/director, even though she was part of the administration for a number of years and worked with petitioner. Petitioner worked with the district for six years as a supervisor. It is hard to comprehend that Forman was unaware of petitioner's tenure status.

I also found the McDavid certification unreliable for many of the same concerns expressed with Forman's testimony/certification. Unfortunately, McDavid was too ill to testify.

The remaining witnesses were not material to the contested issues.

CONCLUSIONS

The purpose of the tenure laws, N.J.S.A. 18A:28-1 to -18, is "to aid in the establishment of a competent and efficient school system by affording teaching staff members a measure of security in the ranks they hold after years of service." Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528-29 (App. Div. 1999). The Tenure Act, N.J.S.A. 18A:28-1 to -18, and N.J.A.C. 6A:11-6.1 (Charter Schools) specifically define the conditions under which teaching staff members are entitled to the security of tenure. Zimmerman v. Newark Bd. of Educ., 38 N.J. 65 (1962), cert. den. 371 U.S. 956 (1963). Tenure arises only upon compliance with the precise conditions articulated in the statute. N.J.S.A. 18A:28-5. Picogna v. Board of Education of Cherry Hill, 143 N.J. 391, 400 (1996). See also, Howley v. Ewing Bd. of Educ., 6 N.J.A.R. (EDU) 509, 516 (1982).

A teaching staff member "is entitled to tenure if they; (1) work in a position for which a teaching certificate is required; (2) hold the appropriate certificate; and (3) have served the requisite period of time." Spiewak v. Summit Bd. of Educ., 90 N.J. 63, 74 (1982); N.J.S.A. 18A:28-2; N.J.S.A. 18A:28-4; N.J.S.A. 18A:26-5. (See also Charter School Program Act, N.J.S.A. 18A:36A-1 to -18, and its implementing regulations, N.J.A.C. 6A:11-1.1 to -6.3)

A teaching staff member who is promoted may acquire tenure in the new position after the expiration of a period of employment of two consecutive calendar years in the new position; employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or, employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years. N.J.S.A. 18A:28-6.⁶

⁶ Unless otherwise specified in the Charter School Program Act or its implementing regulations, or unless otherwise exempted by the Commissioner of Education, "[a] charter school shall operate in accordance with its charter and the provisions of law and regulation which govern other public schools." N.J.S.A. 18A:36A-11(a).

!

Petitioner did not accrue tenure rights as a Principal

I **CONCLUDE** that petitioner did not obtain tenure as a principal for the following reasons: 1) petitioner did not serve as a principal for the required probationary period; 2) petitioner is entitled to tenure credit for substitute service as a principal during vacancies, but not the temporary absences of incumbent principals; and 3) petitioner did not obtain promotional tenure as a principal because he did not serve enough time as a principal.

1. Petitioner did not satisfy the time requirements for tenure as a principal.

Tenure requirements are embodied in N.J.S.A. 18A:28-5. Generally, teaching staff members must be properly certified and serve in the position for a probationary period to attain tenure. The analysis of tenure rights starts with the determination of what certificate is at issue. There are only three types of certificates: 1) **instructional** (e.g. teachers etc.); 2) **administrative** (e.g. principals and superintendents etc.); and 3) **educational services**⁷ (e.g. school psychologists, social workers and guidance counselors etc.).

A certificate is a credential that the State Board of Examiners issues to an individual serving as a teaching staff member. N.J.A.C. 6A:9-2.1. It is their license to teach or work in the public school system. An endorsement authorizes the certificate holder to teach a specific subject area. There are numerous special endorsements that permit educators to teach special subjects within their certified area, such as teaching industrial arts, auto mechanics or elementary education.

An educator can acquire tenure under one of or more of these certificates. N.J.S.A. 18A:28-5. And he or she can attain tenure with respect to all endorsements held under the particular certificate. Ellicott v. Board of Educ., 251 N.J. Super. 342,

⁷ See, N.J.A.C. 6A:9-13.1 et seq.

349, (App. Div.1991); Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987); certif. denied 110 N.J. 512 (1988).

The legislature carved out specific exceptions for administrative certificates and endorsements. N.J.S.A. 18A:28-5. These are managerial positions wherein the actual experience was deemed a vital ingredient of the tenure process. Nelson v. Board of Educ., 148 N.J. 358 (1997). Therefore, after Nelson, the legislature determined that a supervisor such as a principal or assistant principal must actually work in the position to attain tenure. The same exception was not inserted for instructional or educational services certificates. N.J.S.A. 18A:28-5. Finally a teacher with an instructional certificate (i.e. teacher's certification) and an administrative certificate (i.e. principal's certification etc.) cannot cross certificates and claim tenure as a principal unless they have worked the requisite time under the administrative certificate as a principal.

Certainly, petitioner held the appropriate administrative certificate and endorsement (principal) required to serve as a principal. But, he was not officially designated or assigned the title of principal. Nor did he serve the necessary probationary period under N.J.S.A. 18A:28-5(b).

From the 2005 to 2010 petitioner's official title was supervisor. He was promoted to administrative assistant to the chief school administrator for the 2010-2011 school year. This title is the charter school equivalent of an assistant superintendent. It is above a principal. I **CONCLUDE** that petitioner was not appointed to the position of principal and therefore cannot not make a claim of tenure for this title. Even if an administrative assistant to the chief school administrator is the charter school equivalent of a principal, petitioner only served in this title for ten months, which is an insufficient period to acquire tenure.

2. N.J.S.A. 18A:16-1.1 precludes petitioner from attaining tenure as a principal while serving as a substitute for an incumbent principal.

Petitioner holds both a supervisor and a principal endorsement, under an administrative certificate. Petitioner argues that although his job titles were “supervisor” and “director” from 2005 to 2010, he simultaneously performed principal duties to such an extent that he deserves tenure as a principal. Essentially petitioner is attempting to piece together a principal/tenure claim by focusing on the tasks he performed rather than the position he held.

Petitioner is entitled to tenure credit as a principal where he officially served as acting, or interim principal, **during actual vacancies**. But N.J.S.A. 18A:16-1.1 prevents him from accruing tenure as a **substitute** principal during **temporary absences**. N.J.S.A. 18A:16-1.1 authorizes a board of education to “designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee.” However, “no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.” *Ibid.* Thus, “a person properly employed pursuant to N.J.S.A. 18A:16-1.1 is not entitled to the status and the resulting benefits of teaching staff membership.” *In re Sayreville Educ. Assn.*, 193 N.J. Super. 424, 427 (App. Div. 1984). In fact, N.J.S.A. 18A:16-1.1 applies “when the services of a substitute teacher are required because of the temporary absence, even if protracted, of a regular teacher whose return to duty is contemplated.” *Id.* at 428. But, “[i]f that other employee has . . . terminated his employment, then the place which the appointee is filling is not the place of the other but rather a vacant place, and the statute ordinarily does not apply.” *Ibid.*

The Supreme Court stated in Lammers v. Bd. of Educ. of the Bor. of Point Pleasant, 134 N.J. 264, 268 (1993), “[t]he implication drawn by the Appellate Division in Sayreville between a **vacancy** and an **absence** is unmistakable. An absence exists when the missing teacher is scheduled ultimately to return to the position. A vacancy exists when the teacher leaves the position permanently, as in the case of a resignation or a retirement.” Thus, a school employee who serves during a **temporary absence**

may not accrue tenure, while a school employee who serves during a **vacancy** may so accrue tenure. As the Court explained in Spiewak, *supra*, 90 N.J. at 81, N.J.S.A. 18A:16-1.1 is an exception to the statutory rule that a teacher who holds a proper certificate for the requisite number of years is eligible for tenure. As such, a teacher who does not otherwise satisfy N.J.S.A. 18A:28-5 cannot tack on time accrued as a substitute under N.J.S.A. 18A:16-1.1 in order to obtain tenure.

The distinction between **temporary absence** and **vacancy** is illustrated in Walton v. Bd. of Educ. of the Twp. of Newton, EDU 7628-06⁸, Initial Decision (May 10, 2007), *adopted*, Comm'r. (August 8, 2007). In Walton, the Commissioner affirmed the ALJ's conclusion that an interim principal's service before the effective date of the incumbent principal's resignation did not count toward tenure because there was not, until then, an actual vacancy. Relying on Sayreville and Lammers, the ALJ found that N.J.S.A. 18A:16-1.1 precluded Walton from accruing tenure while serving as interim principal, because Walton was in effect a substitute principal until a vacancy was created by the incumbent's resignation. As a result, Walton could not tack the time served as interim principal onto his two calendar years as actual principal in order to obtain tenure under N.J.S.A. 18A:28-6.

In Donnelly v. Bd. of Educ. of Hasbrouck Heights, EDU 7770-99⁹, Initial Decision (October 29, 2001), *rejected*, Comm'r. (December 17, 2001), the Commissioner held that service during a vacancy counts toward tenure in that position. Donnelly served as acting principal for the 1996-1997 academic year; as acting principal for one month in September 1997; as principal for seven months during the 1997-1998 academic year; and, as principal for the 1998-1999 academic year. The Commissioner held that Donnelly's service as acting principal should be credited toward tenure as principal **because there was an actual vacancy during that time**. However, the Commissioner further held that since Donnelly was employed on a calendar year basis, and "he did not serve **two consecutive calendar years**, with reemployment, as an acting principal and principal," Thus the provision requiring consecutive years of service was a factor. N.J.S.A. 18A:28 -5 and -6.

⁸ Found at <<http://lawlibrary.rutgers.edu/oal/search.html>>

⁹ *Id.*

Here, petitioner claims he actually served or was appointed as interim or acting principal during various (vacancy) periods from September 1, 2005 to January 16, 2006; July 1, 2006 to August 31, 2006; September 1, 2006 to November 1, 2006 (or whenever Sheila Williamson began her employment as principal); and July 1, 2007 to August 1, 2007, for a total of nine months (See P-39, P-1). During these dates, petitioner typically served as principal after the resignation of an incumbent principal but, before the start date of the next principal. And since this service occurred during vacancies, petitioner could argue he accrued tenure credit while serving as “acting” principal. The PACS denies that petitioner was officially designated as acting principal. (McDavid Affidavit, ¶ 8 and see P1-14, P-31).

None of petitioner’s contracts or the official board minutes corroborate that petitioner was actually appointed as interim or acting principal (P-14; P-31). Petitioner merely assumed the duties of principal, without formal action of management or the board. Or his superiors asked him to substitute as principal on intermittent dates, between 2005 and 2011. Nevertheless assuming petitioner’s factual assertion to be true, and he was acting principal because there was a real vacancy in that title, he still did not serve the required two years or consecutive periods, sufficient to acquire tenure as a principal. N.J.S.A. 18A:28-5. His service was sporadic and occurred at different points in time, totaling nine months over a five year period. As noted above, a district may designate an employee to serve in the place of another during the absence, disability, or disqualification of the incumbent. N.J.S.A. 18A:16-1.1.

The record reflects substitute service was a common practice at PACS because of its small size and limited administrative staff. Thus, on many dates between 2005 and 2011, petitioner merely substituted during the temporary absences of the incumbent principal whose return was contemplated. Many times the designated principal was only out of the building for a few hours. Pursuant to N.J.S.A. 18A:16-1.1, petitioner cannot be credited for tenure time as a principal.

As the commissioner stated in Rossi v. Bd. of Educ. of the City of Newark, 1977 S.L.D. 734, 739, “[t]he statutory prescription of [N.J.S.A. 18A:16-1.1] is clearly directed

at the need to maintain functional school operations irrespective of employee absence and to insure that the entitlement to accrue service toward a tenured status is afforded to **only one person** in a specific position at one time.” (Emphasis added).

Petitioner was well-aware that he would be needed for substitute service. His contracts stipulated that he could be asked to perform “any other duties as assigned” in addition to those specifically included in his contracts. And he worked for charter schools in the past (Charter Tech). Indeed N.J.A.C. 18A:16-1.1 provided the PACS the flexibility needed to ensure adequate staffing during the temporary absences of incumbent principals. These managerial assignments cannot serve as “an obvious effort to circumvent the school [tenure] laws,” against which the court warned in Sayreville, supra, 193 N.J. Super. at 428.

I **CONCLUDE** that petitioner is entitled to tenure credit while he was acting as principal during vacancies, but not during temporary absences. In this case petitioner’s service as acting principal fell well short of the probationary period he would need to attain tenure as a principal.

3. Petitioner is not entitled to promotional tenure as a principal.

I **CONCLDUE** that petitioner is not entitled to promotional tenure as a principal under N.J.S.A. 18A:28-6. Again, petitioner was never officially assigned the title of principal. Therefore he did not fill the title for the two years necessary to claim promotional tenure. N.J.S.A. 18A:28-5; N.J.S.A. 18A:28-6.

II

Petitioner was a tenured director/supervisor, and is therefore entitled to assert tenure rights over a non-tenured staff member who is working in a title for which petitioner is qualified.

The abolishment of petitioner’s job title did not extinguish his tenure rights. Tenure provides petitioner special re-employment rights by seniority over tenured staff members, and absolute employment rights over non-tenured staff members.

Tenure and seniority have two separate functions. Tenure is a status designed to protect teachers from dismissal for unfounded, flimsy or political reasons, Spiewak, supra at 90 N.J. 73, and to afford teachers a measure of security in the ranks they hold after years of service. Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949). Seniority provides a mechanism for ranking all tenured teaching staff members so that reductions in force and reemployment can be effected in an equitable fashion and in accordance with sound educational policies. Lichtman v. Ridgewood Bd. of Educ., 93 N.J. 362, 368 (1983). Hence, seniority must be regarded as a consequence of tenure.

Petitioner was the AACSA for the 2010-2011 school year, and he was also the supervisor of the special education from May 2010 to March 2011. CSA Verna Forman took over supervision of the special education department in March 2011.

The PACS motives for terminating petitioner were spurious. When petitioner was released in May 2011, the Board stated it was cutting costs by eliminating an administrative position. The board was unclear when it articulated what method it was using in terminating petitioner. First petitioner was non-renewed, which is terminology associated with non-tenured staff members. (P-1:H6). The May 13, 2011, notice does not mention petitioner's title being abolished. Then a second undated notice was issued stating petitioner's position was being abolished. (P-1:H9).

On June 29, 2011, McDavid advised petitioner that the board deliberated and abolished his title. Indeed, the board's June 28, 2011, agenda contained no indication petitioner's job title was scheduled for any official action. (P-1:G8-1). The June 28, 2011, minutes that reflect no action was taken to abolish petitioner's position (C-2). Petitioner's position was abolished on August 31, 2011, according to the board's minutes. (P-35). The process reflects disorganization between the board and its management. Neither the board, McDavid nor Forman had a coherent reorganization plan, in relation to petitioner.

Against this backdrop, the PACS made no effort to evaluate petitioner's seniority or tenure rights once he was terminated on May 13, 2011. It might be that petitioner's seniority rights (as a supervisor) were inferior to the remaining administrative staff. But nothing in this record indicates that petitioner's seniority rights were even considered. This is most evident when Forman testified that if petitioner was tenured, he would have re-employments rights as a supervisor. Yet she had no idea if he was tenured.

The PACS management described its dissatisfaction with petitioner's performance as supervisor of the special education department. (e.g. See, Forman and McDavid certifications.) The PACS utilized the Cape May Special Services District for child study team services. Forman testified that petitioner was not processing bills from the Cape May Special Services District timely. But no complaints, letters, emails, warnings, or performance appraisals confirmed any such complaints from the Cape May District. Petitioner stated that he thoroughly reviewed the invoices to make sure that services were properly billed and received. He was not made aware of any serious complaints or problems. And yet he was relieved from his duty as supervisor of this department, with no documented misdeeds or performance-related complaints. Petitioner was an outcast, and targeted for removal. Rather than bring tenure charges, if just cause existed for petitioner's removal, he was fired, in complete disregard of his tenure rights to other titles.

On July 26, 2011, after petitioner was terminated, but before the official abolishment of his title, the board authorized (by motion), the posting of an internal advertisement for the position of "supervisor," for the 2011-2012 school year. (P-35). The internal advertisement was posted on July 27, 2011. (P-7).

Petitioner was not formally notified of the job posting for "supervisor." In fact, petitioner was purposely excluded from being made aware the posting by the designation "internal posting." The timing is very telling and undeniable. Almost concurrent with the posting of an opening for supervisor, PACS formed a committee to interview prospective candidates for the newly posted (supervisor) position. Petitioner was not invited to interview with the committee, in spite of his tenure status as a supervisor and the law requiring the re-employment of tenured staff. Petitioner learned

about the internal posting from his PACS acquaintances. He notified the district of his interest and requested an interview (P-36), but his request was ignored. CSA Forman was on the committee, but could not explain why petitioner was denied an interview.

The advertisement does not specially mention any title or position. But the McDavid certification states that "I did not believe petitioner to be qualified for a special education director or supervisor position, I decided to non-renew petitioner as the Administrative Assistant to the Chief School Administrator in order to cut costs needed to cover the **new special educational supervisory position**." (P-2:¶ 10). Indeed petitioner was the supervisor of the special education department from May 2010 to March 2011.

CSA Forman also stated that she anticipated hiring a new supervisor¹⁰ of the special education department for the 2011-2012 school year. Likewise, Forman commented in her certification (and during her testimony) that petitioner was not qualified for the special education position irrespective of his 2010-2011 assignment to this department. (P-2). Indeed, petitioner did not receive any negative comments or negative performance reviews.

Once more the timeline is suggestive of the PACS's motives. Petitioner filed legal action against PACS on August 4, 2011. Immediately thereafter, Forman states in her August 12, 2011, certification - - a general supervisory position is longer needed. (P-2). Only a supervisor of special education would be needed and petitioner is not qualified. (P-2). The obvious impact was to deny petitioner a general supervisory position. It was assumed he was not qualified for the special education position, so only that title remained available to be filled.

McDavid and Forman knew, or should have known, that petitioner had the proper credentials to supervise any department, including the special education department, since he was assigned this task in 2010-2011. And the education regulations do not

¹⁰ Petitioner attached minutes of the February 28, 2012, board meeting to his closing brief (P-42), confirming the board hired a new special education supervisor. Petitioner's evidence ended with P-41. P-42 not marked for identification nor was not offered into evidence during the hearing.

specifically require a special education endorsement¹¹ to be the "supervisor" of the special education department. Likewise, the advertisement contained no mention of special education credentials. Therefore, the McDavid and Forman affidavits, as well as Forman's testimony, were disingenuous by stating that petitioner was not qualified to be the supervisor of special education when viewed against his credentials, performance reviews, and prior assignments.

PACS also filled the position of supervisor of curriculum with a non-tenured staff member for the 2011-2012 school year. Again petitioner's tenure status entitles him to displace staff members in titles for which petitioner was qualified and tenured, and which are occupied by non-tenured staff. Kim Smitelli took over the curriculum duties. There is no proof that this title was formally abolished (See P-29)¹². I **CONCLUDE** assigning a non-tenured staff member to perform the duties and functions of a curriculum supervisor circumvented and violated petitioner's tenure rights.

The law regarding reemployment following a reduction in force is set forth in N.J.S.A. 18A:28-12, which states in pertinent part:

If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal...

In Capodilupo v. West Orange Twp. Bd. of Educ., 218 N.J. Super. 510 (App. Div. 1987), the court ruled that a tenured teacher who taught physical education is entitled to retention as against a non-tenured teacher with the same certification. And in Ellicott v. Frankford Bd. of Educ., 251 N.J. Super. 342, 347 (App. Div. 1991), the court reiterated

¹¹ N.J.A.C. 6A:11-5.1(b)1 states that "A lead person or another person who holds a New Jersey standard school administrator or supervisor certificate or a New Jersey standard or provisional principal certificate in accordance with N.J.A.C. 6A:9-8.6 to direct and guide the work of instructional personnel including but not limited to, **the supervision and evaluation of staff and the development and implementation of curriculum...**"

¹² See, In the matter of Marsh v Atlantic City Board of Education, EDU 8582-98, Initial Decision (October 20, 1999), modified on other grounds, Comm'r (December 21, 1999), St. Bd. (October 4, 2000) <<http://lawlibrary.rutgers.edu/oal/search.shtml>>

that a teaching staff member with an educational-services certificate had preference over a non-tenured teaching staff member in all positions for which her certificate qualified her.

The PACS had an obligation to offer petitioner re-employment based upon his tenure as a supervisor. I **CONCLUDE** that the PACS purposely or negligently ignored petitioner's tenure status and violated his rights as a supervisor/director.

ORDER

I **ORDER** that petitioner be reinstated as a supervisor/director with respondent PleasanTech Academy Charter Schools, together with retroactive salary, benefits and emoluments. All other relief sought by petitioner is **DENIED**.

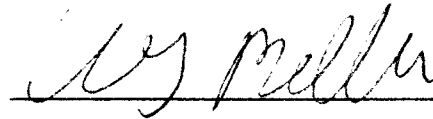
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 14, 2012

DATE



W. TODD MILLER, ALJ

Date Received at Agency:

6-14-12

Date Mailed to Parties:

6-14-12

/sd

WITNESSES

For Petitioner:

Jessie Reeves
Verna Dennis-Foreman
Anthony Calandrillo
Marc Zydiak
Dr. Paula Roberson

For Respondent:

Charmette Long Vernon

EXHIBITS

For Petitioner:

- P-1 Petitioner's Petition with sub-Exhibits A1 through L1 as enumerated in
Petition's Exhibits Table of Contents
- P-2 Certification of Verna Foreman, August 2011
- P-3 August 31, 2012, Board of Trustees Agenda
- P-4 Certification of Kathy McDavid, August 2011
- P-5 Respondent's Supplemental Answers to petitioner's interrogatories,
October 2011
- P-6 Part Three of CSA Michael Carr's October 2008 Evaluation of petitioner
- P-7 July 27, 2011, respondent's posting for Supervisor position
- P-8 Respondent – proposed Organizational Chart, August 9, 2011
- P-9 Demonstrative Exhibits developed during Foreman's trial testimony
- P-10 Affidavit of Anthony Calandrillo, July 20, 2011
- P-11 Petitioner's letter of application for five open positions, July 6, 2011
- P-12 Respondent's Organizational Chart dated August 24, 2011
- P-13 Respondent's Responses to Interrogatories, September 9, 2011

- P-14 PleasanTech Academy administrative positions 2005-2006 through 2011-2012
- P-15 November 30, 2011, E-mail regarding open temporary Vice Principal position
- P-16 Respondent's November 14, 2006, Board of Trustees agenda
- P-17 Respondent's answer to petition dated August 25, 2011, and affirmative defenses
- P-18 Not entered
- P-19 Not entered
- P-20 Petitioner's monthly reports (October/November 2006 through June/July 2007, then October 2009 through June 2011)
- P-21 Petitioner's e-mail confirmation of delivery of each of his monthly reports (2009-2010 and 2010-2011)
- P-22 Respondent's ASA job description
- P-23 Photograph of petitioner's office illustrating his Principal Certification posted as per instructions of his CSAs
- P-24 Suspensions issued by petitioner (**sealed**)
- P-25 Fire drill petitioner conducted
- P-26 E-mails relative to petitioner's exclusion of ill students
- P-27 Documentation regarding petitioner's involvement, writing, filing and delivering Annual Report
- P-28 Petitioner's Annual Evaluation, 2009-2010
- P-29 List of abolished positions at end of 2009-2010 and rehire list for 2010-2011
- P-30 Excerpts of respondent Board of Trustees Minutes containing agenda
- P-31 Salaries of respondent administrators 2005 to 2011
- P-32 Petitioner's work log as building Principal 2008-2011
- P-33 Petitioner's e-mails self-document his work logs as building Principal 2008-2011
- P-34 Documentation concerning petitioner performing duties of Supervisor of Technology, Summer 2007 through December 15, 2009
- P-35 Respondent Board of Trustees meeting minutes May 12, July 14, July 26, August 9, and August 31, 2011

- P-36 Petitioner's USPS receipt applying for open position of Supervisor, August 5, 2011
- P-37 Not entered
- P-38 E-mails documenting meetings conducted regarding Special Education student, S.H.
- P-39 Affidavit of Paula Roberson, July 31, 2011
- P-40 Respondent Organizational Chart "Approved for 2008-2009"
- P-41 Petitioner's perfect attendance 2008-2009 and 2009-2010
- P-42 Not entered
- P-43 Not entered
- P-44 Not entered
- P-45 Not entered

For Respondent:

- R-1 Petitioner's Responses to Respondent's Interrogatories and Demand for Documents

By the Court:

- C-1 Board Meeting Minutes (May 12, 2011, July 14, 2011, July 26, 2011, August 9, 2011 and August 31, 2011)
- C-2 Board Meeting Minutes (June 28, 2011)

IN THE MATTER OF THE TENURE HEARING :
 OF WAYNE CALANDRIELLO, : COMMISSIONER OF EDUCATION
 SCHOOL DISTRICT OF THE TOWNSHIP OF : DECISION
 SOUTH ORANGE-MAPLEWOOD, :
 ESSEX COUNTY. :

SYNOPSIS

The petitioning school district certified thirteen tenure charges of unbecoming conduct and other just cause against respondent – a tenured physical education teacher – alleging, *inter alia*: inappropriate communication and/or contact with students; failure to supervise students during class time; failure to report a student fight incident; failure to report for work; failure to notify the substitute service; shoplifting of magazines; and failure to disclose a dismissal from previous employment with Monmouth County. The majority of the thirteen charges stem from two incidents: respondent's behavior during a study hall which he supervised on January 7, 2010, and the circumstances and aftermath of respondent's failure to report to work on April 15, 2011. In the latter incident, respondent was arrested for shoplifting at a 7-Eleven on his way to work; the criminal charges were later dismissed. The Board contended that respondent's misconduct warrants dismissal from his tenured position. The first of the thirteen charges was voluntarily withdrawn by the Board, and the ALJ dismissed charge 11 as redundant with charge 10.

The ALJ found, *inter alia*, that: respondent engaged in conduct unbecoming when he failed to appropriately supervise his students during a study hall on January 7, 2010, leading to misuse of instructional time and the use of forbidden electronic devices by students; the evidence does not, however, support the Board's contention of failure to respond to or report a student fight because the nature of the 2010 incident shown on videotape can best be characterized as teasing rather than fighting; at the time of the 2010 incident, respondent received only a written reprimand and the conduct is no more egregious two years later; respondent misrepresented the reason for his April 15, 2011 absence from school as well as his efforts to contact the substitution service, and this behavior constituted conduct unbecoming; respondent's failure to report for duty on that day – and failure to give timely notice that he would be absent – also constitute conduct unbecoming a teacher; the credibility of the only witness presented by the Board in support of the shoplifting charge was profoundly deficient, and his testimony was irrational and lacked internal consistency; accordingly, the Board failed to prove that respondent committed a shoplifting offense. The ALJ concluded that respondent was guilty of conduct unbecoming, but that the circumstances of the case do not warrant dismissal from his tenured position. Accordingly, the ALJ recommended that the appropriate penalty in this matter is the forfeiture of the 120 days of salary withheld pursuant to *N.J.S.A. 18A:6-14*.

Upon careful and independent review of the record, the Commissioner concurred with the ALJ's findings and conclusions regarding respondent's unbecoming conduct. However, the Commissioner modified the penalty recommended by the ALJ and ordered that the respondent forfeit one year of salary increment and the 120 days of salary withheld pursuant to *N.J.S.A. 18A:6-14*, plus an additional four months suspension without pay. Accordingly, the Commissioner adopted the Initial Decision of the OAL, as modified with respect to the penalty, as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 30, 2012

OAL DKT. NO. EDU 13720-11
 AGENCY DKT NO. 321-10/11

IN THE MATTER OF THE TENURE HEARING :

OF WAYNE CALANDRIELLO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP OF	:	DECISION
SOUTH ORANGE-MAPLEWOOD,	:	
ESSEX COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the respondent, Wayne Calandriello, and the Board of Education (Board), as well as the respondent's and the Board's respective replies thereto.

This case involves tenure charges brought by the Board against the respondent, a tenured teacher in the South Orange-Maplewood School District. The Board charged the respondent with 13 counts of unbecoming conduct and other just cause stemming from four separate incidents.¹ Following the presentation of the Board's case, the Board voluntarily

¹ The following is a summary of the tenure charges:

- Charge 1: Inappropriate communication and/or contact with a student;
- Charge 2: Failure to properly supervise his students during a third period study hall on January 7, 2010;
- Charge 3: Failure to take any action in response to a fight between students during a third period study hall on January 7, 2010;
- Charge 4: Failure to report a student fight that occurred during a third period study hall on January 7, 2010;
- Charge 5: Misuse of instructional time during a third period study hall on January 7, 2010;
- Charge 6: Failure to report for duty on April 15, 2011;
- Charge 7: Failure to notify the substitute service on April 15, 2011;
- Charge 8: Misrepresentation regarding reason for April 15, 2011 absence;
- Charge 9: Misrepresentation regarding notification of substitute service for April 15, 2011 absence;
- Charge 10: Arrest for shoplifting on April 15, 2011;
- Charge 11: Arrest for shoplifting adult magazines on April 15, 2011;
- Charge 12: Failure to disclose dismissal from employment with Monmouth County Youth Service; and
- Charge 13: Other just cause.

withdrew charge 1 and the Administrative Law Judge (“ALJ”) dismissed charge 11. In his Initial Decision the ALJ found that the respondent engaged in unbecoming conduct by failing to appropriately supervise his students during study hall on January 7, 2010; by failing to provide the Board with timely notice that he would be absent on April 15, 2011; and by misrepresenting his reason for the April 15, 2011 absence and his efforts to contact the substitute service. The ALJ also found that the Board failed to sustain its burden of proving misconduct arising out of the allegation that the respondent engaged in shoplifting on April 15, 2011, and for failing to disclose his dismissal from employment at the Monmouth County Youth Detention Center (“Detention Center”) when he was hired in 2001. The ALJ recommended the imposition of a 120 day suspension as a result of the respondent’s unbecoming conduct.

The Board submitted exceptions to support the contention that the ALJ erroneously found that the Board did not prove certain charges against the respondent, and seeking to have the Commissioner modify the recommended penalty. Initially, the Board takes exception to the ALJ’s summaries of the witness testimony, noting that these do not reflect complete summaries of each and every witness’s relevant direct and cross-examination testimony. The Board provided numerous examples in which it takes exception to the ALJ’s summary of witness testimony, reiterating the factual findings suggested in its post hearing submission.

With respect to charges 6 and 7, the Board maintains that the ALJ incorrectly placed greater responsibility for the unsupervised students on the pool deck on the custodian and the night school teacher than on the respondent. The Board contends that the fact that other individuals before him did not secure the area does not diminish respondent’s responsibilities as it was his duty to supervise the students in the pool area. Since the respondent did not report to

work and failed to notify school officials, his morning swim class entered the pool area without any supervision.

The Board also claims that the ALJ erred in concluding that the Board did not prove charges 10 and 11, involving the shoplifting of pornographic magazines. In connection with charge 10, the Board takes issue with the ALJ's credibility determination, arguing that the Board's witness, Habes Al-Fwaier – who worked at the 7-Eleven store where the alleged shoplifting incident occurred – was more credible than the respondent. The Board stressed that Al-Fwaier had no stake in the proceeding, and he was forthright in his answers – particularly in view of his language difficulties and his reluctance about testifying. On the other hand, the respondent was incredible throughout his testimony. The Board cites numerous examples of the respondent's testimony and argues that because the ALJ found the respondent to be lacking credibility when it involved other aspects of his testimony, it only follows that his whole testimony should be deemed incredible. The Board maintains that selective credibility determinations deserve no deference. With respect to charge 11, the Board contends that the ALJ's conclusion that it was irrelevant whether the magazines the respondent allegedly shoplifted were pornographic is inconceivable. The Board maintains that fact that the respondent felt compelled to obtain pornographic materials on his way to work – where he supervises students in a pool – is very disconcerting.

Finally, the Board asserts that the ALJ erred in concluding that the Board did not prove charge 12. The Board argues that the ALJ incorrectly found that the employment information that respondent submitted to the Board at the time of his hire was accurate. The Board maintains that in light of the Final Decision of the Merit System Board removing him from his position at the Detention Center, the recommendation letter from the

Assistant Superintendent of the Detention Center that the respondent submitted with his employment application was inherently false. As a result, the Board argues that the Commissioner should reject a portion of the Initial Decision and dismiss the respondent from his tenured position.

In his exceptions, the respondent urges the adoption of the Initial Decision with respect to the specific charges that were either dismissed by the ALJ or which the ALJ determined the Board failed to prove. Respondent takes exception to the following factual conclusions contained in the Initial Decision, which he alleges are not supported by the record. The respondent notes that the charges stemming from the incident during study hall on January 7, 2010 arose out of a short video taken with a student's cell phone. Respondent contends that the ALJ should have included the fact that the school had surveillance video of the cafeteria at the time, and that the principal never looked at the video to determine the context of the incident and the respondent's subsequent actions.

Additionally, respondent contends that the ALJ wrongfully concluded that he was able but failed to call the school to report his absence on April 15, 2011. The respondent contends that the circumstances surrounding his dispute with Al-Fwaier at the 7-Eleven regarding magazines and the subsequent police presence prevented him from being able to make a phone call. Further, the respondent contends that the ALJ's conclusion that he improperly failed to disclose the reason for his absence on the day of his arrest and the following days is at odds with *N.J.A.C. 6A:9-17.1*. Under *N.J.A.C. 6A:9-17.1*, the respondent was required to report his arrest within 14 days and, in fact, the respondent sent a memorandum to the Superintendent on April 29, 2011. Finally, the respondent contends that a 120 day suspension is too harsh based

on the totality of the circumstances in this case and the Board's limited and unsubstantiated proofs.

In reply to the respondent's exceptions, the Board contends that no negative inference should be drawn from the lack of the surveillance video because the footage from the student's cell phone was enough to establish the respondent's failure to properly supervise his students, and at the time it was not foreseeable that there would be a need for the evidence in a future tenure case. Additionally, the Board contends that no negative inferences can be drawn from the fact that the 7-Eleven surveillance video was never presented at the hearing. The Board also states that the respondent incorrectly asserted that the ALJ made a finding that his failure to disclose the reason for his absence on April 15, 2011 breached a duty under *N.J.A.C. 6A:9-17.1*. The Board stresses that the ALJ found that it was the false information that the respondent provided to multiple Board employees and his misrepresentations regarding contacting the substitute service that constituted the unbecoming conduct. Finally, the Board reiterates its request to have the respondent dismissed from his tenured position.

In reply to the Board, the respondent contends that the Board exceptions should be rejected because the factual assertions suggested by the Board were previously argued below, and the ALJ's credibility findings should not be rejected because they are supported by the evidence in the record. In his reply, the petitioner essentially provided a lengthy verbatim recitation of the facts that were outlined in his post-hearing submission. With respect to the petitioner's exceptions regarding the shoplifting charge (charge 10), the petitioner emphasizes the clear credibility findings made by the ALJ. The petitioner also contends that charge 11 is related to charge 10 and was therefore properly dismissed by the ALJ because there is no nexus between the nature of the magazines that were allegedly shoplifted and the respondent's work

responsibilities. The petitioner points out that there was no allegation that petitioner shared or intended to share any such magazine with a student or co-worker. Finally, in reply to the Board's exceptions regarding charge 12, the petitioner argues that the Board's arguments concerning the recommendation letter from the Assistant Superintendent of the Detention Center are unfounded by the record and distort the scope of the letter. Lastly, the petitioner again argues that dismissal from his tenured employment is not warranted in this case.

Upon a comprehensive review of the record in this matter, which included the transcripts of the hearing dates conducted at the OAL on March 6, 2012, March 16, 2012, March 23, 2012 and March 26, 2012, the Commissioner concurs with the ALJ that the Board has established that respondent is guilty of unbecoming conduct. The ALJ's finding in connection with the characterization of respondent's behavior as unbecoming conduct is fully supported by the record and consistent with applicable law.

With respect to the January 2010 incident (charges 2-5), the Commissioner is in accord with the ALJ's determination that the respondent engaged in unbecoming conduct by failing to properly supervise his students during study hall, leading to a misuse of instructional time and the use of forbidden electronic devices by the students. Although the surveillance video from the school's cafeteria was not provided by the Board at the hearing, it is readily apparent from the student's cell phone video that the students were not behaving appropriately and that the respondent did not do enough to properly quell the situation. On the charges related to the employment application (charge 12), the Commissioner also agrees with the ALJ – for the reasons discussed on pages 19-21 of the Initial Decision – that the Board failed to prove that the respondent provided erroneous information at the time of his hire in August 2001. There was no indication that the recommendation letter provided by the respondent was fraudulent, and the

Board had authorization to check all of respondent's references. Further, the application did not require the respondent to state why he left his position at the Detention Center.

The Commissioner is also in accord with the ALJ's determination concerning the shoplifting charges and the aftermath of the incident (charges 6-11). Although the respondent was arrested, the charges were eventually dismissed and he claimed that the whole incident with the magazines was simply a misunderstanding. Notably all of the facts related to the alleged shoplifting incident were in dispute; as such, witness testimony and ultimate credibility is the only means available to make a determination as to the veracity of the charges. The ALJ had the opportunity to assess the credibility of the witnesses who appeared before him and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [N.J.S.A. 52:14B-10(c)].

Based on his overall assessment of the Board's only witness related to the alleged shoplifting, Mr. Al-Fwaier, the ALJ found that he was not credible, stating that he "was so profoundly deficient that it is impossible to make findings supported by his testimony." The ALJ went on to note that Al-Fwaier "described Calandriello as a nice and good person, a type of person he was proud to see. This assessment, however, is totally inconsistent with his claim that he watched Calandriello shoplift or had a suspicion that he was shoplifting ... without intervention." (Initial Decision at 15). Notwithstanding the Board's contentions to the contrary, the Commissioner finds no basis in the record to reject either the ALJ's recitations of testimony

or his determinations of witness credibility. Further, since the Board carries the burden of proof, without a credible witness or other evidence in the record, the charge must be dismissed.

Although the Board did not sustain its burden of proving that respondent was guilty of shoplifting, there is no doubt that respondent failed to report to duty that day and did not provide the school with notice before the start of his morning classes. The ALJ found the respondent's assertion that he was prevented from making a phone call after he was confronted at 7-Eleven by Al-Fwaier was not plausible. There is nothing in the record to contradict the ALJ's assessment of the respondent's credibility and his finding on this point. Moreover, it is undisputed that the respondent failed to notify the substitute service, which was a violation of Board policy. It is also undisputed that the respondent informed the Superintendent of his arrest within 14 days in accordance with *N.J.A.C. 6A:9-17.1*, yet the Commissioner agrees with the ALJ that the respondent's misrepresentations in the days following the arrest were problematic in that he gave false and conflicting information to three different Board employees on four separate occasions, putting into question the respondent's professionalism. The term unbecoming conduct is elastic and broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services." *Karins v. City of Atlantic City*, 152 N.J. 532, 554 (1988). Behavior rising to the level of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." *Hartman v. Police Dep't of Ridgewood*, 258 N.J. Super. 22, 40 (App. Div. 1992) (citing *Asbury Park v. Dep't of Civil Serv.*, 17 N.J. 419, 429 (1955)). As a

result, the ALJ's finding in connection with the characterization of respondent's behavior as unbecoming conduct is fully supported by the record and consistent with applicable law.

Turning to the appropriate penalty, the Commissioner recognizes that the factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, any evidence as to provocation, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring. *In re Hearing of Kittell, Little Silver School District*, 1972 S.L.D. 535, 541; *Fulcomer, supra*, 93 N.J. Super. at 422.

While in no way minimizing the seriousness of respondent's infractions, the Commissioner is in accord with the ALJ that – under all of the circumstances and considerations existing in this matter – removal of respondent from his tenured position is an unduly harsh penalty. The dismissal of the respondent from his teaching position is not justified because the conduct that was proven does not establish his unfitness to discharge the duties and functions of his position as a teacher. Nor is there is any indication that the respondent's behavior will have any long term effects on the maintenance of discipline among the students and staff in the South Orange-Maplewood School District. Moreover, the respondent has also received positive evaluations throughout his employment with the Board.

It is important to recognize that the appropriate penalty must be assessed based upon the conduct proven. Despite the list of charges, the Board effectively proved that the respondent failed to properly supervise his students during one incident in 2010², and that the respondent did not report for duty on April 15, 2011 – which situation was compounded by respondent's failure to follow proper protocol and by his communication of conflicting

² The January 2010 study hall incident resulted in nothing more than a written reprimand by the Board at the time, and the incident was never referenced in the respondent's subsequent evaluation.

information to Board employees. The Board deemed the fact that the respondent was picking up adult magazines on his way to school to be extremely significant, yet there is no indication that he ever had such materials in the school building or that he shared them with any students or coworkers. Without any additional evidence, the mere fact that the respondent admitted to possessing a Playboy magazine does not rise to the level of unbecoming conduct necessitating the removal of his tenure.³

Although dismissal in this case is not warranted, respondent's unbecoming conduct necessitates an appropriate penalty. It is without question that "teachers carry a heavy responsibility by their actions and comments in setting examples for the pupils with whom they have contact." *In the Matter of the Tenure Hearing of Blasko, School District of the Township of Cherry Hill*, 1980 S.L.D. 987, 1003. Certainly the proper supervision of students is a paramount component of a teacher's responsibilities. Although the respondent may not have intended to be absent from school on April 15, 2011 when he left his house, the situation he ended up in resulted in students being left unsupervised on a pool deck and caused confusion within the school as to his whereabouts, which is not conducive in a productive school setting. The respondent's unfortunate actions were only further exacerbated by his subsequent communications with Board employees that did not convey the requisite candor that is expected of a teaching staff member. Respondent's conduct in January 2010, coupled with the series of events on April 15, 2011, indicates that the respondent displayed questionable judgment that does not meet the implicit standard of good behavior required by teaching staff members.

Therefore, the Commissioner finds and concludes that the loss of respondent's increment for one year and the 120 days salary withheld pursuant to *N.J.S.A.* 18A:6-14,

³ Although it was alleged that the respondent shoplifted other types of pornographic magazines, the only thing proven at the hearing was the respondent's own admission that he left the 7-Eleven with a Playboy magazine.

following the certification of tenure charges plus an additional four months suspension without pay is a sufficient penalty to impress upon respondent the seriousness of her errors in judgment displayed in this matter. Accordingly, the Initial Decision of the OAL, as modified with respect to the penalty, is adopted as final decision in this matter.

IT IS SO ORDERED.⁴



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/30/12

Date of Mailing: 7/31/12

⁴ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 13720-11

AGENCY DKT. NO. 321-10/11

**IN THE MATTER OF THE TENURE
HEARING OF WAYNE CALANDRIELLO,
SCHOOL DISTRICT OF THE TOWNSHIP OF
SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY.**

Joanne L. Butler, Esq., for petitioner, School District of the Township of South Orange-Maplewood (Schenck, Price, Smith & King, attorneys)

Sheldon H. Pincus, Esq., for respondent, Wayne Calandriello (Bucceri and Pincus, attorneys)

Record Closed: May 11, 2012

Decided: June 14, 2012

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE

The School District of the Township of South Orange-Maplewood (District) brought thirteen charges against tenured teacher Wayne Calandriello (Calandriello) for conduct unbecoming a teaching staff member and/or other just cause. A tenured employee of a public school system shall not be dismissed except for inefficiency, incapacity, unbecoming conduct, or other just cause. N.J.S.A. 18A:6-10. The District

certified charges alleging: (1) inappropriate communication and/or contact with students; (2) failure and/or refusal to supervise students during class time; (3) failure to take any action in response to fight, etc.; (4) failure to report student-fight incident; (5) misuse of instructional time; (6) failure to report for duty; (7) failure to notify the substitute service; (8) misrepresentation regarding reason for April 15, 2011, absence; (9) misrepresentation regarding notification of substitute service for April 15, 2011, absence; (10) arrest for shoplifting; (11) arrest for shoplifting of adult magazines; (12) failure to disclose dismissal from employment with County of Monmouth; and (13) other just cause. The issues are whether Calandriello engaged in the alleged conduct, and, if so, what is the appropriate penalty.

PROCEDURAL HISTORY

The District certified charges against Calandriello to the Bureau of Controversies and Disputes of the Department of Education (Commissioner) on August 26, 2011. Upon the receipt of Calandriello's Answer on November 15, 2011, the Director of the Bureau of Controversies and Disputes referred the tenure charges to the Office of Administrative Law (OAL) on November 25, 2011, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

In accordance with the statutory and regulatory case-processing and discovery requirements related to tenure charges, the hearing commenced on March 6, 2012, and continued on March 16, March 23, and March 26, 2012. The parties ordered transcripts and filed closing briefs on May 11, 2012, in compliance with the schedule permitted by the regulations. The record closed on that date.

The District voluntarily withdrew Charge One at the conclusion of the presentation of its case.¹ I also dismissed Charge Eleven at that time as being redundant with Charge Ten and because it separately bore no relationship to Calandriello's teaching responsibilities.

¹ In light of the voluntary dismissal of Charge One, I have removed P-7 from the record as well as paragraphs two through five of P-2.

FINDINGS OF FACT

Background

I **FIND** the following background **FACTS**:

Calandriello was hired by the District for the 2001-2002 school year based on his New Jersey K-12 certification as a teacher of health and physical education. For the ensuing eleven years, he taught physical education, health, driver's education, and swimming based on his water safety instructor certification. He also holds a K-12 teacher of the handicap certification. Calandriello has been assigned to Columbia High School (the School) for seven and one-half years of his employment with the District. Judy LoBianco has been his supervisor for the last seven years. LoBianco had observed and evaluated Calandriello's performance during this period and had consistently found him to be proficient in virtually all relevant areas of performance each year. (P-38 to P-62.)

Charges Two Through Five

Charges Two through Five arise out of the same January 7, 2010, incident and are treated together.

On January 7, 2010, eighty percent of Calandriello's thirdperiod thirty-two-student swim class was assigned to a biology lab. Rather than conduct swim instruction for the remaining few students, Calandriello exercised his discretion to hold a study hall in the school cafeteria, and he informed the non-lab students a day earlier to report to the cafeteria with work to do.

During the study hall, a student recorded on his cell phone, for almost five minutes, an interaction between a male (M) and female (F) student. (P-30.) The recording shows that F and an additional student were also using cell phones in plain view despite a school policy that students must refrain from using electronic devices and that staff members prohibit their use. The policy also requires the confiscation of

the device if a student is uncooperative as well as referral to the dean for further discipline. The recording was posted on Facebook, eliciting a complaint by the parent of M to Columbia High School Principal Lovie Lilly claiming that his son had been assaulted.

The following can be observed from the cell phone recording: M and F were sitting across from each other at a cafeteria table. Calandriello was at the table a few seats away reading a newspaper during the entire interaction. M and F are teasing each other, and M is pestering F with questions about her moving from town. She replies that it is none of his business and that she is moving that month. F walks around the table, grabs M's arm and says, "I swear to God. Stop talking to me." F returns to her side of the table. M then stands up and leans across toward her, whereupon F swats at him. M tries to reach her across the table, but there is no contact. M then comes to F's side, and she swats at him knocking his glasses off. M says, "do you know how much these glasses cost?" They continue to tease each other. At the end of the recording, Calandriello finally tells them to stop. Both M and F are loud and not doing anything productive in terms of studying during the study hall. However, neither of them exhibited the malice or aggressiveness one would attribute to a fight. It was more akin to mutual teasing and banter.

Calandriello testified that M and F knew each other from swim class. M apparently liked F and they would egg each other on. Calandriello would try to keep them apart in the pool. On January 7, as M and F entered the cafeteria, M was telling her that he liked her, and she replied that she did not like him. Before the recording, Calandriello went to M and made a sign across his lips to convey to M that he should seal his lips. Calandriello also testified that, after the encounter between M and F, M begged him not to report him to the principal.

Principal Lilly reviewed the recording and concluded that there was unacceptable behavior by the students. She criticized Calandriello, who sat next to the students during the interaction reading the newspaper and did nothing for approximately five minutes to quell the situation until he finally told them to stop. There was no supervision of the class. She was critical that no instruction was taking place in this study hall

supervised by Calandriello and that the study hall was not structured. Lilly met with Calandriello on January 20, 2010, and issued a memorandum to him on January 28, 2010, which was placed in his personnel file. (P-9.) The memorandum recites Calandriello's admission that, in an instructional/supervisory capacity, he failed to intervene during a conflict between students and failed to submit disciplinary referrals regarding the male student. Lilly criticized Calandriello for a failure to execute his professional responsibilities for the general supervision of students as follows:

. . . you failed to do the following:

1. Intervene during a student conflict that included bullying and harassment, and resulted in a physical assault.
 - a. Students were observing yelling, screaming, and taunting each other.
 - b. One student was observed leaving her seat, running past you, and threatening another student, while you were observed reading a newspaper.
 - c. One student was observed slapping another, causing a pair of glasses to fall to the floor.
 - d. One student was overheard telling the argumentative students "to stop" and "threatening" to place the footage from the videotape on Facebook.
2. Prevent a student from using an electronic videotaping device during an instructional period.
3. Call for security and/or an administrator to quell the situation.²
4. Report the incident to school officials (dean of students/administrators).

Lilly determined that Calandriello's conduct on January 7, 2010, warranted the above Memorandum of Reprimand and a written warning that "in the future, failure to properly supervise students under your tutelage may lead to disciplinary actions and/or consequences." Calandriello did not file a grievance in protest of the letter of reprimand.

² Board Policy 3290 requires a teaching staff member to immediately report any instance of violence. (P-9.)

I **FIND** that Lilly's assessment of the encounter was accurate except for her characterization of harassment, bullying and an assault. The totality of the interaction suggests a disruption of a class and clearly inappropriate behavior. It did not constitute such serious misbehavior, however, that warranted a referral to security and/or the administration for disciplinary action. Nevertheless, Calandriello's lack of intervention, lack of control over his class, ignoring the open use of electronic devices, and apparent disinterest in assuring that a productive study hall took place constituted a derogation of his teaching responsibilities. This is so despite Calandriello's claim that he had attempted to separate and quiet the two students earlier during the forty-minute study hall and before the recording was made. The video itself counters claims by Calandriello that he was not in a position to see several students using cell phones. Even with Lilly's more severe characterization of the January 7, 2010, encounter than what I have found, the District determined that Calandriello's conduct warranted no penalty more severe than a written reprimand. There was no increment withholding or tenure charges. The incident went unmentioned in his subsequent evaluation.

Charges Six Through Eleven

Charges Six through Eleven arise out of the same April 15, 2011, incident and its aftermath and are treated together. At the end of the Board's case, I dismissed Charge 11 (arrest for shoplifting of adult magazines) as being redundant with Charge 10 (arrest for shoplifting). Moreover, the District failed to establish that the nature of the allegedly shoplifted items had any unique bearing on his teaching duties so as to warrant a separate charge from that of arrest for shoplifting.

On his way to work on April 15, Calandriello followed his daily routine of stopping at a 7 Eleven store in Union where he would purchase The Daily News, The New York Post, and some food. Store manager Habes Al-Fwaier testified that he observed Calandriello take four or five magazines from a rack on the right side of the store and move to the refrigerator area in the back. Al-Fwaier further claimed he asked his cashier if Calandriello had paid for the magazines and was told that he had only paid for the newspapers. Al-Fwaier followed Calandriello to his car and asked him where were

the magazines, to which Calandriello replied that he didn't take a magazine. Al-Fwaier grabbed the magazines from inside Calandriello's jacket. He claimed that the magazines were in Calandriello's jacket and not between the two newspapers. Calandriello then gave him some money. He instructed Calandriello to return to the store. Calandriello was compliant; followed Al-Fwaier back into the store; and told him that if he wanted to call the cops to go ahead. Al-Fwaier estimated the value of the magazines to be approximately \$70. Al-Fwaier then called the police who arrived and arrested Calandriello.

Al-Fwaier described Calandriello, whom he observed coming to the store every day, as nice, good, and, "I was proud to see some people like him." He liked Calandriello. Yet, Al-Fwaier also testified that Calandriello had been taking magazines without paying for them for "months and months and days, every day come and do the same." He elaborated that Calandriello had been taking magazines once a week when new deliveries were made over a period of six months. He had not confronted Calandriello before because he wanted to make sure Calandriello was doing this. Although he testified that he had watched Calandriello shoplift repeatedly for six months without intervention, he also expressed shock and surprise that he would take adult magazines. Despite this testimony about delaying any confrontation, he also testified that the owner had instructed him that, any time he saw shoplifting, he was to report it to the police with a telephone number he had been given. He also stated that he always followed that directive of the store's owner. Al-Fwaier acknowledged that the store had six or seven video cameras that cover every corner of the store but did not know if Calandriello's alleged conduct was ever recorded. No surveillance tapes of the alleged shoplifting were produced during the pendency of the criminal charges or in this proceeding.

Calandriello was arrested, detained for a few hours, and charged with shoplifting.

Regarding the April 15 incident, Calandriello tells quite a different story. In January 2011, he slipped on black ice on his back porch and experienced pain in his left shoulder. He missed several days of school. He visited Dr. Kurt Von Suskil who suspected a rotator cuff disorder and prescribed Percocet. He again visited Von Suskil

on February 3 complaining of dizziness. The doctor suspected Vertigo and prescribed medication. Around this time, Calandriello also visited Orthopedist Dr. Laurie Glasser who had been treating him for knee and back problems. She ordered an MRI and gave him another prescription for pain. The MRI revealed a slight tear of the left rotator cuff. Approximately three weeks after seeing Von Suskil, Calandriello began taking the Percocet because the shoulder pain was getting progressively worse. He saw Dr. Vicki Raab on April 4 for his persistent vertigo-related dizziness. She noted his complaint of dizziness when driving in stop-and-go traffic. She believed that his symptoms were related to a possible inner-ear concussion from a fall in January and recommended that he continue to take Dramamine.³

Calandriello further testified that, due to his shoulder pain, he took a Percocet pill at 11:30 p.m. on April 14 and another one at 3:00 a.m. on April 15. At 6:00 a.m. he commented to his wife that his shoulder was killing him, and she suggested that he go to the emergency room of Riverview Hospital. He declined because this was a Friday before the District's Easter vacation, and such an absence could be an issue. He never told his wife he was going to the hospital. Nor did he instruct his wife to call the District's substitute service. He took another Percocet before he left for school at 7:10 a.m.

Calandriello followed his usual routine that day of exiting the Garden State Parkway and cutting through Union where he would stop daily at a 7 Eleven. His routine was to buy newspapers there as well as sometimes a drink and sometimes a magazine. He recalled that, on April 15, between 8:00 and 8:15 a.m., he parked his car; entered the 7 Eleven; picked up The Daily News and The New York Post; and picked up four magazines by the magazine rack. The magazines were Playboy, Sports Illustrated, People Magazine and Rolling Stone Magazine. He started feeling dizzy and wobbly and dropped the magazines. He picked up the magazines and proceeded to the back of the store to get something to drink and again dropped the magazines. He again

³ At the hearing I admitted medical records on behalf of Calandriello without the testimony of the doctors. The records satisfied the residuum rule (N.J.A.C. 1:1-15.5) with regard to corroboration of Calandriello's testimony. Additionally, they met the standards for a hearsay exception under N.J.R.E. 803(a)(6) and (c)(4) as business records and statements made for the purposes of medical diagnosis or treatment. Finally, the physician records represented straightforward observations as opposed to complex diagnostic explanations.

picked them up and stuck them between the two newspapers and did not procure a drink. Calandriello then waited in line at the cash register. As he was waiting, he saw Al-Fwaier walk outside the store before it was his turn at the register. He remembered talking to the person at the register about the National Basketball Association playoffs. He put the newspapers with the four magazines between but not inside them on the counter and gave the cashier a \$20 bill. He did not remember how much change he was given. He picked up the papers, put the money in his pocket and said to the cashier, "have a great weekend, take care" as he exited the store.

According to Calandriello, he then walked to his car, opened the door, and felt a slap on his sore left shoulder by Al-Fwaier causing him pain. Calandriello said, "don't do that again," Al-Fwaier said, "you didn't pay for the magazines" and Calandriello responded with, "what are you talking about." Contrary to Al-Fwaier's testimony, Calandriello denied that he had the magazines stuffed in his jacket, but rather they were with the newspapers. Calandriello testified that, after Al-Fwaier said he had not paid for the magazines, he said, "I didn't?" and added, "well, let's pay for the magazines," meaning, "I'll give you the money for the magazines." Calandriello wanted to clear up what, in his view, was a misunderstanding. Al-Fwaier then became nasty saying "mother fucker, give me the magazines, I called the police, I want them right now." Calandriello said, "here's the magazines." Al-Fwaier again put his hand on Calandriello's shoulder and started pulling him while saying, "you're coming inside." He walked into the store on his own. When in the store, Calandriello gave Al-Fwaier \$40, which he took. Al-Fwaier ordered him to sit behind the counter. His four magazines were no longer in view. He then observed Al-Fwaier go to the magazine rack, pick up some other magazines, put them on the counter, and hit them with the price gun. When Calandriello said, "look, I gotta make a phone call," Al-Fwaier replied, "no, you're not going to make any phone calls, the police are on their way. Just sit there and shut up." Calandriello testified that he had his cell phone in his car.

A police officer arrived around 8:15 a.m. and would not listen to Calandriello's side of the story. He took him outside and handcuffed him. Calandriello was in the back of the police vehicle for about fifteen minutes. He told the officer several times that he needed to call work but was told, "we can't let you do that." He was transported to

the Union Police headquarters where he was arrested. He was not permitted to leave until about 10:15 a.m. Two to three requests to make a phone call were denied.

Al-Fwaier testified that he subsequently agreed in a discussion with Calandriello and his lawyer at municipal court that he would dismiss the complaint against Calandriello if he paid the 7 Eleven owner the equivalent of \$70 times four times a month for six months. Al-Fwaier signed a letter on July 8, 2011, to the Union Township Municipal Court prepared by Calandriello's attorney. It said, "I, Habes Al-Fwaier, on behalf of Twfik Thabata, 7 Eleven and myself wish to have the charges against Wayne Calandriello dismissed. This was part of a larger civil dispute between us and has been resolved. We do not wish to pursue criminal charges and want the charges against Wayne Calandriello dismissed." (P-28.)

The Union Township Municipal Court dismissed the charge of shoplifting (N.J.S.A. 2C:20-11B(1)) against Calandriello on July 14, 2011. (R-11.) Calandriello denied that he paid Al-Fwaier money to cause him to dismiss the charges. He considered this to be a civil settlement that implicated Al-Fwaier having put his hands on him and getting physical with him. He was unaware of any formula for determining the amount of civil settlement.

Calandriello denied shoplifting from the store on April 15 or at any other time. He had had no intention of walking out of the 7 Eleven on April 15 with any items for which he had not paid.

Columbia High School has a written procedure for the reporting of staff absences. (P-11.) It contracts with an outside substitute service. In the event of an unanticipated absence, a teacher is to call the substitute service no later than 6:30 a.m. giving one's name, school, department, reason, and length of absence. After 6:30 a.m. he or she must call the main office at a designated number, which is that of School secretary Joan Foote. She keeps the attendance for staff members and directs substitutes as they come into the main office. When Foote reports at 7:00 a.m., she checks the fax machine for an attendance sheet from the substitute service as well as

her voice mail and e-mail. The staff member must also call the substitute service even after 6:30 a.m.

On April 15, Foote and then Vice Principal Janice McGowan were notified by the security staff around 9:00 a.m. that Calandriello's swimming class at the Columbia High School pool was unattended, thereby creating a potentially dangerous situation. The students were directed back to the locker rooms. Calandriello was due at school at 8:15 a.m. to cover an 8:25 a.m. swimming class. Students can only access the pool deck when a staff member opens otherwise-locked locker room doors. The doors this day were left open, not by Calandriello, but by the neglect of a custodian who had checked the pool earlier that morning and by a night school instructor, neither of whom had secured the doors as required.

Both Principal Lilly and Supervisor LoBianco testified as to their extreme student safety concern due to the unanticipated absence of Calandriello on the morning of April 15, because students, some of whom were non-swimmers, were present unsupervised on the deck of the swimming pool. As a swimming teacher, Calandriello's duties are to supervise the space and maintain security, safety, and cleanliness. It is undisputed that students do not have access from the locker rooms to the pool unless someone with an access card opens the doors from the inside. The pool area is under video camera surveillance at all times. The video of April 14 and 15 showed that the teacher of the adult swim class the night before had failed to secure the doors. The video also showed that the custodian who checked the PH level of the water on the morning of April 15 had likewise failed to secure the doors as required. Had either person secured the doors as they were supposed to, students would not have had access to the pool deck in Calandriello's absence.

The fax from the substitute service for April 15 did not indicate that Calandriello had called it to report an absence. (P-13.) Nor had Foote received a notification from Calandriello of his absence as of 9:00 a.m. Foote consulted with McGowan and tried to locate teachers to cover Calandriello's classes until she could ascertain when he would be in. Foote was unsuccessful in her attempts to contact Calandriello on his home and cell phones. McGowan also unsuccessfully called his two numbers and left messages

for him. McGowan also e-mailed the substitute service to inquire whether it had heard from Calandriello and received a response that it had not heard from him. (P-14 and P-15.) Foote testified that Calandriello called her around 10:00 a.m. on April 15 and told her that he had been at the hospital and would not be in. He said nothing else.

Calandriello testified that, as soon as he was returned to his car at the 7 Eleven after being released by the police, he called the main school telephone number where he left a message for Foote, but did not speak with her, advising only that he would not be able to make it in for the rest of the day at work and would need a substitute. He also claimed that, at 10:15, there were no messages on his cell phone, but one from McGowan appeared after one-half hour. When he arrived home, there were no messages on his home phone from anyone from the school.

On April 15 Maplewood Detective Sergeant James Deval, who is the police liaison to the District, telephoned Principal Lilly between 10:00 and 11:00 a.m. to report a call he had received from the Union Township Police Department. He conveyed to Lilly that one of her teachers, Calandriello, had been arrested that day for allegedly shoplifting approximately \$67 worth of magazines at a 7 Eleven store in Union Township. He had no personal knowledge as to what had occurred.

The District was on spring break for the week following April 15. Foote testified that, on Monday April 25, Calandriello came to her desk and said, "I am sorry about the 15th. I take full responsibility. I had taken some medication, and I thought that my wife had called to report my absence." Foote notified Calandriello's supervisor Judy LoBianco by e-mail that he had come to see her that morning and "said he took full responsibility for not calling for a sub on Friday April 15, 2011. He was taking medication for pain in his shoulder that knocked him out and he asked his wife to call the sub line which he thought she had done." (P-20.) Unlike April 15, the substitute service records reflect that Calandriello had called it or the main office in accordance with the required practice approximately twenty-one other times. (P-21.)

McGowan testified, in addition to Foote, that Calandriello approached her on April 25 after the spring break. He apologized for not returning her phone call on April

15. He told her that he had a shoulder injury and had taken prescribed Percocet on Thursday evening and had asked his wife to call in on Friday morning before 6:30 a.m. to say he would not be in. They discussed the concern that students were in the pool area without a teacher, to which he responded that students had always been told not to enter the pool deck without a teacher. Calandriello did not inform McGowan that he had been arrested on the morning of April 15. McGowan memorialized this April 25 conversation in an e-mail to LoBianco that day. (P-23.)

Calandriello also met with Supervisor LoBianco on the morning of April 25 regarding his April 15 absence. LoBianco testified that he told her that he was in shoulder pain over an on-going rotator cuff injury and went to the emergency room of Riverview Medical Center around 2:30 in the morning of Friday April 15. He explained that he was given Percocet for pain and that he takes full responsibility for not calling the sub service, but thought he had called from his cell phone at some point in the morning. He advised LoBianco that he had also spoken with McGowan and Foote that morning. LoBianco described Calandriello as visibly sweating and repeatedly apologizing during their meeting. (P-22.) He did not mention his April 15 arrest during this conversation.

Calandriello testified as to his discussions with staff on April 25 after the Easter vacation. At around 8:05 a.m. he kneeled down by Foote's desk in the main office and said, "I'm sorry what happened on Friday. I'll take full responsibility." She responded that it was a situation where no one knew where he was and they thought something had happened to him. He then went to McGowan's office and told her he had gotten her message and was sorry that he had not gotten back to her and would take full responsibility. She replied that they had been concerned about him and about the children on the pool deck. He answered that the children should not have been on the pool deck. Calandriello denied that he told either Foote or McGowan that he had gone to an emergency room or had instructed his wife to call and say such that morning. Calandriello does not permit students on the pool deck until he uses his electronic-locking-system swipe card on the door from the male locker room. He also spoke with LoBianco that day. She said they had been concerned about his health and his whereabouts on April 15. He told her he had an issue with his shoulder and had taken

some Percocet. He also told LoBianco that his wife said he should go to the emergency room on April 15, but he did not tell LoBianco that he had actually gone. He denied that he told LoBianco that he had instructed his wife to call the substitute service on April 15. During these conversations on April 25, no one mentioned knowledge of his arrest.

Calandriello participated in an April 26 meeting with Lilly, Assistant Superintendent for Administration James Memoli, LoBianco, and Union Representative Chandler Dennis. Lilly expressed concerns over Calandriello failing to properly report his absence on April 15 and the concern about students being unsupervised on the pool deck as a result of Calandriello's absence. Calandriello remained silent during this meeting and did not mention that he had been arrested on April 15. At the end of this meeting Memoli provided Calandriello with a letter signed by Superintendent Brian Osborne suspending him pending the investigation related to his April 15 absence. (P-25.) On April 29, 2011, Calandriello provided a handwritten memorandum to Superintendent Osborne indicating, "I was arrested on April 15, 2011. The charge was 2C:20-11B (1) Disorderly Persons Offense."

The District bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982); In re Garcia, 1970 S.L.D. 335. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., L. and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

Calandriello's recitation of what occurred at the 7 Eleven on April 15, 2011, raises concern about his candor even if his actions that day were influenced or confused by the effect of the prescription drugs he was taking for pain and vertigo. However, the credibility of the only witness presented by the District in support of the charge of shoplifting was so profoundly deficient that it is impossible to make findings supported by his testimony. He described Calandriello as a nice and good person, a type of person he was proud to see. This assessment, however, is totally inconsistent with his claim that he watched Calandriello shoplift or had a suspicion that he was shoplifting on a weekly basis for six months without intervention. Al-Fwaier testified that he had not confronted Calandriello earlier because he wanted to make sure Calandriello was doing this. If there were a suspicion of improper conduct on a weekly basis over six months, there would be no better way of proving it than to use the six or seven video cameras that cover every corner of the store. Astonishingly, Al-Fwaier, although the store manager, did not bother to access the room where the recordings were kept, nor did he make sure the cameras were operational. Although the criminal charge was never adjudicated, a negative inference can be made regarding the lack of video support for Al-Fwaier's charge when the video capabilities were present in the store and Al-Fwaier knew or at least had a suspicion before April 6 that Calandriello had been shoplifting. It is inconceivable that Al-Fwaier would have tolerated such conduct for such an extended period of time and in view of the alleged repetitiveness. Another glaring inconsistency with his lengthy failure to take action was his claim that the store owner had instructed him to report shoplifting to the police any time he saw shoplifting. There was neither an adjudication nor a plea to the shoplifting charge that might have supported the District's related charge. Al-Fwaier's testimony was irrational and lacked any semblance of

internal consistency. The District did not produce the 7 Eleven cashier to support Al-Fwaier's testimony. It is not inconceivable that Calandriello, in a medication-diminished state of mind and in a rush to get to work would purchase magazines and the newspapers and not think about the fact that he received change from a twenty-dollar bill. Again, the omnipresent video cameras, the contents of which no one produced, would have been helpful to determine whether magazines were visible among the newspapers when Calandriello allegedly placed them on the cashier's counter. There was no proof that the magazines Al-Fwaier tendered to the police were the ones that Calandriello actually had picked from the magazine rack or, as Calandriello contended, were instead ones that Al-Fwaier had picked from the rack after the fact and before the police arrived.

In short, Al-Fwaier's testimony cannot in any way be credited. As the burden of proof rests with the District, I **CANNOT FIND** that Calandriello committed a shoplifting offense on April 6, 2011.⁴ If the evidence were in equipoise, and there is, as here, no other persuasive evidence, the question in issue must go against the party who has the burden of persuasion. See In re Miller, EDU 5812-01, Final Decision (April 8, 2002), <http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>, where the Commissioner stated:

. . . the Commissioner is cognizant of the well-established standard that, in tenure matters, the charging entity bears the burden of proving, by a preponderance of the credible evidence, respondent's guilt on the charges. It is, likewise, clear that this burden is not satisfied where the evidence is in equipoise or is such as to raise legitimate doubt as to the existence of essential facts.

[Id. at *22.]

⁴ Although I previously dismissed Charge Eleven as being redundant and bearing no relationship to Calandriello's teaching responsibilities, the dismissal of Charge Eleven is further predicated on the lack of a finding that shoplifting of any magazines occurred—no less adult magazines. In view of the voluntary withdrawal of Charge One by the District, there is no factual basis to consider Dr. Osborne's concern that Calandriello's arrest for allegedly shoplifting adult magazines on the way to teach adolescents to swim in a swimming pool fit into Calandriello's pattern of making female students feel uncomfortable. There is no evidence of such a pattern.

Calandriello has been charged with a failure to report for duty. There is no dispute that he was arrested in Union around 8:15 a.m. on April 15, 2011, while on his way to work, or that he did not report to the School after his release that morning. I **FIND** that Calandriello failed to report for duty on April 15, 2011, and failed to advise of his absence before the start of classes.

Calandriello has also been charged with failure to notify the substitute service of his absence. District policy requires a staff member to report an unanticipated absence to an outside substitute service no later than 6:30 a.m. After 6:30 a.m., one is to call the main office number of Joan Foote and the substitute service as well. (P-11.) I **FIND** that Calandriello embarked on his trip to school after 6:30 a.m. only to be impeded by his detention in Union later that morning. Under such circumstances his primary obligation was to call Foote's number and secondarily that of the substitute service as well. Although Calandriello testified that he called Foote after his release by the police and left a message for her (Foote testified that they actually spoke to each other), he never disputed that he did not also call the substitute service as required. Information from the substitute service supported the claim that Calandriello never contacted it on April 15. Accordingly, I **FIND** that Calandriello did fail to notify the substitute service in violation of District policy.

With regard to Calandriello's interaction with School personnel related to his April 15 arrest, the testimony of the District's witnesses was more credible than that of Calandriello. He shared with none of them that the true reason for his absence was his arrest in Union on his way to School. Foote, McGowan, and LoBianco all testified forthrightly, without apparent animus and with recollections reinforced by timely written memorializations. None had any motive to fabricate a story. Each of them tempered their testimony. McGowan has retired from the District. LoBianco was very supportive of Calandriello in all of her yearly evaluations.

There is no doubt that Calandriello was shocked, terrified, and embarrassed over his detention at the 7 Eleven. He, however, had an imperative obligation to immediately contact the School when it became apparent that he would not be present to cover his morning classes. Unpersuasive is Calandriello's claim that he was prevented by store

personnel from accessing his cell phone in his car after being confronted in the parking lot and after he accompanied Al-Fwaier back into the store. He was not under arrest at that time. The police had not yet arrived to restrict his movements. It is not plausible, as he claimed, that the store personnel could have physically restrained him from accessing his phone and calling the School. I **FIND** that Calandriello was able but failed to call the School to report his absence before the commencement of classes.

I **FIND**, as Foote testified, that Calandriello called her around 10:00 a.m. on April 15 and told her nothing else other than that he had been in the hospital and would not be in. He was dishonest regarding the reason he gave for the absence. I do not credit Calandriello's claim that he never spoke to Foote that day, but instead called and left a message on her answering machine. I **FIND** that Calandriello compounded his dishonesty with School personnel when he approached Foote on April 25, the next school day after a vacation week, and told her as follows: he took full responsibility for the failure to timely report his April 15 absence but had been taking medication for a pain in his shoulder that knocked him out; and he had asked his wife to call the substitute service, which he thought that she had done. There is no reason to doubt that Calandriello was suffering from shoulder pain around April 15 or even that he was on strong medication at the time. That medical situation, as well as the testimony that no one on Calandriello's behalf had called the substitute service on April 15, is irrelevant because Calandriello is not now contending that someone had called or had been asked to call the substitute service, or that he was absent because of his physical condition. He instead has denied that he ever made that statement. Also, there is no question but that the true and sole reason for his absence was his arrest that day and that his failure to report for duty after his release was not due to his medical condition. I additionally **FIND** that Calandriello was dishonest with McGowan on April 25 when he told her that he thought his wife had called the substitute service before 6:30 a.m. on April 15 to say he would not be in because of medication he had taken. Again, that was not the reason for his April 15 absence. I **FIND**, again, that Calandriello was dishonest with LoBianco when he volunteered to her that he was absent on April 15 due to an evening visit to a hospital because of his shoulder injury and medication he had taken, and that he thought he had called the substitute service from his cell phone that morning.

Charge Twelve

The District alleges that Calandriello engaged in unbecoming conduct by not disclosing in his August 30, 2001, employment application or during his employment interview that he had been removed from his position with the Monmouth County Department of Corrections/Youth Services (Youth Detention Center) or that he had appealed that decision to the Merit System Board (now known as the Civil Service Commission).

As a result of a "Google" search of Calandriello in 2011, District personnel learned of a Final Administration Action of the New Jersey Merit System Board dated October 24, 2003, upholding the June 1, 2000, removal of Calandriello as a physical education instructor at the Youth Detention Center because of excessive lateness and absenteeism. (P-29.) In or about August 2001, Calandriello applied for a K-12 physical education and health position with the District. He submitted an application and resume. (P-6.) On August 30, 2001, he signed a "Statement of Assurances." (P-6.) It provided as follows:

By my signature below, I certify that all information supplied to the South Orange/Maplewood School District in support of my application for employment is true and accurate as stated. This includes information contained in my application, resume, curriculum vitae, employment folder, and oral statements I made to all District employees/representatives. I understand that if subsequent investigation reveals that I provided any false information, the District may refuse to hire me, may rescind any pending offer, or may terminate my employment, as it deems appropriate.

Under the heading "Teacher Experience," Calandriello listed as prior school employments, grade and subject, dates of service and length of service as follows:

Bradley Beach Elementary K-8 PE + Health- 2/99-6/00 1½ Years

Monmouth Cty. Youth Detention Center Juveniles Ages 8-18- 5/94-5/00 6 Years

In response to the question, "Why do you wish to change your present position?" Calandriello wrote on the application, "(Was Laid off)." Calandriello testified without contradiction that his reference to being laid off was with regard to his employment with the Bradley Beach Elementary School. He also listed on the application as references, Phillip Sidotti, Principal for the Middlesex Public Schools; James Jones Jr., Assistant Superintendent at the Youth Detention Center; and Ines Csulak, Recreation Director in Holmdel. Calandriello's accompanying curriculum vitae also listed Bradley Beach Elementary School full-time from February 1999 to June 2000 and the Youth Detention Center part-time from May 1994 to May 2000. Calandriello's application packet also contained a June 4, 2001, letter of recommendation from James L. Jones, Assistant Superintendent, Monmouth County Youth Detention Center which provided as follows:

Wayne Calandriello was the Recreation Supervisor under my supervision for several years. He performed his duties in an excellent manner, was responsive to the needs of young folk under his care, and conducted programs in accordance with the policies and procedures of this facility. If I can be of any further assistance, I can be contacted at the Monmouth County Youth Detention Center.

The District's Assistant Superintendent James Memoli testified regarding the application and interview process for Calandriello in 2001. He indicated that the consideration of Calandriello's application was made by Daniel Brundage, a former supervisor of physical education, who did not testify in this proceeding. The application packet (P-6) contains a "Transmittal Sheet" signed by Brundage recommending Calandriello's hire. The "Transmittal Sheet" also reflects that Brundage checked the references from Csulak, Sidotti, and Jones. Although neither Memoli nor Osborne would concede that Brundage telephoned the references, they were not in a position to deny that he had done so. The "Transmittal Sheet" has telephone numbers for all three references even though Csulak had not submitted a letter. Brundage must have looked up these numbers and called them. I **FIND** that Brundage called the listed references including Jones. Memoli acknowledged that there was no question on the employment application asking whether Calandriello was party to any employment-related litigation,

or that such a question was asked by Brundage during the interview. There is also no such question on the "Statement of Assurances."

Based on the testimony and the application-related documents, I **FIND** that, although Calandriello did not disclose on his application or at his interview that there was a pending administrative appeal related to his June 1, 2000, removal from his part-time job at the Youth Detention Center, he was never asked to make a disclosure of such nature in either instance. There is no evidence that he made any falsification during this process. Indeed, he accurately informed that he had been laid off from his current (or last) employment, which was the Bradley Beach Elementary School rather than the Youth Detention Center. According to the Merit System Board decision, the Youth Detention employment ended June 1, 2000, whereas the Bradley Beach employment would have ended later in June upon the completion of the 1999-2000 school year. Additionally, the "Statement of Assurances" requires only that the information on the application and employment folder be accurate. I **FIND** that the information was accurate. Even Jones's letter of recommendation that accompanied Calandriello's application asserting that Calandriello performed his duties in an excellent manner does not seem inconsistent with a dissatisfaction that was limited to his attendance. Had Calandriello been asked for the reason for the termination of all prior employments or whether any of the terminations had not been voluntary, it would have been incumbent on him to have explained his status with the Youth Detention Center. He, however, was asked no such questions.

LEGAL ANALYSIS AND CONCLUSIONS

The District has brought tenure charges against Calandriello alleging conduct unbecoming a teaching staff member and other just cause. Under N.J.S.A. 18A:6-10, tenured teaching staff members may be dismissed for inefficiency, incapacity, unbecoming conduct, or other just cause.

The statutory status of a tenured employee may not be lightly removed. Tenure protects teachers from arbitrary dismissal for "unfounded, flimsy or political reasons." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982). It is designed to aid in the

establishment of “a competent and efficient school system” by affording teachers a measure of security in the ranks they hold after years of service. Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949).

“Unbecoming conduct” is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances “be such as to offend publicly accepted standards of decency.” Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily “be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.” Hartmann v. Police Dep’t of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep’t of Civil Serv., 17 N.J. 419, 429 (1955)). Unbecoming conduct is particularly troubling in public education where teachers should set the good example and be a role model rather than engage in activity, which is inimical to the public interest and which is designed to impede the orderly process of public education. In re Sammons, 1972 S.L.D. 312, 321. The Commissioner in Sammons stressed that teachers are professional employees “to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.” Ibid.

In light of the above findings I **CONCLUDE** that Calandriello engaged in conduct unbecoming a teaching staff member by failing to appropriately supervise his students during study hall on January 7, 2010, leading to a misuse of instructional time and the use of forbidden electronic devices by students. However, the nature of the interaction between the two teasing students was not of such character as to warrant any additional adverse conclusions regarding the charges of failure to take any action in response to a fight and failure to report a student fight incident. The District’s previous

evaluation and weighing of the seriousness of Calandriello's January 7, 2010, conduct resulted in the substantially tempered discipline of a written reprimand. This conduct, even with the perspective of two-years' hindsight, is no more egregious now and should be treated no differently except to the extent of a determination of progressive discipline.

Calandriello, and any staff member of a District, is obligated to be honest in all interactions with District personnel. It was undoubtedly embarrassing for Calandriello to share the reason for his absence on April 15 regardless of whether or not he had actually committed the offense with which he was charged. Nevertheless, there was no justification for a lack of candor with three District personnel on four separate occasions including on the day of the arrest. At the time of his call on the morning of April 15, he appropriately notified Foote as the primary post-6:30 a.m. contact rather than the substitute service in accordance with District policy. Yet, I **CONCLUDE** that the false information he gave to Foote that day as well as the stories he gave to McGowan, LoBianco, and Foote on April 25 constitute conduct unbecoming a teaching staff member. He misrepresented the reason for his April 15, 2011, absence and also misrepresented his efforts to contact the substitution service. It is of no moment that Calandriello had thirty days to report his arrest to the Administration in that it provides no excuse for dishonesty. Such conduct subverts a teaching staff's responsibility to be a role model for students.

Based on the above finding that Calandriello had an opportunity to give timely notice that he would be absent on April 15 but failed to do so, I also **CONCLUDE** that Calandriello engaged in conducting unbecoming a teaching staff member. This constituted a failure to report to duty. One is derelict in his duty when he fails to take steps to minimize the chance that a class be uncovered, especially if the safety of students is imperiled. In this particular situation, Calandriello's responsibility to supervise students—some of whom were non-swimmers in a pool area—was great. Had he contacted Foote in a timely manner, emergency coverage could have been secured so that no students were left unattended on the pool deck. Despite the potential for an unfortunate accident at the pool that morning, the implications of Calandriello's misconduct, however, must be weighed against the undisputed fact that

no student would have had access to the pool deck and been put in danger if the custodian had fulfilled his responsibility to secure the pool access doors after he treated the pool that morning and if the night school teacher had similarly fulfilled his or her duty to have secured the doors before leaving the previous night.

Based on the above findings, I **CONCLUDE** that the District has not sustained its burden of proving misconduct arising out of the allegation that Calandriello engaged in shoplifting on April 15, 2011.

Finally, I **CONCLUDE** that the District has not sustained its burden of proving misconduct by Calandriello for failing to disclose his dismissal at the Youth Detention Center, an earlier employment. He accurately disclosed all information requested on his employment application with the District; he was never directed to make disclosures as to the reason for departing each and all past employments; and he did not deviously deny the District the opportunity to access representatives of the Youth Detention Center, as, indeed, the District's Brundage did reach out for a Youth Detention Center administrator.

With respect to the appropriate penalty, factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring. See In re Young, EDU 9771-09, Final Decision (October 15, 2010), <http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>; In re Suitt-Green, EDU 7071-96, Final Decision (October 14, 1997), aff'd, State Bd. of Educ. (February 4, 1998), <<http://www.state.nj.us/education/legal/index.html>>. Some of the charges against Calandriello have been affirmed and some have not. Although the totality of Calandriello's conduct certainly does not leave him blameless, it does not warrant the loss of his tenure. His 2010 misconduct resulted in a written reprimand, a penalty appropriate under the circumstances. His acts of misrepresentation on April 15 and April 25, although understandable in light of the embarrassing nature of the alleged arrest, were nonetheless inexcusable. The failure to timely report his absence from school on April 15, 2011, did, indeed, imperil the safety of students on the pool deck

because it resulted in a temporary lack of supervisory coverage. This failing is, however, tempered by the acknowledgment that student access to the unsupervised pool that day was due not to Calandriello's absence but to the failure of others responsible for securing the doors. Aside from the single 2010 written reprimand, Calandriello has been evaluated as proficient in each of his ten years of service to the District. In consideration of all of the factors relative to a penalty, I **CONCLUDE** that the imposition of a 120-day suspension is the appropriate penalty.

ORDER

I **ORDER** that certain tenure charges against Wayne Calandriello be **AFFIRMED** and that certain tenure charges be **DISMISSED** consistent with the above conclusions.

I further **ORDER** that Calandriello shall forfeit all salary and benefits that otherwise would have been accrued during the first 120 days of his suspension.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 14, 2012

DATE

Jesse H. Strauss

JESSE H. STRAUSS, ALJ

Date Received at Agency:

6/14/12

Date Mailed to Parties:

6/14/12

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

Judy LoBianco
Joan Foote
Brian Osborne
James Memoli
Habes Al-Fwaier
Janice McGowan
Lovie Lilly
James Deval

For Respondent:

Hannah Edelman
Wayne Calandriello

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

P-1 Sworn Statement of Evidence, August 26, 2011
P-2 Affidavit, Janice McGowan
P-3 Affidavit, Dr. Lovie Lilly
P-4 Affidavits, Joan Foote
P-5 Affidavit, Judy LoBianco
P-6 Calandriello resume and application packet
P-7 Removed
P-8 Memo to Calandriello, January 13, 2010
P-9 Memo to Calandriello, January 28, 2010
P-10 Calandriello schedule
P-11 Procedures for Absences
P-12 Memo to All Faculty re: Period Coverage Forms

- P-13 Daily Teacher Absence by School
- P-14 E-mail from Foote, April 15, 2011
- P-15A CD
- P-16 E-mail, LoBianco to Memoli, April 25, 2011
- P-17 Request Form for a Card Access System Report
- P-18 Pool Log
- P-19 E-mail, LoBianco to Calandriello, April 21, 2011
- P-20 E-mail, LoBianco to Memoli, April 25, 2011
- P-21 Daily Teacher Absence Reports by School
- P-22 Second E-mail, LoBianco to Memoli, April 25, 2011
- P-23 E-mail, LoBianco to Memoli, April 25, 2011, forwarding McGowan E-mail
- P-24 Memo, LoBianco and Lilly to Calandriello
- P-25 Letter, Osborne to Calandriello, April 27, 2011
- P-26 Memo, Calandriello to Osborne, April 29, 2011
- P-27 Arrest and Investigation Reports
- P-28 Criminal Charge Dismissal Correspondence
- P-29 Final Administrative Action of Merit System Board, October 24, 2003
- P-30 CD, January 7, 2010, Cafeteria Incident

For Respondent:

- R-1 Duplicate
- R-2 Duplicate
- R-3 Duplicate
- R-4 Duplicate
- R-5 Duplicate
- R-6 Duplicate
- R-7 Duplicate
- R-8 Letter of Rehire, May 17, 2011
- R-9 Duplicate
- R-10 Duplicate
- R-11 Certified Abstract of Municipal Court Dismissal, November 18, 2011
- R-12 Letter, Durant to Calandriello, August 23, 2011
- R-13 Absence Record Report, January 5, 2012

- R-14 Rx for generic of Percocet, January 20, 2011
- R-15 Von Suskil Medical Record Entry, January 20, 2011
- R-16 Von Suskil Medical Record Entry, February 3, 2011
- R-17 Von Suskil Medical Record Entry, February 3, 2011
- R-18 Von Suskil Medical Record Entry, February 10, 2011
- R-19 Letter, Glasser to Von Suskil, February 2, 2011
- R-20 Copies of four Rx's from Dr. Laurie Glasser
- R-21 Letter, Glasser to Von Suskil, March 2, 2011
- R-22 Medical Record Entry for Dr. Vicki Raab, April 4, 2011
- R-23 Medical Record Entry for Raab, May 19, 2011
- R-24 E-mail, LoBianco to Memoli, April 27, 2011
- R-25 Skipped
- R-26 January 2010 Monthly Calendar
- R-27 to R-36 Duplicates
- R-37 Newspaper Article
- R-38 to R-61 Summative Evaluations and Observation Reports between December 7, 2001, and June 7, 2010
- R-62 Letter, Lilly to Calandriello, February 5, 2007
- R-63 Medical Record Authorizations
- R-64 Board Policy - Code of Conduct
- R-65 Board Policy - Remotely Activating Communication Devices—Pagers and Cellular Phone

AGENCY DKT. NO. 208-7/12

YOU AND ME PRESCHOOL,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
NEW JERSEY DEPARTMENT	:	
OF EDUCATION, DIVISION OF	:	
ADMINISTRATION AND FINANCE,	:	
RESPONDENT.	:	

The petitioning preschool for children with disabilities challenges respondent's rescission of its approval to operate and seeks a stay of the rescission pending adjudication of the matter. A review of the parties' motion papers reveals the following.

N.J.A.C. 6A:23A-18.3(c)(1) requires that within two years of approval of a private school for students with disabilities, the school must show that it has reached a minimum level of enrollment. *N.J.A.C. 6A:23A-18.3(c)(1)(iii)* sets that minimum average daily enrollment (ADE) at 16 students for schools which were approved before the 2004-2005 school year – as was the case with petitioner.

By letter dated December 18, 2009, respondent notified petitioner that it had not been maintaining the required number of students. That letter is marked as Exhibit A to the Certification of Claudia Sommerer in petitioner's motion papers, and contains an advisement to petitioner that it "must attain an ADE of 16 public school placement students by the end of the 2011-2012 school year or the school's approval status will be rescinded." Another letter from respondent, dated November 19, 2010, warned petitioner that it still had not reached the

minimum ADE, and its approval would be rescinded if it failed to do so by the end of the 2011-2012 school year. *See*, Exhibit B to the Certification of Claudia Sommerer.

In October of 2011, petitioner submitted to respondent a request for a waiver of the attendance requirement. *See*, Exhibit C to the Certification of Claudia Sommerer. By letter dated November 22, 2011, respondent denied the request (*see* Exhibit D to the Certification of Claudia Sommerer) and by letter dated January 13, 2012, respondent again reminded petitioner of the June 30, 2012 deadline for achieving the minimum required ADE. *See*, Exhibit E to the Certification of Claudia Sommerer. Petitioner submitted another request for a waiver on or about June 11, 2012 (*see*, Exhibit G to the Certification of Claudia Sommerer) which was denied by the Commissioner of Education on June 29, 2012. *See*, Exhibit H to the Certification of Claudia Sommerer.

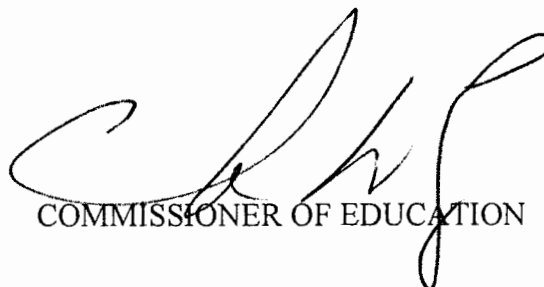
Subsequent to the June 29, 2012 denial of petitioner's waiver request, respondent wrote to petitioner advising that its approval as a private school for students with disabilities was rescinded, effective July 1, 2012. *See*, letter dated July 9, 2012 from Assistant Commissioner David F. Corso to Claudia Sommerer, marked as Exhibit I to the Certification of Claudia Sommerer. On or about July 25, 2012, petitioner appealed to the Superior Court, Appellate Division, both the Commissioner's decision denying its waiver request and the July 9, 2012 rescission of petitioner's approval to operate as a private school for students with disabilities. A motion seeking stays of the implementation of both of the appealed actions was filed with the Commissioner on July 27, 2012.

It would appear that today, after consideration of petitioner's motion, respondent has given its consent to a stay of its decision to rescind petitioner's approval to operate as a private school for students with disabilities. That consent is evidenced in a letter of even date

from respondent's counsel. In light of same, the Commissioner grants petitioner's motion for a stay of the rescission. Further, the granting of said motion makes it unnecessary to address petitioner's request for a stay of the above-referenced denial of a waiver from the enrollment requirements set forth in *N.J.A.C.* 6A:23A-18.3(c)(1)(iii).

Accordingly, petitioner's motion is granted, and implementation of respondent's July 9, 2012 rescission of petitioner's approval to operate is stayed pending adjudication of the underlying merits of same.

IT IS SO ORDERED.¹



COMMISSIONER OF EDUCATION

Date of Decision: 7/31/12

Date of Mailing: 8/01/12

¹ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, c. 36 (*N.J.S.A.* 18A:6-9.1).

V.L. and C.L., on behalf of minor children,
R.S. and R.L.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE
CITY OF RAHWAY, UNION COUNTY

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON

APPLICATION FOR EMERGENT RELIEF

The record of this emergent matter – which included a digital recording of the hearing conducted at the Office of Administrative Law (OAL) on July 11, 2012 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs with the ALJ that petitioners have failed to satisfy the requirements necessary for the granting of emergent relief as set forth in *Crowe v DeGioia*, 90 N.J. 126 (1982); most notably, petitioners have failed to demonstrate irreparable harm or the likelihood of prevailing on the merits of their claim.

Accordingly, the recommended order of the OAL denying petitioners' application is hereby adopted. This case shall proceed at the OAL for such further proceedings as may be required to bring it to conclusion.

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/31/12

Date of Mailing: 8/01/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to P.L. 2008, c. 36 (N.J.S.A 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION FOR
EMERGENT RELIEF

OAL DKT. NO. EDU 08554-12

AGENCY DKT. NO. 169-6/12

V.L. AND C.L., ON BEHALF OF MINOR CHILDREN

R.S.AND R.L,

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY
OF RAHWAY, UNION COUNTY**

Respondents.

V.L. pro se

Mark Tabakin, Esq., for respondent City of Rahway Board of Education

Record Closed: July 11, 2012

Decided: July 11, 2012

BEFORE **KIMBERLY A. MOSS, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the City of Rahway Board of Education's (Board) decision to move their children from Roosevelt Elementary School to Cleveland Elementary School at the start of the 2012-2013 school year as part of the Board's decision to

redistrict students. On June 25, 2012, petitioner filed a Motion for Emergent Relief allowing their children to remain at Roosevelt School. In support of the motion, petitioner submitted a verified petition and letters. Oral argument on the motion was scheduled for July 5, 2012. Respondent requested an adjournment to which petitioner consented. Respondents submitted a brief and certification on July 10, 2012. Petitioner submitted a letter from Central Jersey Behavioral Health, LLC on July 10, 2012. The motion was as held on July 11, 2012. An Order was rendered by the undersigned on July 11, 2012, which is attached hereto for reference.

FACTUAL DISCUSSION

I **FIND** the following to be the **FACTS** of this matter.

Starting on or about 1976 and continuing through 2005 the Board voluntarily bussed students from their neighborhoods to more distant schools to achieve racial diversity. In 2005 regulations no longer required the Board to maintain a certain balance of racial groups within a school. On July 26, 2005, the Board adopted a redistricting plan which sought to reach three objectives (1) determine school assignments based on address, rather than race, (2) to create attendance areas that are closer to each elementary school and to reduce bussing of elementary students.

The bussing of a number of students living in the Cleveland School neighborhood to Roosevelt School continued after July 26, 2005, because Cleveland School did not have space to accommodate the additional students. Petitioner's children were among the children in the Cleveland School neighborhood that were bussed to Roosevelt School.

On June 29, 2009, the Board approved a proposed thirty-four million capital project proposal. On September 29, 2009, a referendum was approved by the citizens of Rahway regarding the thirty-four million dollar capital project proposal. Cleveland School has been renovated to accommodate a greater number of students due to the capital project proposal. R.S. and R.L. attended Roosevelt School through the 2011-

2012 school year. R.L. and R.S. would be enrolled in Cleveland School for the 2012-2013 school year. The elimination of bussing would save the Board between \$130,000 and \$180,000.

The Board implemented a district wide program of sixth grade realignment. It determined that sixth grade students experience a decline in standardized test scores and an increase in disciplinary infractions when students are moved to a middle school where they are exposed to older peers, intensified expectations and greater responsibility. The sixth grade students in Rahway will attend their respective elementary school instead of going to middle school. Twenty-four fifth graders who were bussed to Roosevelt School but were transferred to Cleveland School will complete the sixth grade at Cleveland School.

The Rahway school district has 3890 students. Of those students forty-two percent are Black, thirty-four percent are Hispanic, nineteen percent are White and five percent are other including Asian, Native American and Multicultural. The Districts overall demographics show that the racial and ethnic makeup of each school is reasonably reflective of the diverse population living within the area.

During the 2011-2012 school year, Roosevelt School's racial composition was nineteen percent White, forty-seven percent Black, twenty-nine percent Hispanic and five percent other. It is anticipated that Roosevelt School's racial composition for the 2012-2013 school year will be approximately twenty-two percent White, thirty-eight percent Black, thirty-two percent Hispanic and 6.4 percent other. During the 2011-2012 school year, the Cleveland School student body was seven percent White, forty-eight percent Black, forty-one percent Hispanic and four percent other. It is anticipated that Cleveland School's racial composition for the 2012-2013 school year will be approximately seven percent White, fifty-five percent Black, thirty six percent Hispanic and four percent other. Madison Elementary School has the highest percent of White students, thirty-three percent. The majority of the students at Madison School are minority students. There is no elementary school in Rahway that has a racial composition that is more than thirty-three percent white.

Petitioner alleges that the redistricting plan violates N.J.A.C. 6A:7-1.7, provisions for equality in school and classroom practices. Petitioner has not provided documentation that the purpose of the redistricting plan was to segregate students based on race. Petitioner has provided no documentation that minority students are underrepresented in all classes or programs including gifted and talented, accelerated and advanced classes. Petitioner has provided no documentation to substantiate her claim that Rahway does not include a multicultural curriculum in its instructions and methods and that the students understand the basic tenant of multiculturalism. Petitioner has not provided documentation that African American history as well as the history of other cultures is not infused in the curriculum and taught as part of the history of the United States.

Petitioner submitted a letter from Roy Hirschfeld of Central Jersey Behavioral Health, LLC stating that the children were anxious about losing their peer relationships and changing to a new school. It was his impression that it would be detrimental to change their aschool environment.

LEGAL DISCUSSION AND CONCLUSIONS

Petitioner did not meet the criteria of Crowe v. DeGioia for emergent relief. N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner's claim is settled;
3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in his favor.

It is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "substantial injury to a material degree coupled with the inadequacy of money damages." Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief requires a "clear showing of immediate irreparable injury," or a "presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law." Ibid. (citation omitted.)

Petitioner claims that her children will suffer irreparable harm because they will be going to a different school, Cleveland School, and that Cleveland School had a majority of minority students thereby subjecting her children to racial segregation. Petitioner has not shown that her children will suffer irreparable harm. Petitioner is requesting her children remain at Roosevelt School. Roosevelt School and Cleveland School both have a racial composition that has vastly more minority students than white students. In fact, all of the elementary schools in Rahway have more minority students than white students.

The letter petitioner submitted from Central Jersey Behavioral Health by Roy Hirschfeld stated that the children had anxiety about going to a new school and it was his **IMPRESSION** that it would be detrimental for them to change schools. He did not state that this was his opinion based on any degree of reasonable certainty. There is no clear showing of immediate irreparable harm.

I **CONCLUDE** that petitioner has failed to shoulder its burden of proving that her children will suffer irreparable harm.

Petitioner has not proved that there is a likelihood of prevailing on the merits of the underlying claim. The petitioner has not provided any documentation to support her claims. Actions of the Board or any administrative agency must be upheld unless it is deemed to be arbitrary, capricious or unreasonable. See Shuster v. Bd. of Ed. of Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676, *adopted* Comm'r. 96 N.J.A.R.2d (EDU) 677. Petitioner has not provided any evidence that the decision to send students who live in the Cleveland School neighborhood to Cleveland School was arbitrary, capricious or unreasonable. Petitioner's children were originally sent to Roosevelt School because there was not sufficient space at Cleveland School. Cleveland School can now accommodate the students in the Cleveland School neighborhood. In both Roosevelt and Cleveland schools the majority of the students are minority students. Petitioner cited Madison School in her petition. The majority of the students at Madison School are also minority students. In the Rahway school district, the vast majority of the students are Black and Hispanic.

The Board began district wide program of sixth grade realignment. The reason for the realignment was to combat the decline in standardized test scores and the increase in disciplinary infractions when sixth grade students enter the middle school. The realignment meant that the sixth grade would remain in the elementary schools. The realignment was not arbitrary, capricious or unreasonable.

I **CONCLUDE** that petitioner has failed to shoulder its burden of proving that it has a likelihood of prevailing on the merits of his claims.

Based on the foregoing, I **CONCLUDE** that petitioner has failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting a stay or emergent relief. Accordingly, I **ORDER** that petitioner's application for such relief be and hereby is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

July 11, 2012

DATE

ljb



KIMBERLY A. MOSS, ALJ

NADINE TRIBBETT,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF WILLINGBORO,	:	
BURLINGTON COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner was notified in May 2011 that her position of Director of Curriculum was to be eliminated in a reduction in force (RIF) effective June 30, 2011. Petitioner subsequently filed an appeal in September 2011 asserting her tenure rights to reinstatement as a school principal or to one of two new administrative positions in respondent Board's school district. The Board contended that petitioner waived her tenure rights when she was offered the position of high school principal or one of two other administrative positions, but rejected them. Petitioner, however, disputed that she had received an official offer of these positions, and instead asserted that the Superintendent had questioned her tenure status and had merely asked if she would be interested in these jobs. When petitioner did not respond in the affirmative, the Board sent her a letter accepting her resignation.

The ALJ found, *inter alia*, that: petitioner was never offered the position of high school principal because the Superintendent did not make a bona fide offer of employment that petitioner could rely upon; the District interpreted petitioner's preference for a middle or elementary school position as a rejection and never fulfilled its duty to actually offer her a position in accordance with her tenure and seniority rights; even after petitioner clarified her position by stating in writing that she would take the high school principal position if it was offered to her, the Board decided to terminate her by sending a letter accepting her resignation; waiver of tenure rights is only effective if the protected employee intended to relinquish them, and in this case petitioner clearly expressed her job preferences; but when it became clear that the Board was interpreting this as a rejection, petitioner clarified any confusion by stating that she would accept the principal position if it was offered to her. Accordingly, the ALJ ordered the Board to reinstate petitioner to the position of High School Principal or a similar position effective June 30, 2011, with back pay, seniority, and any other emoluments to which petitioner is entitled.

Upon review and consideration, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter for the reasons set forth by the ALJ.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 1, 2012

OAL DKT. NO. EDU 11233-11
 AGENCY DKT. NO. 231-8/11

NADINE TRIBBETT,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF WILLINGBORO,	:	
BURLINGTON COUNTY,	:	
	:	
RESPONDENT.	:	

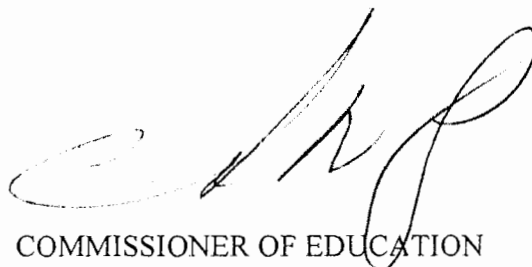
This controversy arose as a disagreement between the parties as to whether, subsequent to the elimination of petitioner's position as Curriculum Director, she was offered a high school principalship and refused same – resulting in the forfeiture of her tenure in respondent's district. Review of the record and Initial Decision of the Office of Administrative Law (OAL)¹ reveals that the Administrative Law Judge (ALJ) carefully applied the principles of contract law to the material and relevant facts, correctly concluding that no *bona fide* offer had been made to petitioner. Consequently she could neither be deemed to have rejected an offer of employment nor be found to have knowingly waived her tenure rights. The ALJ ordered petitioner's reinstatement with back pay and benefits, minus mitigation.

Subsequent to the Initial Decision respondent rehired petitioner, making the controversy concerning her employment status moot. Accordingly, the Commissioner adopts the Initial Decision regarding the remaining issue in controversy, *i.e.*, the payment of back pay and

¹ Respondent's exceptions and petitioner's replies thereto were also considered.

benefits. Petitioner shall be paid full salary and benefits – minus mitigation, if any – for the period from July 1, 2011 through the date upon which she was reinstated by respondent.

IT IS SO ORDERED.²



COMMISSIONER OF EDUCATION

Date of Decision: 8/01/12

Date of Mailing: 8/01/12

² This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11233-11

AGENCY DKT. NO. 231-8/11

NADINE TRIBBETT,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF WILLINGBORO,
BURLINGTON COUNTY,**

Respondent.

Salvatore Perillo, Esq., for petitioner (Nehmad, Perillo and Davis, attorneys)

Richard L. Goldstein, Esq., for respondent (Marshall, Dennehey, Warner,
Coleman and Goggin, attorneys)

Record Closed: April 11, 2012

Decided: May 10, 2012

BEFORE **DONALD J. STEIN, ALJ:**

STATEMENT OF THE CASE

Nadine Tribbett (petitioner) was the subject of a Reduction in Force (RIF) and demands reinstatement as a school principal or one of two new administrative positions. The Willingboro Board of Education (Board) asserts that they have offered these positions to the petitioner and she has turned them down.

PROCEDURAL HISTORY

On September 27, 2011, this matter was transmitted to the Office of Administrative Law (OAL). On March 26, 2012, the matter was heard in the OAL (Trenton). The parties requested time to submit closing arguments. On April 11, 2012, the briefs were received and the record closed.

STATEMENT OF FACTS

Some of the facts are not in dispute. The petitioner is a tenured principal in the Willingboro School District (District). She was an assistant principal in 2003, and served as principal in the Elementary and Middle schools from 2006 to 2009. In 2009, petitioner's employment was terminated as part of a RIF, and she was assigned a central administration position as Director of Curriculum. In 2010, she was hired for one year as the Director of Curriculum for Kindergarten through twelfth grade.

In June 2011, her position was subject to a RIF, and the facts are contested as to what occurred after the RIF. The Board contends that the petitioner waived her rights by not accepting two positions. The petitioner asserts that she was never offered the position, and never waived her rights.

NADINE TRIBBETT

Nadine Tribbett was a teacher in a Camden City elementary school from 1994 to 1999 (P-1). She was recruited by John Hopkins to work as an educational consultant to go to districts in need of improvement. She decided she wanted to work in one school. In 2003, she was hired to be the assistant principal at the middle school in Willingboro. After two years, she became the principal at Martin Luther King School. In 2005, she was transferred back to the middle school as the principal. She then became the principal at the Hawthorne Elementary School from 2006 to 2009. In 2009, she was appointed Director of Curriculum and Instruction for Kindergarten through fifth grade.

She served one year at this position, and was subject to a RIF. In 2010, she was hired for one year as the Director of Curriculum for Kindergarten through twelfth grade.

Dr. Hespe was the superintendent throughout this time, but was transitioning out of this position in February 2011. Dr. Taylor became the superintendent.

On May 2, 2011, Dr. Taylor presented a realignment plan for middle management at a conference meeting. She was required to attend and watched Dr. Taylor's PowerPoint presentation (P-3). He proposed two new positions, Chief Academic Officer (CAO), and Chief of Schools. The CAO was responsible for academic services, and the Chief of Schools dealt with principals. Members of the public asked why two positions were created when someone had those responsibilities. The petitioner for the first time during the presentation saw her position was eliminated. When asked why he was creating these positions and eliminating petitioner's job, Dr. Taylor said that he was not pleased with her.

She admitted that she did not have all of the responsibilities of the two positions. The most prominent responsibility of the new position was the evaluation piece, as well as the responsibility for supervising personnel. She never did evaluations and did not have supervisory authority.

A RIF list was prepared. There were thirty-one people on the list, and she was first (P-5). On May 12, 2011, the Board approved the RIF. On May 13, 2011, she received a letter from Dr. Taylor that she was not being offered employment for the 2011-2012 school year. She was confused by the letter because it said the RIF was applicable to nontenured employees, and she was tenured.

She reviewed the list of current tenured and nontenured staff (P-4). She had seniority over all five principals and four assistant principals. One principal and two assistant principals were not tenured.

On June 7, 2011, she met with Dr. Taylor. He informed her that he would not be hiring her for either of the two positions. He said she should apply for the positions of either Early Childhood Director or Twenty-First Century Coordinator. Dr. Taylor said there may be a problem with her tenure as assistant principal and principal, and asked for proof of tenure. He also told her that he had concerns with her attendance and possible issues with her family.

She was surprised that this was an issue because she had asked to carry over forty vacation days. One time, she applied for one-half of a personal day to go to court to get custody of her niece. On another occasion, she used vacation time to take care of her sick mother.

Dr. Taylor told her that the only position she could replace a nontenured teacher was the high school principal and he asked if she would be interested. She told him that she had experience at the elementary and middle school, but was not interested in the high school. She never said she would be surrendering her tenure rights, only that she was not interested in the high school position. She never told him that she had time and family restraints which would take her out of the position.

On June 8, 2011, Dr. Taylor sent her an email summarizing the meeting. The letter states that if found to be tenured, "the lowest tenured Principal you would replace would be Mr. E. Brown at the High School", and that petitioner said she was not interested in that position (P-8). The letter further invited her to respond with any corrections. On June 9, 2011, she advised that she was getting legal counsel and is retaining all tenure and seniority rights (P-9). On the same day, she sent another email to Dr. Taylor reiterating that Dr. Taylor asked her how she felt about working at the high school, and said she was not interested in the position of high school principal (P-10). On June 15, 2011, she emailed Dr. Taylor that she was never specifically offered the high school position, and if the offer was made, she would accept it. She also stated that she was claiming her tenure rights and seniority positions (P-11).

On June 16, 2011, Dr. Daniel Mastrobuono of the Human Resource Department (HR) wrote to her reiterating her rejection of the positions offered and that the "District accepts your voluntary resignation effective June 30, 2011" (P-12).

She testified that this is contradiction to the policy of resignation. The resignation policy states that the employee's resignation must be tendered to the Board through the superintendant who may accept or reject it. If accepted, the resignation must be ratified by the Board (P-2). None of these steps were taken.

She has been collecting unemployment since August 2011. She has had no other employment. She has been sending out her resume, and used internet searches.

DR. RONALD TAYLOR

Dr. Ronald Taylor has a Bachelor of Arts degree in education, and a Masters and Doctorate Degree in School Leadership (R-2). He had been a teacher for six years in multiple school districts, an assistant principal for three years and principal for six years in Washington, D.C., and the regional supervisor for twenty-one Newark schools in 2009. In 2011, he was appointed the superintendant for Willingboro.

When he arrived in Willingboro, he found almost every department had deficiencies. He asked each department to prepare a PowerPoint presentation so he could evaluate each department. Every department gave him a PowerPoint presentation except the petitioner. She told him that she did not place high importance on the presentation and apologized. He never received the presentation from her.

He found that there was a lack of curriculum in the District. Some of the curriculum was from 1998.

As result of this investigation, he made certain recommendations in May 2011. He wanted to raise accountability. He found the accountability of the middle managers, such as the petitioner, was not defined. He prepared a PowerPoint presentation

showing his realignment of middle management (R-3). The plan was approved by the Board and the Burlington County Supervisor of Education.

He was changing to a more streamlined design to define roles in central administration. The department heads had no authority. The District was spending a lot of money on middle management, but they had no supervisory authority.

His plan created an academic services department for academics and special education under the authority of a Chief Academic Officer (CAO). The CAO had supervisory authority which the petitioner did not. The petitioner also was not involved in special education.

The other position created was the Chief of Schools. The principle duties of this position included funding, evaluations, and guidance. The difference between this position and petitioner's position is that the principals are accountable to the Chief of Schools.

The Director of Human Resources and the Business Administrator were maintained, but the bulk of middle management was RIF'd, which was approximately twenty positions.

He reviewed the tenure status of similar positions. Of the five principals, three had tenure (P-4). The petitioner was the first name on the RIF (P-5). Letters were sent to all RIF'd employees (P-6).

He met with the petitioner on June 7, 2011 to see what she was going to do. He discussed his concerns that she may not have achieved tenure. Petitioner told him that she was not interested in a high school principal position because her experience was in elementary school.

He memorialized this conversation in an email stating that she told him that she was not be interested in the high school principal position because of family

commitments and other time restraints, as well as lack of experience in high school (P-8). He noted that this position requires more hours and especially evening hours. He further noted that the classification of principal was the same, whether in the elementary or high school setting.

Petitioner also turned down the positions of Program Administrator for Twenty-First Century Grants and Program Administrator for Early Childhood. He believed she was qualified and met the requirements for these positions, as well as the high school principal. After his conversation with the petitioner, he concluded that she was not interested in these positions. On June 9, 2011, she confirmed in an email that she was not interested in the high school principal position (P-10). On June 22, 2011, he confirmed in writing that petitioner declined to apply for the Program Administrators position for the Twenty-First Century Grants and Early Childhood programs, as well as the high school principal position, and as a result, her last day of employment would be June 30, 2011 (R-4). Although Dr. Mastrobuono wrote that the petitioner voluntarily resigned (P-12), the District did not view this as resignation, but as a RIF.

He admitted the petitioner told him that although she did not accept the positions she wanted to retain all tenure and seniority rights (P-9). He told her that if she did not take any of the positions offered, she would give up tenure rights.

FINDINGS OF FACT

The essential facts are not in issue. At issue is whether an offer was made and the petitioner relinquished her tenure rights.

Petitioner is a tenured principal for the Willingboro School District. On May 13, 2011, petitioner was notified that she was not being offered employment for the 2011-12 school year due to reasons of economy and that her last day of employment would be June 30, 2011. Subsequently, petitioner was requested by the school superintendent, Dr. Taylor, to meet with him for a one-on-one meeting, eventually held on June 7, 2011.

At the meeting, Dr. Taylor told petitioner that she would not be considered for either of the two new administrative positions, but felt she would be a good candidate for other positions such as the Twenty-First Century Grant Coordinator or Early Childhood Coordinator. Petitioner stated she was not interested in either position for several reasons, including that neither position requires the administrative certification in which she has tenure. Dr. Taylor then informed her that there was some question as to whether petitioner was tenured.

Dr. Taylor then informed her that if she was found to be tenured, she would qualify for the high school principal position. Petitioner stated that she was not interested in this position due to time restraints and because she preferred a middle or elementary school position where she gained her experience as principal.

On June 9, 2011, petitioner sent Dr. Taylor a letter memorializing the meeting and confirming that she stated she was not interested in the high school principal position. On June 15, 2011, petitioner emailed Dr. Taylor to clarify that despite feeling better qualified for an elementary or middle school position, she would accept the high school principal position if it was offered to her.

The preceding information has not been disputed by the parties and is **FOUND AS FACT.**

CONCLUSIONS OF LAW

Educational personnel acquire tenure under statute in New Jersey. Spiewak v. Bd. of Educ., 90 N.J. 63, 72 (1982) (citations omitted). The New Jersey Tenure Act, N.J.S.A. 18A:28-1 to -18, specifically defines the conditions under which teachers are entitled to the security of tenure. It is undisputed that petitioner has satisfied the tenure requirements and her status as such in the Willingboro School District is not at issue. That having been said, tenure and reemployment rights are not absolute and may be voluntarily relinquished, or be the subject of a RIF. O'Toole v. Forestal, 211 N.J. Super.

394, 402 (App. Div. 1986), cert. denied 107 N.J. 123 (1987); Lange v. Bd. of Education of Audubon, 26 N.J. Super. 83, 88 (App. Div. 1953).

To be valid, New Jersey case law has long held that the resignation or waiver of tenure rights by a tenured employee must be voluntary and intentional to be effective. Rieder v. Caldwell-West Caldwell Bd. of Ed., EDU 7609-97, Initial Decision, (Jan. 22, 1999), adopted, Comm'r. (March 10, 1999), aff'd, St. Bd. (July 7, 1999) <http://lawlibrary.rutgers.edu/collections/oal/search.html>. A waiver requires a clear, unequivocal and decisive act by a party. Evaul v. Bd. of Ed. of City of Camden, 35 N.J. 244, 249-250 (1961) (holding that tenured employee's written resignation does not divest the employee of tenure rights where the resignation was submitted under emotionally-charged and unusual circumstances); Vexler v. Bd. of Ed. of Red Bank, 1 N.J.A.R. 196, 202 (1980) (holding that a tenured employee, whose full-time position was legally abolished, does not waive tenure rights by refusing to accept a position of lesser rank).

In the present matter, respondent concluded that petitioner waived her tenure rights during the June 7 meeting with Dr. Taylor because petitioner was allegedly offered the position of high school principal, but she rejected it. Determining whether this meeting resulted in petitioner waiving her tenure rights requires a determination of (1) whether petitioner was actually offered the position, and (2) whether she subsequently rejected it and, in doing so, that she knowingly and intentionally relinquished her tenure rights.

An offer requires a manifestation of willingness to enter into a bargain such that acceptance would create a binding contract without any further action on the part of the offeror. "The making, requisites, and validity of a contract of employment of educational employees in the public schools are governed by the rules relating to contracts generally. Delgado v. Bd. of Ed. of the City of Union, 93 N.J.A.R.2d (EDU) 744, 746. Restatement (2nd) of Contracts Sections 24 and 26 (1981) define what can be considered an offer. Section 24 defines an offer as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his

assent to that bargain is invited and will conclude it.” Section 26 states that a manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.

Sections 24 and 26 suggest that an offer arises when the recipient would be justified in accepting the proposal with knowledge that acceptance would conclude the negotiations. In other words, an offer is something that can be accepted to form a binding contract without any further action on the part of the offeror. Determining whether an offer exists is a fact intensive inquiry. What each of the parties’ principals did or said and how their conduct and words were perceived and acted upon, and whether reasonably or not, are among the critical determinants in resolving whether the dealings between the parties constituted an offer. Central Paper Distribution Services v. International Records Storage and Retrieval Service, Inc., 325 N.J. Super. 225, 232 (App. Div. 1999), cert. denied 163 N.J. 74 (2000).

In the present matter, Dr. Taylor admitted during the June 7 meeting that there was confusion as to the petitioner’s tenure status. Until this issue was decided, it is unclear how the District could have offered her the high school position. It is reasonable that petitioner could conclude the discussion on assuming the high school principal position was only preliminary negotiations because there was no reasonable basis for the petitioner to believe, that by accepting the high school principal position at the June 7 meeting, that she could bind the respondent. By expressing uncertainty regarding petitioner’s tenure, Dr. Taylor was protecting and precluding himself from making an offer to which petitioner could accept and bind him.

Under contract law principles, when some further act of the purported offeror is necessary, the purported offeree has no power to create contractual relations, and there is as yet no operative offer. 1 Joseph M. Perillo ed., Corbin on Contracts § 1.1 (rev. ed. 1993). In indentifying an offer, “we must exclude invitations to deal or acts of mere preliminary negotiation . . . as these are acts that do not lead others reasonably to

believe that they are empowered 'to close the contract.'" Ibid.; See also Restatement (2nd) of Contracts § 24, supra.

Furthermore, Superintendent Taylor's comments in the June 7 meeting displayed no "manifestation of willingness to enter into a bargain." In fact, his recollection of the meeting does not show that he ever asked petitioner if she wanted the high school principal position. He simply made a statement that if it were found that petitioner was tenured, the lowest tenured principal she would replace would be the principal at the high school. Petitioner responded that she was not interested and preferred an elementary or middle school position where she had experience as a principal. Petitioner confirmed this statement in her email of June 9, 2011.

Superintendent Taylor's preface expressing uncertainty as to petitioner's tenure status precluded petitioner from accepting or rejecting any offer. By requiring confirmation of her tenure status, Superintendent Taylor is putting off making the offer until such confirmation. The evidence reflects that Superintendent Taylor expressed, in very general terms, an intention to offer petitioner the high school principal position pending verification of tenure.

The District is arguing that petitioner's expression of a lack of interest in the high school principal position amounted to refusal of an offer to the position. Restated, respondent is arguing that petitioner's lack of interest in the high school principal position relieved it of a duty to actually offer her the position. However, there is no basis in New Jersey law for the proposition that making one's preference known for one position over another constitutes a rejection of an offer of employment. Thus, viewing the June 7 conversation in its entirety, Superintendent Taylor's preface expressing uncertainty as to petitioner's tenure status and absent any language that manifests a willingness to enter into a bargain at that time, it must be concluded that Superintendent Taylor's statements do not meet the minimum definitional requirements for an offer.

A waiver of tenure rights is only effective if the tenured individual knew these rights existed and intentionally relinquished them. O'Toole v. Forestal, supra, 211 N.J.

Super. at 402. In O'Toole, the petitioner's part-time position as physical education teacher was abolished, and she was offered a full-time physical education position that she declined by stating she had relocated to Vermont. Id. at 397. The Commissioner and State Board of Education deemed this refusal as abandonment of her tenure and reemployment rights. Ibid. In its decision, the Appellate Division held that, under the circumstances presented, petitioner's rejection of the position resulted, as a matter of law, in an abandonment of her rights to reemployment. The Court found that petitioner knowingly and intentionally waived her rights by communicating her decision through her attorney and because petitioner made no response to the motion before the Administrative Law Judge or the exceptions to his determination, nor did she claim on appeal that her decision not to accept the offered position was made without knowledge of the effect of such refusal. Id. at 402-403.

The District also cites to an unpublished opinion, Kelly v. Bd. of Educ. of the Middlesex County Vocational Technical School District, Docket No. A-5190-06T3 (N.J. App. Div., March 28, 2008), as further evidence that tenure rights can be waived. In Kelly, the Appellate Division applied the reasoning of O'Toole to conclude petitioner forfeited her tenure rights when she rejected an offer of recall for an open position because she was contractually obligated to another employer at the moment and unable to leave immediately. Id. at 21. The District also cites Alt v. Bergenfield Bd. of Educ., EDU 9624-02, Initial Decision, (Aug. 15, 2003), adopted, Comm'r. (Sept. 29, 2003) <http://lawlibrary.rutgers.edu/collections/oal/search.html>, which held the petitioner's failure to respond to the Board's employment offer coupled with his failure to make further inquiry for approximately eight years was the equivalent of his refusing the full time position offered and the forfeiture of his tenure and reemployment rights.

O'Toole, Kelly, and Alt all make clear that a waiver of tenure rights requires a clear and unequivocal rejection of an offer of employment. In the present matter, there is no such rejection by the petitioner that would constitute a knowing and intentional forfeiture of her tenure rights. First, as stated above, she was never offered a position that she could reject. Second, though she expressed her disinterest in the high school principal position and preference for a middle or elementary school position, when it

became evident to her that the respondent was treating this preference as a rejection of employment, she clarified any doubt by stating in her June 15, 2011 email to Dr. Taylor that she would accept the high school principal position if offered. In contrast to the teachers in the cited cases, petitioner here made clear that she would accept the position if offered.

CONCLUSION

Petitioner was not offered the position of high school principal because the superintendent never manifested a willingness to enter a bargain that would justify petitioner in accepting the proposal with knowledge that acceptance would conclude the negotiations. Instead, the District interpreted petitioner's preference for a middle or elementary school position as a rejection and never fulfilled its duty to actually offer her a position in accordance with her tenure and reemployment rights.

In fact, she clarified her position by stating that she would take the position discussed if offered. In spite of receiving that letter, the District decided to terminate her even after receiving this letter.

Even if such an offer was made and rejected, waiver of tenure rights is only effective if the protected employee intended to relinquish them. In this case, petitioner expressed her job preferences and when it became clear that respondent was interpreting this as a rejection, she clarified any confusion by stating she would accept the principal position if it was offered to her.

DECISION AND ORDER

Based upon the foregoing, it is **ORDERED** that the petitioner be reinstated to the position of High School Principal or a similar position, effective June 30, 2011 with back pay, seniority, and any other emoluments to which he would otherwise have been entitled. The amount of back pay awarded is to be reduced and mitigated to the extent

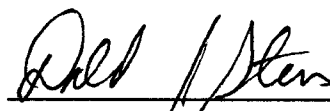
of any income earned or that could have been earned by petitioner during this period of any potential back pay.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 10, 2012
DATE


DONALD J. STEIN, ALJ

Date Received at Agency:

5-11-12

Date Mailed to Parties:

5/17/12

cmo

APPENDIX
WITNESSES

For Petitioner:

Nadine Tribbett

For Respondent:

Ronald Taylor

EXHIBITS

For Petitioner:

- P-1 Resume of Petitioner
- P-2 Willingboro Board Policy for Resignation
- P-3 Proposed Restructuring of Central Administration
- P-4 Tenured/Non Tenured Administrators
- P-5 RIF Approval
- P-6 Letter from Taylor to Tribbett dated May 13, 2011
- P-7 Resolution Approving Reappointment of Non-Tenured Administrators for 2010-2011
- P-8 Email from Taylor to Tribbett dated June 8, 2011
- P-9 Emails between Taylor and Tribbett dated June 8, and June 9 2011
- P-10 Letter from Tribbett to Taylor June 9, 2011
- P-11 Email from Tribbett to Taylor June 15, 2011
- P-12 Letter from Mastrobuono to Tribbett dated June 16, 2011
- P-13 Letter from Hespe to Tribbett dated April 28, 2010
- P-14 Job Description – Description of Curriculum and Instruction
- P-15 Job Description – Chief of Schools

P-16 Job Description – District Director of Curriculum and Instruction K-5s

For Respondent:

- R-1 Email from Tribbett to Taylor dated June 7, 2011
- R-2 Resume of Ronald Taylor
- R-3 Realignment of Middle Management Resources
- R-4 Letter from Taylor to Tribbett dated June 28, 2011

#306-12

IN THE MATTER OF THE TENURE :
 HEARING OF MIGUEL VALLADARES, : COMMISSIONER OF EDUCATION
 SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
 OF BELLEVILLE, ESSEX COUNTY. :

SYNOPSIS

Petitioning school district certified six tenure charges against respondent – a tenured custodian – alleging unbecoming conduct, misbehavior, insubordination, and other just cause. These charges stem from the Board's allegations that: respondent received the proceeds from a vending machine placed in School #5 without authorization of the Board of Education; misappropriated public property by operating and receiving the proceeds from a vending machine placed in School #8 during the period from 2008 through July 2011; neglected his duties as a custodian when he serviced these vending machines in Schools #5 and #8; and made intentionally false statements to the superintendent and his direct supervisors regarding his conduct. Respondent contended that he had the principals' permission to install and service the machines in question, made periodic cash payments from the proceeds of the machines to each school's main office, and did not neglect his custodial duties because the machines were serviced on his dinner breaks.

The ALJ found, *inter alia*, that: the District had no clear policy on the operation of vending machines, and testimony made clear that there was a patchwork of vending machines and operators during the relevant time period; there was precedence in the District for individual operators to own and service vending machines in teacher lounges; respondent gave credible testimony that he believed he had permission from the building principals to own and operate a vending machine in both School #5 and School #8, and respondent's testimony was buttressed by testimony from the former principal of School #5, who in effect recruited the respondent to install a vending machine in the teacher lounge; respondent is not a sophisticated business owner, and did not understand the importance of recordkeeping in regard to his ownership of the machines or his accounting of the proceeds from them, a percentage of which was paid in cash to the main office – often by slipping an envelope under the door; no evidence was presented to show that respondent was servicing the vending machines when he should have been working; respondent did, however, fail to disclose the fact that he had been operating a machine in School #5 when it became obvious that an investigation was ongoing regarding the machine in School #8; respondent has an otherwise unblemished career of service in the District. The ALJ concluded that respondent's failure to disclose the existence of the second vending machine constituted an act of insubordination, but that the Board failed to meet its burden of proof on the other charges. Accordingly, the ALJ ordered that respondent forfeit 120 days of pay, and be returned to his tenured position as custodian.

Upon careful review and consideration, the Deputy Commissioner – to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-33 – concurred with the ALJ's findings and conclusion, and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 3, 2012

OAL DKT. NO. EDU 2455-12
AGENCY DKT NO. 39-2/12

IN THE MATTER OF THE TENURE	:	
HEARING OF MIGUEL VALLADARES,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF BELLEVILLE, ESSEX COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

This case involves tenure charges brought by the Board of Education (Board) against the respondent, Miguel Valladares, a tenured custodian in the Belleville Township School District. The Board charged the respondent with unbecoming conduct, insubordination and other just cause for the misappropriation of public property and receiving funds from the operation of two vending machines. The Administrative Law Judge (“ALJ”) found that the Board proved by a preponderance of the credible evidence that respondent’s failure to disclose the existence of the vending machine located at School #5 after it was identified that he owned a vending machine located at School #8 was an act of insubordination. The ALJ also found that the Board did not sustain its burden of proving the other charges against the respondent. The ALJ recommended the imposition of a 120 day suspension as a result of the respondent’s insubordination.

Upon a comprehensive review of the entire record in this matter, which included the transcripts of the hearing dates conducted at the OAL on May 15 and 16, 2012, the Deputy Commissioner – to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-33 –

concurs with the ALJ for the reasons discussed in the Initial Decision that the Board has established that respondent is guilty of insubordination. The Deputy Commissioner is also in accord with the ALJ's determination that the remaining charges against the respondent should be dismissed. The Deputy Commissioner finds no basis in the record to reject either the ALJ's recitations of testimony or her determinations of witness credibility. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Deputy Commissioner's review is:

The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [N.J.S.A. 52:14B-10(c)].

Moreover, the Deputy Commissioner fully concurs with the ALJ's assessment of respondent's conduct in light of applicable law and prior decisional precedent, and agrees that the conduct proven in this proceeding necessitates an appropriate penalty.

Therefore, the Deputy Commissioner finds and concludes that the 120 days salary withheld pursuant to *N.J.S.A.* 18A:6-14, following the certification of tenure charges, is commensurate with the error in judgment displayed by the respondent. Accordingly, the Initial Decision of the OAL is adopted as final decision in this matter.

IT IS SO ORDERED.*


DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/03/12
Date of Mailing: 8/06/12

* Pursuant to *P.L.* 2008, c. 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 02455-12

AGENCY DKT. NO. 39-2/12

**IN THE MATTER OF THE TENURE
HEARING OF MIGUEL VALLADARES,
SCHOOL DISTRICT OF BELLEVILLE,
ESSEX COUNTY.**

Alfonse DeMeo, Esq., for petitioner Belleville Board of Education

Gail Oxfeld Kanef, Esq., for respondent Miguel Valladares (Oxfeld Cohen,
attorneys)

Record Closed: June 4, 2012

Decided: June 19, 2012

BEFORE **CAROL I. COHEN, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On January 23, 2012, the Board of Education of Belleville, New Jersey, filed Tenure Charges against respondent Miguel Valladares. The respondent was charged with unbecoming conduct, misbehavior, insubordination and other just cause, to wit: receiving the proceeds from a vending machine placed in School #5 without authorization of the Board of Education, misappropriating public property by operating and receiving the proceeds from a vending machine placed in School #8 during the

period from 2008 through July 2011, neglecting his duties as a custodian when he serviced said vending machines at Schools #5 and #8, and making intentionally false statements to the superintendent and his direct supervisors regarding his conduct.

On February 23, 2012, the respondent filed an Answer to the Tenure Charges. On February 23, 2012, the Department of Education deemed the charges sufficient and forwarded the matter to the Office of Administrative Law (OAL), where it was filed. A pre-hearing conference was held on March 13, 2012, at which time a discovery schedule and hearing dates were determined and an Order was issued. The matter was heard on May 15 and 16, 2012. Following the completion of the District's case, the respondent moved to have Charges 3 and 4 dismissed. The respondent argued that there was no testimony that showed that Mr. Valladares had neglected his duty by servicing the vending machines during his work hours, and therefore the District had failed to sustain its burden on those charges. The District argued that Mr. Valladares could, in fact, have been servicing the machines during work time, and that would amount to a theft of services. I reserved on the motion. Simultaneous summation briefs were submitted on June 4, 2012.

ISSUES

1. Did Mr. Valladares have the authority to install two unauthorized vending machines in the school district?
2. If he did not, did said conduct amount to theft of services, conduct unbecoming, misbehavior, insubordination and other just cause such that he should lose his tenured position?
3. Did Mr. Valladares intentionally seek to mislead the District regarding his operation and/or installation of the machines such that he should lose his tenured position?

ARGUMENTS OF THE PARTIES

The District argued that the respondent operated vending machines in two of the District schools without obtaining permission from his superiors to do so. By misappropriating public property by operating and receiving the proceeds from the vending machines, he demonstrated conduct that was unbecoming a public school custodian. In addition, by failing to turn over the proceeds from the vending machines and by conspiring with other District employees, he in effect took money from the taxpayers of Belleville. Further, by servicing these machines during school time he neglected his duties and responsibilities as a custodian and was insubordinate. Finally, by failing to admit, when questioned, that he was operating a second vending machine, the respondent made intentionally false statements to the superintendent. This behavior amounted to insubordination.

The respondent did not dispute that he operated vending machines in two schools in the District. However, he disputed the conclusions drawn from this ownership. Mr. Valladares asserted that, prior to his operation of one of the machines, it was operated by another private individual. The individual had an arrangement with certain schools that he would install and service the machine, in return for which he paid 15 percent of the proceeds to the school administrator for use by the school. Mr. Valladares consulted with the principal of the school, who said that there was no problem with the vending-machine arrangement. In the other school, the principal asked the respondent to install a machine. Based on these arrangements, Mr. Valladares bought vending machines and operated them. Further, he disputed that he serviced the machines during his work day. Therefore, he did not neglect his duties. He also denied misappropriating funds from the proceeds of the vending-machine sales and claimed that he had never misrepresented the location of his vending machines in the District.

TESTIMONY

Joseph Picardo

Mr. Picardo testified that he has been the superintendent of schools in Belleville since April 9, 2010. In July 2011 he was informed that there had been a break-in at School #8. He was told that windows had been broken and a vending machine damaged. At the time he did not know who owned the vending machine. He was later informed that the machine was owned by Miguel Valladares. On July 28, 2011, he convened a meeting in his office with the respondent, his union representative, the business administrator and the supervisor of buildings and grounds (Mr. Fiscella, who had been supervisor for over ten years). Mr. Valladares acknowledged that he owned the vending machine in School #8. When asked under what authority he was operating the machine, the respondent said that he had obtained permission from the former principal of the school. Mr. Picardo testified that Mr. Valladares stated that he made payments to the building principal of a percentage of the proceeds of the sales from the vending machine. He put the money in an envelope and placed it under the principal's office door. When asked whether he was operating any other machines in the District, Mr. Valladares responded in the negative. Mr. Picardo said that he later discovered that the respondent was also operating a machine in School #5.

Mr. Picardo said that he convened another meeting in early August 2011, where the same individuals were present. Mr. Picardo said that at this meeting Mr. Valladares said nothing about operating a vending machine in School #5. On cross-examination, Mr. Picardo stated that he understood that at some point Mr. Valladares removed the vending machine from School #5, but he did not know when that occurred. Mr. Picardo asserted that Pomptonian Food Services was contracted to operate vending machines in the District, but acknowledged that there was nothing in the 2011–2012 addendum to the contract that referred to vending machines. He also asserted that no employee has the authority to enter into a contract with an outside service; all contracts have to be approved by the Board of Education and recommended by the superintendent; and no principal has the authority to enter into a contract. Mr. Picardo stated that he had no knowledge of a school principal entering into a contract to install a vending machine.

Mr. Nazziola, who was the principal of School #8 in the summer of 2010, never submitted a request to have a vending machine placed in the school, and the District never received the proceeds from the vending machine. When questioned, Mr. Picardo stated that in the terms of the contract with Pomptonian, all proceeds from the vending machines go to the District and are used for the District's benefit. Mr. Picardo stated that at some time following the incident, a secretary in School #5 came forward and said that she found an envelope in her desk containing \$88, which had been in her drawer for over a year. He did not know if the envelope had the words "vending machine" on the outside.

Following the break-in at School #8, Mr. Picardo prepared a list of vending machines in the District (R-1). There were no machines owned by Pomptonian in School #5 or School #8. Mr. Picardo stated that vending machines in the areas frequented by students had to be operated according to the rules of the U.S. Department of Agriculture. The vending machines in Schools #5 and #8 were in the teachers' lounge and were not subject to the Department of Agriculture. He did not know if the Pomptonian contract predated the installation of the vending machines in Schools #5 and #8.

Mr. Picardo stated that Vincent Fiscella was Mr. Valladares' supervisor. He asserted that there was nothing in the collective bargaining agreement stating that custodians could operate private vending machines.

Edward Appleton

Mr. Appleton testified that he is the Board secretary for the Belleville Board of Education and has been the school administrator for twenty-four years. Among his duties, he oversees all business and support services for the District, including food services. He said that the District has had contracts with Pomptonian Food Service for about nine years. Mr. Appleton testified that the arrangement is that Pomptonian owns the machines, fills them and services them. The District pays for the products in the machines and derives profits from the machines, and those profits are used to purchase equipment for the food services in the schools, such as ovens, refrigerators, etc. He

said that the District did not contract with anyone else to provide vending machines for the schools. Mr. Appleton testified that at no time did Mr. Valladares have a contract with the District to operate vending machines. Mr. Appleton stated that following the break-in at School #8 in July 2011, the maintenance supervisor was told to go through the building and check on any damage. The vending machine in the teachers' lounge had been damaged and he called Pomptonian to report this. Pomptonian informed him that they did not own the vending machine in question. Through further investigation he discovered that the machine was owned by Mr. Valladares. Mr. Appleton described a meeting involving Mr. Valladares and other people from the District that took place in July 2011. Mr. Valladares informed those present at the meeting that the vending machine had been placed in the school by a vendor, who offered to sell it to the respondent. Mr. Valladares said that he never asked permission from the Central Office to operate the machine. The respondent said that he turned over 15 percent of the profits from the vending machine to the principal. His procedure was to slide an envelope under the door of the principal's office. This occurred while Mr. Petrillo and Ms. Cavallo were principals of the school. The business manager said that the District never received the funds allegedly put in the envelopes. Mr. Appleton testified that at the second meeting with Mr. Valladares, in August 2011, the District offered to allow Mr. Valladares to resign, and nothing further would occur. Mr. Valladares turned down this offer. According to Mr. Appleton, Mr. Valladares never mentioned at the second meeting that he was operating another vending machine in the District. The business administrator could not remember when Mr. Valladares removed the vending machine from School #5.

On cross-examination, Mr. Appleton acknowledged that an inventory had been done of the vending machines following the break-in. As a result, they found non-Pomptonian machines in Belleville Middle School and School #4. The owner of the vending machine in the teachers' lounge in School #4 was Fritz Vending. As far as Mr. Appleton knew, no money came to the District from this vending machine. Mr. Appleton was not aware of how Fritz came about placing the machine in School #4. They never determined the owner of the vending machine in the middle school and considered it abandoned. No one was disciplined in either school regarding these machines.

Vincent Fiscella

Mr. Fiscella testified that he has been the supervisor of buildings and grounds for the District for twenty-five years. He said that when he was informed of the July 2011 break-in at School #8, he went through the building and found that the vending machine had been vandalized. Mr. Fiscella actually did two reports. Upon the request of Mr. Appleton, he did a second investigation to give the Central Office a more detailed account of the damage. About two weeks later he was instructed to remove all non-Pomptonian vending machines from the District and bring them over to Belleville High School. Mr. Fiscella said that he attended a meeting where the superintendent, Mr. Appleton, Mr. Gerst and Mr. Valladares were present. He said that ownership of the vending machine at School #8 was discussed, and he believed that Mr. Valladares said that the machine was not his.¹ Ultimately, Mr. Fiscella found out that Mr. Valladares owned the machine in School #8. He spoke to Leonard Gerst, the custodian of School #8, who told him that Mr. Valladares filled the vending machine in the teachers' lounge in the school. Mr. Fiscella said that Mr. Valladares never came to him and told him that he was operating a vending machine in the District or asked his permission to operate a vending machine in the school. Mr. Fiscella claimed that at the July 2011 meeting with Valladares and other District officials, Mr. Valladares was asked if he had machines in any other schools in the District, and he denied having any other machines in the District. Mr. Fiscella stated that between the July and August meetings with Mr. Valladares, the vending machine in School #5 was removed. Mr. Fiscella said that he recalls doing inventory of the vending machines during the second week in July. At the time, there was a vending machine in School #5. When he went back to do another inventory in August, the machine had been removed. Mr. Fiscella said that sometime in August he removed (or locked up) four non-Pomptonian vending machines from schools in the District.

Mr. Fiscella identified P-3, which was a memo from Mr. Fiscella to Mr. Valladares dated December 14, 2007. The memo dealt with an incident unrelated to this matter.

¹ This testimony contradicts that of Mr. Appleton and Mr. Picardo, who stated that Mr. Valladares admitted to ownership of the vending machine in School #8.

However, it was introduced to show that Mr. Valladares knew of the chain of command regarding whom he was responsible to report to. The letter stated, "Even though you spoke with the Principal, you circumvented the central office and me. This behavior will not be tolerated."² Mr. Fiscella testified that Mr. Valladares never came to him to seek authorization to install and/or service a vending machine in any building in the District.

Dora Cavallo

Ms. Cavallo testified that she was hired as principal of School #8 in September 2009. Mr. Valladares was a custodian at the school for the 2009–2010 school year and the beginning of the 2010–2011 year until he was transferred. His working hours were from 12:00 p.m. until 8:00–8:30 p.m. She said that she observed Mr. Valladares filling the vending machine sometime between 12:30 and 4:00 p.m. After Mr. Valladares was transferred to School #5, she never saw him servicing the machine. However, it continued to be stocked. Ms. Cavallo testified that Mr. Valladares would assist in the lunchroom between 11:30 a.m. and 12:25 p.m. The custodians would finish up in the lunchroom by 12:30. Ms. Cavallo stated that she never received the proceeds from any vending machine in the school. She never saw money in an envelope under her door marked "vending machine" or "petty cash."

On cross-examination, Ms. Cavallo said that she arrived at the school at about 7:30 a.m. and her secretary arrived between 7:30 a.m. and 7:45 a.m. The custodians arrived before her and always opened up her office and her secretary's office. She usually left school at 4:00 p.m., but sometimes stayed later or left earlier. She said that when she came to the school in September 2009, the vending machine was already there.

Lisa Kistner

Ms. Kistner testified that she has been the secretary at School #8 since September 2010. She usually arrived at the school at 7:30 a.m. Before becoming a

² The memo was allowed into evidence only to show knowledge of chain of command and not for progressive-discipline purposes.

secretary, she worked as a paraprofessional at School #5. She knew Mr. Valladares from the time she worked at School #5 and he was the assistant custodian. Ms. Kistner said that the teachers never came to her to have Mr. Valladares restock the vending machine. She never saw the respondent stocking the machine at School #8. She never went into the teachers' lounge where the machine was located. Ms. Kistner stated that she never received money from Mr. Valladares from the vending machines; she never found an envelope under her door or anything marked "for the vending machine." She said that Ms. Cavallo did not have any financial accounts for monies for the building.

Gabriel Nazziola

Mr. Nazziola testified that he has been employed by the Belleville School District since September 1990. He has worked primarily as a music teacher, with periodic stints as an administrator. In 2008 he became interim principal of School #3. The next year he returned as a teacher. For the 2010–2011 school year he was principal at School #5. At the present time he is a teacher at the middle school. When he was principal at School #5, Mr. Valladares was a custodian there. Mr. Nazziola would work from 7:30 a.m. to approximately 4:00 p.m. Mr. Nazziola recalled that he spoke to Joe Petrillo, a principal at the high school in August 2010, about how he could obtain a vending machine for School #5 and how the arrangement worked. He said that he consulted with Mr. Petrillo because he had been in the District for many years and would know how things worked. Mr. Petrillo told him that the school gets 15 percent of the proceeds from the vending machine and the money goes directly to the school. Mr. Nazziola approached Mr. Valladares and asked him if he could get a vending machine for School #5. He talked with the respondent about obtaining the proceeds from the vending sales, and was told that when he cashed out the machine, he would get 15 percent for the school. Mr. Nazziola said that he never saw Mr. Valladares servicing the vending machine. Mr. Nazziola said that he received vending-machine money in the middle of the year and at the end of the year. Mr. Valladares handed an envelope containing cash directly to him. Mr. Nazziola stated that he has worked in each of the elementary-school buildings and has seen vending machines in the teachers' lounges in Schools #3

and #4. He was not sure about the other schools, but thought that he saw vending machines in at least four elementary schools.

Mr. Nazziola acknowledged that he was not disciplined for his part in the vending-machine situation. On cross-examination, Mr. Nazziola stated that he did not go to the superintendent, the business administrator, or anyone else in the Central Office about getting permission to have a vending machine installed in the school. Even though he acknowledged that the superintendent was his boss, he did not feel that he had to go to him about permission to have a vending machine placed in the school. He stated that the reason that he asked a fellow principal, rather than the superintendent, about the vending machine was that he was a first-year principal and did not want to bother Mr. Picardo all the time. Mr. Nazziola stated that when he got the vending-machine money, he did not turn the proceeds over to the central administration or report the proceeds to them. He did not get receipts from Mr. Valladares and did not try to verify whether the amount that he received was correct. When questioned, Mr. Nazziola stated that when he was principal of School #3, he did not ask Lucy Demikoff, the principal for whom he was filling in, about the vending-machine situation. Mr. Nazziola testified that he thought that he received a total of \$11 for the whole year from Mr. Valladares for School #5, and he gave the money to the secretary. When questioned, Mr. Nazziola said that there were thirty teachers at School #5 at the time. He did not think that the volume of sales was high, and therefore he thought that \$11 was the correct amount based on 15 percent of sales.³ Mr. Nazziola said that he did not keep a ledger of the money. He simply recorded the amount in the envelope on the front and gave it to the secretary. He did not use the money personally. He said that there was no bank account for the petty cash. It was just kept in a box.

John Faronea

Mr. Faronea testified that he is the head custodian at School #5. He has been employed by the District since November 2009. He stated that Mr. Valladares came to School #5 in November 2010. While Mr. Faronea worked the 6:00-a.m.-to-4:00-p.m.

³ There was a question of whether it was 15 percent of gross proceeds or net proceeds.

shift, Mr. Valladares worked from 12:00 p.m. to 8:30 p.m. Mr. Faronea stated that he recalled Mr. Nazziola inquiring about getting a vending machine for the teachers' lounge in School #5 like they had in School #8. Mr. Faronea told the principal that Mr. Valladares came from School #8 and would probably know where the vending machines came from. Sometime thereafter, Mr. Faronea helped the respondent bring a vending machine into School #5. Mr. Faronea recalled seeing Mr. Valladares servicing the machine at the school. He thought that he saw this occur between 5:00 p.m. and 6:00 p.m., which was the respondent's normal dinner time. Mr. Faronea testified that he was never asked by Mr. Valladares to deliver money to the principal, nor did he ever give a message to the respondent that he should service a vending machine in another school. On cross-examination, Mr. Faronea stated that as head custodian he is responsible for the whole school, which consists of three floors, thirty classrooms, an office, an all-purpose room and the teachers' lunchroom. Once or twice a month Mr. Faronea would stay late, and he saw Mr. Valladares at the school.

Leonard Gerst

Mr. Gerst testified that he has been employed by the District for twenty-one years. He has been head custodian at School #8 for six years. He has been president of the maintenance workers' union for over one year. He stated that he was not the union president when the break-in involving the vending machine occurred, but he was the union representative when Mr. Valladares was called into a meeting with the superintendent and other school officials. He worked with Mr. Valladares, but they were on different shifts. He worked from 6:00 a.m. to 4:00 p.m., and Mr. Valladares worked from 12:00 p.m. to 8:30 p.m. Mr. Gerst said that he actually worked beyond 4:00 p.m. because the school had a YMCA after-care program at the school. He would stay until 5:00 p.m. so that Mr. Valladares could take his lunch break from 4:00–5:00 p.m.

Mr. Gerst stated that when he started at School #8, there were no vending machines in the teachers' lounge. He thought that at some point the principal, Mr. Petrillo, arranged to have the machine brought into the school. Mr. Gerst did not know the name of the vendor, but knew that it was not Mr. Valladares. Mr. Gerst said that he recalled a conversation with Mr. Valladares in which Mr. Valladares mentioned

that he was considering purchasing the vending machine at School #8. Mr. Gerst told him to speak with the principal, Mr. Petrillo, because the principal was responsible for the building. Later, Mr. Valladares told Mr. Gerst that he spoke to Mr. Petrillo, who gave him the go-ahead on the vending machine. Mr. Gerst said that Mr. Valladares told him that he serviced the vending machine after 8:30 p.m., when he was done with his shift. Mr. Gerst stated that he never saw Mr. Valladares servicing the machine.⁴ According to Mr. Gerst, Mr. Valladares was transferred from School #8 to School #5. Mr. Gerst remained at School #8. Mr. Gerst recalled seeing Mr. Valladares servicing the vending machine at School #8 between the hours of 4:00 and 5:00 p.m.⁵ This was the time of Mr. Valladares' lunch break when he was at School #8. Mr. Gerst did not know of other times Mr. Valladares serviced the machine after 5:00 p.m., since he was not at the school in the evening.⁶ Mr. Gerst stated that after Mr. Valladares was transferred to School #5, he no longer had the keys to School #8. The building would have been locked up by 8:30 p.m., when the last employee left.

Mr. Gerst recalled on one occasion giving the proceeds of the vending machine to Mr. Petrillo. He put the envelope on Mr. Petrillo's desk. The next day he went back to be sure that the principal had received the envelope. Mr. Gerst stated that this occurred while he and respondent were both at School #8.

Mr. Gerst recalled that at the first meeting he attended with Mr. Valladares and the administration, they discussed the fact that the vending machines should not have been in the building, and the administration was thinking of taking action and would let the union know what they had decided to do. He did not recall Mr. Valladares being asked about vending machines other than the one at School #8. At the second meeting, Mr. Valladares was asked to submit his resignation. He did not recall whether there was any discussion about the machine in School #5.

⁴ During the summer Mr. Gerst worked the same hours as Mr. Valladares, namely, 6:30 a.m. to 3:00 p.m. They took lunch from 12:00–1:00 p.m. Mr. Gerst would see Mr. Valladares servicing the machine during lunchtime.

⁵ There was testimony that Mr. Valladares' lunch hour was 5:00–6:00 p.m. when he was at School #5.

⁶ Mr. Gerst stated that when he saw Mr. Valladares servicing the machine, the operation took him no more than twenty minutes.

On cross-examination, Mr. Gerst stated that he is the first person in the building in the morning. He opens all the doors, including the doors to the principal's and secretary's offices. He said that their offices do not remain open if they are not there. Mr. Gerst stated that from the time of Mr. Petrillo's transfer until the present, he has never found any envelopes containing cash under the principal's door. In addition, he never delivered any money to Ms. Cavallo from the fall of 2009 until the summer of 2011. While he continued to see Mr. Valladares service the teachers'-lounge vending machine, he was never given an envelope containing cash to give to Ms. Cavallo.

Miguel Valladares

Mr. Valladares testified that he was hired by the Board of Education as a custodian in 2003. He started working at the high school, then went to the middle school, and then moved on to School #8 in 2004. He remained there until February 2010, when he was involuntarily transferred to School #5. His hours at School #8 were 12:00–8:30 p.m. When he first went to School #8, Angela Himercy was the principal. In 2007 Mr. Petrillo became the principal. In September 2009 Mr. Petrillo went back to the high school and Ms. Cavallo became the principal. When Mr. Petrillo was principal he was told by the chief custodian, Mr. Gerst, and Mr. Fiscella that Mr. Petrillo was the supervisor of the building. Mr. Valladares identified R-3 and R-4, two performance evaluations, which designated Mr. Petrillo and Mr. Fiscella as the certified evaluators for the 2008–2009 school year. Exhibit R-5, the evaluation for the 2009–2010 school year, designated Ms. Cavallo and Mr. Fiscella as the certified evaluators. Exhibit R-6, Mr. Valladares' evaluation for the 2010–2011 school year, designated Mr. Fiscella and Mr. Nazziola as the certified evaluators.

Mr. Valladares testified that in 2004, when he was first assigned to School #8, there were no vending machines in the teachers' lounge. At some point during the year, a machine was installed. He had nothing to do with its installation and had no responsibility to service the machine. He said that a man named Steve serviced the machine. He said that he ran into Steve a number of times and spoke to him. He had no idea if Steve had other vending machines in the District.

The respondent stated that while he was at School #8 he had one fifteen-minute break and one hour for dinner. His break was at about 2:30 to 2:45 p.m. and dinner was usually from 4:00 to 5:00 p.m., although sometimes the times were changed depending on whether he had something that he had to do at the time. Mr. Valladares stated that in the fall of 2008 Steve informed him that he was selling his vending-machine route and he wanted to know if Mr. Valladares was interested. Mr. Valladares said that he would discuss it with his wife and the principal of the school. He said that he discussed it with Mr. Petrillo a few days after that, sometime in late November 2008. He testified that he told Mr. Petrillo that Steve offered to sell him the vending machine, and the principal said that it would not be a problem as long as the school continued to receive 15 percent of the vending-machine profits. Mr. Petrillo told him that the cash should be placed in an envelope and should be given either to the main office or to him. Following this conversation, Mr. Valladares contacted Steve and said that he would buy the machine. The respondent stated that he also bought another machine a month later from Steve, which was located at a nursing home. Mr. Valladares testified that Steve never mentioned the company for which he worked and, in fact, he did not know Steve's last name.

Mr. Valladares stated that in December 2008, after he purchased the machine at School #8, he gave Mr. Petrillo money from the proceeds in an envelope. He gave him money again in late January 2009. He said that he would do this each month. However, he did not always physically give the money to Mr. Petrillo. Sometimes he would put the envelope in Mr. Petrillo's mail bin. After Mr. Petrillo left School #8 and Ms. Cavallo became principal, he did not speak to her about the vending machine. He did not hand her an envelope directly, but put it in her mailbox.

When asked about the operation of the machine, Mr. Valladares said that he purchased the products for the machines from Sam's Club. He did not keep any records about how much money he took out of the machines, how often he restocked the machines, or the amount of product he put in the machines. He said that while he was at School #8 he would restock the machine about every two weeks during his lunch break. He said that he took about \$80–\$90 out of the machine each month, and each month he would bring money to the office. Once he was transferred to School #5 in

February 2010, he would come back to School #8 during his lunch break at 5:00 p.m.⁷ about every two weeks to service the machine. He did not have keys to School #8 any longer; it was open at the time he got there because of the YMCA after-school program that ended at 6:00 p.m. When asked how he knew that the machine in School #8 needed stocking, he said that besides the regular servicing, some teachers or the secretary would leave messages when the machine needed to be restocked.

Mr. Valladares testified that when he arrived at School #5 in February 2010, there was no vending machine. Mr. Nazziola approached him and asked about placing a machine in the teachers' lounge. The respondent said that he had a machine that he had removed from a nursing home. Mr. Nazziola inquired about the money arrangement, and Mr. Valladares said that he would pay the school the same 15 percent as he was paying at School #8. He installed the machine in September 2010. He used the same procedure of servicing the machine during his lunch break about every two weeks. He recalled giving Mr. Nazziola the proceeds sometime early in 2011 via an envelope with cash inside. At the end of the school year in June, he gave Mr. Nazziola another envelope containing cash. Mr. Valladares said that he waited until the end of the year because Mr. Nazziola said that there was so little money on a monthly basis that it did not pay to distribute the money monthly. Mr. Valladares recalled giving Mr. Nazziola \$88 in June at the end of the school year.

Mr. Valladares said that he did not keep records about the proceeds of the vending machines and the percentage given to the schools. Neither Mr. Petrillo nor Mr. Nazziola ever watched him empty the machines to see if the amount he said he collected was correct. In addition, neither of the principals told him that he needed permission from the Central Office to install and/or service the machines.

Mr. Valladares said that he had two meetings with the administration regarding the machines. The first was in late July. At that meeting, he was asked who gave him the authority to bring the machine into School #8, how it was purchased, and from whom. He was told that there would be an investigation. He asserted that at the

⁷ Mr. Valladares testified that he worked from 12:00–8:30 p.m. at School #5 and took lunch/dinner from 5:00–6:00 p.m.

meeting no one mentioned the machine in School #5 or asked if he owned it. During direct examination, Mr. Valladares stated that he removed the machine in School #5 before the late-July meeting. When asked why he did this, he said that he had found out that Mr. Nazziola was no longer going to be the principal of School #5; he was fighting for his position and, since he had requested the machine, and there was going to be a new principal at the school, he thought he should take the vending machine out. At the second meeting, in late August, the superintendent told him that they wanted him to resign. He told them "no." He did not recall their asking him a question about the vending machine at School #5 or if he had other machines in the District. On cross-examination, Mr. Valladares stated that he removed the vending machine from School #5 sometime in late July or early August 2011, which was between the two meetings he had with the administration. He had no idea of the exact date, since he kept no records.

On cross-examination Mr. Valladares was asked what arrangement he had with Ms. Cavallo. He said that he did not talk to her about the vending-machine arrangement, but just left the envelopes containing the school's share of the proceeds under the principal's door. He could not explain why Mr. Gerst said that he never found an envelope when he unlocked the principal's door or why Ms. Cavallo and Ms. Kistner said that they never found any envelopes. He was directed to Interrogatory #14 (P-1), which said that he had an agreement with Mr. Petrillo to place the proceeds in an envelope under the door, but said nothing about giving money to Ms. Cavallo or putting money in her mail bin. When asked about the discrepancy between his testimony that he serviced the machine at School #8 between 5:00 and 6:00 p.m. and Mr. Gerst's testimony that he serviced the machine between 4:00 and 5:00 p.m., Mr. Valladares asserted that he was telling the truth about the time he serviced the machine. Mr. Valladares was asked about Mr. Nazziola's testimony that he only received \$11 for the whole year from the vending machine. Mr. Valladares said that he paid Mr. Nazziola by placing cash in an envelope during the beginning of the school year, and not again until June. He did not dispute the \$11 payment. When asked how he knew whether he was making money from the vending business, he said that he was not doing the vending machines in order to make money, but rather as a service to the

school.⁸ When he took the vending machine out of the nursing home, it was not being used. When Mr. Nazziola said that he wanted a vending machine, Mr. Valladares was happy to supply one. Mr. Valladares acknowledged that he never reported the income from the vending machines on his tax returns and never told his accountant about the business.

Mr. Valladares was questioned about his understanding of the chain of command. He was directed to P-3, a letter of reprimand sent to him from Vincent Fiscella on December 14, 2007. The memo stated, "Even though you spoke with the Principal, you circumvented the central office and me. This behavior will not be tolerated."⁹ Based on his knowledge that Mr. Fiscella was his supervisor, Mr. Valladares was asked why he did not ask permission from him before installing the vending machines in the schools. Mr. Valladares' response was that his supervisors at the schools were the principals, because they ran the buildings, and they approved of the installation of the vending machines. The principals were the ones that he had to go to with any issues or problems within the school. Mr. Petrillo had initially authorized the installation of the vending machine in School #8, before Mr. Valladares ever started working there, so it was the principal whom he questioned about his buying the vending machine for the school, not Mr. Fiscella. In addition, Mr. Valladares testified that he was told by both Mr. Gerst and Mr. Fiscella that he had to report to the principal in the school that he was assigned to. When asked on cross-examination why he did not advise Ms. Cavallo about the vending-machine contract, he said that he assumed that Mr. Petrillo had said something to her about it. Since Mr. Valladares no longer had the keys to School #8 once he had been transferred, he could not open Ms. Cavallo's door and could only slip the cash in an envelope under the door when he came in to service the vending machine during his dinner break. When asked how he responded to Mr. Gerst's testimony that he never found an envelope under the door of the main office or Ms. Cavallo's office, Mr. Valladares stated that he was not accusing Mr. Gerst of stealing the money. The respondent said that he was never told by his superiors that

⁸ However, it was pointed out by the attorney for the District that Mr. Valladares had paid \$1,000 for each of the vending machines and, therefore, it seemed strange that he was not expecting a profit from them.

⁹ There was an objection to the introduction of this letter on grounds that it might be used for progressive discipline and it was too remote in time, irrelevant and too prejudicial. I allowed the document in evidence only on the issue of prior knowledge of chain of command.

he was not allowed to go back to School #8. Mr. Valladares claimed that in discussions with Steve and Mr. Petrillo, they said that the vending machine was grandfathered in and therefore was allowed in the school.

Joseph Petrillo

Mr. Petrillo testified that he had been employed by the Belleville School District from September 1972 until he retired in 2011. He started as a social studies teacher, became a principal at the high school in 1994, briefly worked as the principal of School #4, and then returned to the high school. He was transferred to School #8 for the period September 2007 to June 2009.¹⁰ When he went to School #8, Mr. Valladares was working there. He did not recall whether there was a vending machine in the school at the time. Mr. Petrillo thought that he had a vending machine brought to the teachers' lounge at School #8 during the 2007–2008 school year. He said that he had arranged for vending machines in the high school several times. He said that he contacted vendors; screened them, as he had done several times before; and got a machine for the school. He did not discuss bringing in the machine with anyone in the Central Office. He asserted that he did not have to speak to anyone in administration, including the business administrator, because there was no policy regarding vending machines, and the amount collected from the machine was negligible. In addition, he asserted that the business administrator knew about the vending machines in the high school and never asked about them.¹¹ He also stated on cross-examination that the Central Office did not need to be involved because the vending machine was a fundraiser. The vending machine that he brought in was only in the teachers' lounge. At the time he brought in the machine, it was not owned by Mr. Valladares, but rather by Gary Villardi. When he negotiated the contract, the terms were that the company would be responsible for providing the supplies and 10 to 15 percent of the profits would be turned over to the secretary, who would keep the money in a petty-cash box for the student-activities account. He thought that they obtained no more than \$11, \$15 or \$20 per month. He posited that Mr. Valladares had once or twice handed him an envelope

¹⁰ In total, he was principal of the high school for seventeen years.

¹¹ Mr. Petrillo stated that Mr. Appleton used the vending machine in the high school, which was near where his office was located.

with cash in it, which he turned over to the secretary. Mr. Petrillo thought that he might have had a discussion with Mr. Valladares, before he went back to the high school, about his taking over the vending machine, but he did not give him permission to operate the machine. He did not think that there was a problem with Mr. Valladares operating the machine.

On cross-examination, Mr. Petrillo stated that in 2002–2003 the vending machines in the high school were audited and the money from the machines was given to the school secretary, who kept a ledger for the student account. When Pomptonian took over the machines in the high school, he did not know what arrangements were made with the prior owners of the vending machines. As far as he knew, Pomptonian collected the money from the machines and gave it to the business administrator, who gave a percentage back to the high school student fund. Mr. Petrillo said that he never received money from Mr. Valladares from the vending machine after he left School #8.

FINDINGS OF FACT

Based on the testimony presented and the exhibits submitted, I make the following **FINDINGS OF FACT:**

1. Mr. Valladares was hired by the Belleville Board of Education as a custodian in 2003. After working at a few of the District schools he was moved to School #8 in 2004, where he remained until February 2010, when he was moved to School #5.
2. Besides the present charge, he has an unblemished disciplinary history.
3. His hours at School #8 were 12:00 p.m. to 8:00 p.m. He had a fifteen-minute break at about 2:30 p.m., and usually had a dinner break from 4:00 p.m. to 5:00 p.m.
4. When Mr. Valladares first went to School #8 in 2004 there was no vending machine in the teachers' lounge. Sometime during the 2007–2008 school

year the principal, Mr. Petrillo, contacted vendors and arranged for a vending machine to be placed in the teachers' lounge. He contracted with Gary Villardi, who agreed to supply the machine and supplies, and agreed that 15 percent of the profits would be turned over to the secretary to be placed in a petty-cash box for student activities. A vending machine was subsequently installed in the lounge and serviced by someone named Steve. Mr. Petrillo had also arranged for vending machines when he was the principal at the high school.

5. It was Mr. Petrillo's position that he did not have to ask permission from anyone to have a vending machine installed because there was no policy regarding vending machines, the amount received was negligible, the proceeds were for fundraising, and there were vending machines in the high school and no one in Central Administration had questioned their being there.
6. In the fall of 2008, Mr. Valladares made an arrangement with Steve to buy two vending machines for \$1,000 each. One was located in the teachers' lounge at School #8 and the other was in a nursing home. Mr. Valladares consulted with the principal of the school, Mr. Petrillo, prior to purchasing the machine. Mr. Petrillo stated that there was no problem as long as the school continued to receive 15 percent of the proceeds from the machine, as had occurred during Steve's ownership. The arrangement was that the proceeds, in cash, were to be placed in an envelope and given to either Mr. Petrillo or his secretary. While Mr. Petrillo was principal of the school, Mr. Valladares would either give the principal the envelope or place it in his mail bin.
7. While Mr. Valladares was custodian at School #8 he would stock the vending machine at 8:30 p.m. after he finished his shift.
8. Once Mr. Valladares was transferred to School #5, he would come back to School #8 approximately two times per month to stock the machine. He

would come to the school during his lunch/dinner time from School #5 at about 5:00 p.m.

9. When Mr. Valladares was first transferred to School #5 in February 2010, there was no vending machine in the teachers' lounge. The principal, Mr. Nazziola, approached him and asked him about placing a machine in the teachers' lounge. Previously, Mr. Nazziola had consulted with Mr. Petrillo about whether a vending machine could be placed in the teachers' lounge and the procedure that should be followed. Mr. Valladares placed the second machine that he owned, which had previously been at a nursing home, in School #5. Mr. Valladares and Mr. Nazziola negotiated the same payment arrangement as existed at School #8. Initially, Mr. Valladares made two cash payments to Mr. Nazziola in December 2010 and January 2011. Because the payments were so small, he did not make another payment until the end of the school year.
10. Mr. Gerst, a custodian in the District, acknowledged that on one occasion, at Mr. Valladares' request, he delivered an envelope that contained cash to the school office.
11. Mr. Valladares did not keep records of the amount of supplies that he bought for the two machines, the cost of the supplies, or the profit that he made from the vending machines. He also did not keep track of the amount that he paid the two schools as their percentages of the profits from the machines.
12. Once Mr. Petrillo left School #8, Mr. Valladares did not speak to Ms. Cavallo about any arrangements with regard to the vending machine. Despite the fact that Mr. Valladares asserted that he slipped the payments under the principal's door or the door to the main office, neither Ms. Cavallo nor Ms. Kistner had any record of receiving the money. Mr. Gerst, who unlocked the principal's and secretary's offices each

morning, testified that he did not find any envelopes under the doors in the morning. However, Mr. Picardo, the superintendent of schools, acknowledged that one of the building secretaries at School #5 had an envelope containing \$88 that she kept in her drawer for a full year.

13. Since approximately 2003 the District has had a contract with Pomptonian Food Service to handle the food service. This includes the cafeteria and vending machines in the student area. (However, the 2011–2012 addendum to the Pomptonian contract does not mention the vending machines.) According to this contract, Pomptonian operates and stocks the vending machines and the profits go to the District.
14. In July 2011 there was a break-in at School #8 and the vending machine owned by Mr. Valladares was vandalized. During the investigation into the break-in, the District learned that Mr. Valladares owned the machine in School #8 and impounded it.
15. In July 2011 following the break-in, Mr. Valladares was called into a meeting with the superintendent of schools, Mr. Picardo, the supervisor of buildings and grounds, Mr. Fiscella, the business administrator, Mr. Appleton, and a union representative, Leonard Gerst. At that meeting Mr. Valladares acknowledged that he owned the vending machine at School #8. He did not say anything about owning other vending machines in the District.
16. Another meeting took place between the same people in early or mid-August. Between the first and second meetings, Mr. Valladares removed his vending machine in School #5. When questioned at the second meeting as to whether he was operating any other vending machines in the District, he answered in the negative.

ANALYSIS OF THE LAW

The tenure of custodians is authorized in N.J.S.A. 18A:17-3. According to N.J.S.A. 18A:6-10, no person under tenure of office, position, or employment shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause. Tenure is a status in a particular position created by statute, not the agreement of the parties, therefore, it is a “statutory right imposed upon a teacher's contractual employment’ [that] may not be forfeited or waived.” Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 77 (1982) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), cert. denied, 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed. 2d 502 (1963), and citing Red Bank Educ. Ass’n v. Red Bank Bd. of Educ., 78 N.J. 122, 141 (1978)). Tenure was designed to protect employees “from dismissal ‘for unfounded, flimsy or political reasons.’” Wright v. Bd. of Educ. of E. Orange, 99 N.J. 112, 118 (1985) (quoting Zimmerman, supra, 38 N.J. at 71). While tenure was designed to protect employees, teachers (and other tenured employees) are responsible to act in a professional manner and to serve the welfare of the students in their care. Tenure charges can be sustained based on a history of unprofessional conduct, In re Riddick, 93 N.J.A.R.2d (EDU) 345, or based on a single incident, “if sufficiently flagrant.” In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967).

Among the charges lodged against Mr. Valladares was “conduct unbecoming.” This conduct was defined by the administrative law judge in In re Tenure Hearing of Motley, State-Operated School District of Newark, Essex County, EDU 7421-97, Initial Decision (May 5, 1999), aff’d as modified, Comm’r (August 4, 1999), aff’d, State Bd. of Educ. (December 1, 1999), <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>:

“Unbecoming conduct” is an elastic term broadly defined to include any conduct “which has a tendency to destroy public respect for [government] employees and [confidence] in the operation of [public] services.” Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). Behavior rising to the level of unbecoming conduct “need not be predicated upon a violation of any particular rule or regulation, but may be based merely upon the violation of

the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 22, 40 (App. Div. 1992). Despite the apparent vagueness of this standard, "it fairly and adequately conveys its meaning to all concerned." Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1957). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), certif. denied, 65 N.J. 292 (1974).

Conduct unbecoming can also be found when a tenured employee demonstrates a "willful and continued disobedience to Administration directives." See Scarpignato v. Edgewater Bd. of Educ., 1983 S.L.D. 311, aff'd, Comm'r, 1983 S.L.D. 335, aff'd, State Bd., 1983 S.L.D. 338, aff'd, App. Div., 1984 S.L.D. 2013.

Charge 1

The District charged that Mr. Valladares misappropriated public property by operating and receiving proceeds from a vending machine placed in School #5 without authorization from the Board of Education. This constituted conduct unbecoming, misbehavior, insubordination and other just cause. From the testimony presented it is clear that there was a patchwork of vending machines and operators in the District and that the Board did not have a clear policy on the operation of the machines or an understanding of what machines were actually housed in the District. While there was a contract with Pomptonian for the operation of machines in the area servicing students,¹² there was certainly no general policy regarding vending machines located in teachers' lounges and no contract or policy presented that outlined the responsibility of Pomptonian to supply vending machines in the teachers' lounge. After the "break-in" the District discovered a number of machines that were not under Pomptonian's control; some were identified as belonging to other operators, including Mr. Valladares, and others were just abandoned. In addition, there was testimony from Mr. Nazziola that he

¹² The District did not present a contract between Pomptonian and the District covering the operating of vending machines. However, there did not appear to be a dispute between the parties that in fact Pomptonian was the official contractor of vending machines in areas serviced by students.

was interested in having a vending machine installed in School #5. He contacted another principal, Mr. Petrillo, a longtime principal in the District, to see how this could be arranged. When Mr. Petrillo told him that there was no problem and he had made arrangements for a vending machine in the lounges before, Mr. Nazziola then spoke to Mr. Valladares about his installing a machine in the building. It is clear from the testimony that Mr. Nazziola did not think that he had to contact the Central Office about installing a machine in the teachers' lounge, and this was borne out by the testimony of Mr. Petrillo. The District pointed to a prior 2007 memo from Mr. Fiscella to Mr. Valladares regarding the chain of command as proof that the respondent knew that he should have consulted with his supervisor before installing the vending machine in the teachers' lounge. However, there was also testimony from Mr. Nazziola and Mr. Petrillo that principals were the parties in charge of the buildings. Since the installation of a vending machine in the teachers' lounge of the school building would directly involve the building that the principal supervised, it would not appear unreasonable for a custodian to rely on the authority of the principal to allow for its installation.¹³ Additionally, in this case the principal actually recruited Mr. Valladares to install a machine. While the District pointed out that there is a procedure to be followed in contracting with vendors and that the principal would not have the authority to approve entering into such a contract, this information is more pertinent to any charges that might be brought against Mr. Nazziola and not Mr. Valladares. I **CONCLUDE** that it was reasonable for Mr. Valladares, as a custodian, to rely on the authority of the school principal.

Charge 2

In large part the analysis that was put forward in Charge 1 applies to Charge 2 as well. One of the differences that did exist was that instead of the principal soliciting Mr. Valladares to install a vending machine in the teachers' lounge, in School #8 the respondent consulted with the school principal, Mr. Petrillo, about buying a vending machine that was already installed in the teachers' lounge. The District, in its summation brief, cited Mr. Petrillo's testimony on cross-examination in which he denied

¹³ The respondent also pointed out that the school principal was one of the persons who did the performance evaluation of Mr. Valladares as one of his supervisors.

that he gave permission to Mr. Valladares to run the machine. However, in the line prior, when asked if he gave the respondent permission to operate the vending machine in the building, Mr. Petrillo said:

I wouldn't say I gave permission. He discussed something right before I was going to be transferred back to the high school about acquiring ownership, see? You know, I didn't see anything, you know, wrong about that

Mr. Petrillo also testified that he had arranged for the installation of non-Promptonian vending machines in the high school; had spoken with Mr. Nazziola about the procedure for getting a vending machine in his school; and asserted that there was no District policy regarding machines in the teachers' lounge. It was clear from the totality of the testimony that Mr. Valladares believed that his supervisor had given him the go-ahead to keep a vending machine in School #8. Based on this, Mr. Valladares purchased the machine from Steve.

The District also pointed out that it was highly suspicious that Mr. Valladares purchased a machine from someone without even knowing that person's last name and his authority to transfer the vending-machine ownership to him. At first blush, this argument would seem persuasive. It certainly is not the usual arrangement for one not to know at least the last name of the person you are dealing with in a business enterprise. Secondly, it is uncommon in a business relationship to pay \$2,000 in cash and not receive a receipt. However, after assessing Mr. Valladares on the stand, it is my opinion that he is not sophisticated in the business realm and could very well have made this arrangement on a handshake without knowing the full name of the seller or getting any kind of receipt. The fact that he did not report his earnings to the IRS could certainly get him into trouble with the federal government, but it does not bear on the charges before me.

Charges 3 and 4

Following the completion of the District's case, the respondent moved to have Charges 3 and 4 dismissed. Charge 3 states that during the 2010–2011 school year,

while misappropriating public property by operating and receiving proceeds from a vending machine placed in School #5, Mr. Valladares neglected his duties and responsibilities as a custodian when he serviced the vending machine. This constituted conduct unbecoming a custodian, misbehavior, neglect, insubordination and other just cause for dismissal. Charge 4 was identical, except that it dealt with School #8. The respondent argued that there was no testimony that showed that Mr. Valladares had neglected his duty by servicing the vending machines, and therefore the District had failed to sustain its burden on those charges. The District argued that Mr. Valladares could in fact have been servicing the machines during work time, and that would amount to a theft of services. I reserved on the motion.

Having heard all of the evidence and read the summation briefs of the parties, I must **CONCLUDE** that the District has failed to meet its burden as to Charges 3 and 4, and therefore they must be dismissed. Mr. Valladares testified that he serviced each of the machines during his dinner/lunch hour either on break from his duties at School #5 or School #8 or at 8:30 p.m. after he completed his shift. The time for his lunch/dinner break was 4:00–5:00 p.m. while he was a custodian at School #8, although sometimes the break time was changed depending on whether he had something to do at the time. Once he was transferred to School #5 in February 2010 he would go back to School #8 to service the machine at his lunch/dinner time, which was 5:00–6:00 p.m. He took about twenty minutes to service the machine. He was never told by his superiors that he could not go back to School #8. Mr. Nazziola, who was principal of School #5 when Mr. Valladares was the custodian, testified that he worked from 7:30 a.m. to 4:00 p.m. He never saw Mr. Valladares servicing the vending machine during the time that he was in the building. Since he left the building at 4:00, this would mean that Mr. Valladares serviced the machine at School #5 after 4:00, which would fall into line with his dinner/lunch break. Mr. Faronea testified that while he was the head custodian at School #5, he worked the 6:00-a.m.-to-4:00-p.m. shift. Mr. Valladares worked from 12:00 p.m. to 8:30 p.m. Mr. Faronea testified that once or twice a month he would stay late, and he saw Mr. Valladares servicing the machine at the school during the period from 5:00–6:00 p.m., which was Mr. Valladares' normal dinner break. Mr. Gerst, who was the custodian at School #8, testified that while Mr. Valladares was at that school, the respondent told him that he serviced the vending machine after 8:30 p.m., when he

was done with his shift. After Mr. Valladares was transferred, Mr. Gerst recalled seeing Mr. Valladares servicing the vending machine at School #8 between the hours of 4:00 and 5:00 p.m.¹⁴

The District called attention to the fact that Mr. Gerst testified that he saw Mr. Valladares at School #8, after he had been transferred to School #5, servicing the vending machine between 4:00 and 5:00 p.m. The District pointed this out to show that Mr. Valladares was servicing the machine on school time. However, Mr. Gerst did not say that he saw Mr. Valladares doing this on a regular basis, and Mr. Valladares testified that his dinner hour was adjusted from time to time depending on the circumstances. While there is some discrepancy in the time that Mr. Valladares serviced the vending machines, it appears that this activity occurred during his dinner/lunch break. Ms. Cavallo testified that while Mr. Valladares was assigned to School #8 she saw him servicing the vending machine. However, she could not give any specific dates or times. In addition, there was no evidence that Mr. Valladares neglected his duties in order to service the machine, that he failed to perform any of his duties as a custodian, or that the building was not properly cared for. In fact, during the period of time in question, Mr. Valladares' evaluations showed that he was performing his duties adequately. Moreover, there was no testimony that Mr. Valladares was not allowed to leave the building during his "break time," at which point he could have gone to School #8 to service the vending machine.

It is the obligation of the District to prove the tenure charges by a preponderance of the credible evidence. The Commissioner, in In re Tenure Hearing of Grundfest, School District of Madison, Morris County, EDU 5326-98, Comm'r (June 20, 2000), rev'g Initial Decision (March 29, 2000), aff'd, State Bd. (November 1, 2000) <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>, outlined what a board of education had to prove in order to meet its burden in a tenure charge:

Sustaining tenure charges for unbecoming conduct,
however, is a very serious matter. . . . Since the penalty for

¹⁴ Mr. Gerst testified that he would stay until 5:00 because there was an after-school program that lasted until 5:00.

respondent would be severe, it is the Board's responsibility and its burden to prove by a preponderance of credible evidence [the tenure charges against respondent].

It is the District's obligation to prove that Mr. Valladares did in fact service the vending machines during the time that he was supposed to be performing his duties as a custodian, not that he could have been servicing the machines during this time. The evidence presented by the District or elicited on cross-examination does not bear out the fact that Mr. Valladares was servicing the vending machines when he should have been working or that he neglected his custodian duties in order to service the machines. Therefore, Charges 3 and 4 must be dismissed.

Charge 5

The District also alleged that the fact that Mr. Valladares installed machines in the schools amounted to a theft of public funds, since under the contract with Pomptonian the proceeds from the vending machines would be turned over to the District. If the revenue from the food program fell short, then it would have to be supplemented by the local tax levy. By installing the vending machine in School #5, the District was deprived of revenue that could have been generated by that vending machine. However, there were was no proof that Pomptonian operated vending machines in any of the teachers' lounges and that the proceeds from those machines would ever find their way into the public coffers.

There is also a question of what happened to the money that Mr. Valladares was to turn over to school officials at Schools #5 and #8. Mr. Nazziola testified that he received two payments from Mr. Valladares that amounted to \$11. This money was kept in cash and was supposed to be used for student activities, although there was no accounting by the principal of the vending-machine money. Mr. Petrillo remembered receiving some money from Mr. Valladares, and Mr. Gerst recalled Mr. Valladares, on one occasion, asking him to take an envelope containing vending-machine money to the main office. The vending-machine money from School #8 was held in cash, as well, in a strong box, and was not formally accounted for. Neither of the principals required any kind of formal accounting and basically believed that Mr. Valladares gave an honest

accounting of the amount due. Therefore, the evidence does not sustain any charge of misappropriation of funds by Mr. Valladares during the time that Mr. Nazziola and Mr. Petrillo were principals. The evidence is not as clear with regard to School #5 when Ms. Cavallo was principal.¹⁵ Mr. Valladares testified that he never discussed the vending-machine arrangement with Ms. Cavallo, and assumed that she had somehow been made aware of the situation. He stated that once he was transferred, he periodically slipped envelopes containing the school's percentage of the proceeds from the vending machine under the door of the main office. Mr. Gerst, the custodian of the school, testified that he opened the school and the main offices each morning and never found any envelopes containing money. When asked if he thought that Mr. Gerst had appropriated the money, Mr. Valladares said that he was not accusing anyone of stealing.

Determinations often turn on credibility. Credibility is the value that a finder of the facts gives to the testimony of a witness. The process of evaluating the credibility of witnesses entails: (a) observing demeanor; (b) evaluating the ability to recall specific details; (c) considering the consistency of the testimony under direct and cross-examination; (d) determining the significance of any inconsistent statements or evidence; and (e) otherwise developing a sense of the witness's candor. This requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. See Carbo v. U.S., 314 F.2d 718, 749 (9th Cir. 1963), cert. denied sub. nom., Palermo v. U.S., 377 U.S. 953 (1964).

In evaluating the weight, trustworthiness and reliability of the evidence, factors such as motive, bias, confirming witnesses or statements, corroborative evidence, and common sense must be considered. Frequently, the trier of fact relies on the innate sense of whether the testimony has the ring of truth.

¹⁵ There was testimony from Mr. Picardo that the secretary at School #5 had \$88 in an envelope in her desk for one year. While this was School #8 and not School #5, this could bolster Mr. Valladares' testimony that his method of payment was to leave cash in an envelope in the main office.

I found both Ms. Cavallo's and Ms. Kistner's testimony that they never received an envelope containing cash from vending machines to be credible. They do not appear to have been aware of any arrangement regarding the vending machines. That leaves the testimony of Mr. Gerst and Mr. Valladares. While Mr. Valladares' method of paying the schools their share of the proceeds of the vending machines was far from orthodox, it appears to have been consistent. Both Mr. Nazziola and Mr. Petrillo testified that they received payments, albeit small, from Mr. Valladares on a regular basis when they were the principals of Schools #5 and #8. Therefore, either Mr. Valladares decided to keep the proceeds from the vending machine at School #8 after Mr. Petrillo left, or someone else took the envelopes that he said he left under the door for the principal. On cross-examination, Mr. Valladares refused to implicate Mr. Gerst as the person who stole the envelopes. I could not discern from the testimony presented whether Mr. Valladares or Mr. Gerst was more credible, or if another person took the alleged envelopes filled with vending-machine money. In addition, the District failed to link-up the proceeds of the vending machine with any theft of funds from the taxpayers of Belleville. There was no testimony that demonstrated that the proceeds from the vending machines were to be used to defray District expenses and that the loss of that revenue would affect the school budget.¹⁶ Since the District has the burden to prove the theft by a preponderance of the evidence, and since it did not meet its burden, I must **CONCLUDE** that the charge of theft regarding money from the School #8 vending machine was not sustained.

Charge 6

In Charge 6 the District alleged that Mr. Valladares made intentionally false statements to the superintendent and his direct supervisor, in that, when asked at the meetings held after the "break-in," he denied having any vending machines in the District other than the one in School #8. This amounted to insubordination. "Insubordination" has been found in an employee's "'willful refusal of submission' to the authority of [his or] her superiors." Laba v. Bd. of Educ., 23 N.J. 364, 385 (1957)

¹⁶ Since there was no testimony that Pomptonian ever dealt with vending machines in the teachers' lounges in the District and since both principals testified that the money received was never turned over to the District and was not used to defray District expenses, the connection between the vending-machine money and the theft of District funds could not be supported.

(quoting Harrison v. State Bd. of Educ., 134 N.J.L. 502, 505 (Sup. Ct. 1946)). It has also been defined as the willful and intentional disregard of the lawful and reasonable directives of an employee's duly authorized supervisor. In re Tenure Hearing of Motley, supra, EDU 7421-97, Initial Decision (May 5, 1999), modified, Comm'r (August 4, 1999), adopted, State Bd. of Education (December 1, 1999), <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>. Mr. Picardo testified that Mr. Valladares was asked at the first meeting, in mid-July 2011, whether he was operating vending machines in the District other than the one discovered at School #8, and that Mr. Valladares responded "no." Mr. Picardo stated that at the second meeting, the respondent did not say anything about owning/operating another vending machine. (Mr. Picardo did not know the exact date when the second machine was removed from the school.) Mr. Appleton said that at the first meeting, Mr. Valladares said "no" to the question of whether he was operating another machine in the District. Mr. Appleton stated that at the time of the second meeting, Mr. Valladares did not mention anything about having another machine in the District. However, Mr. Appleton did not recall when the vending machines were impounded and did not know if that occurred before or after the first meeting. Mr. Fiscella, who also attended the meetings, testified that Mr. Valladares was asked at the first meeting if he had machines in the District besides the one in School #8, and that he responded "no." Mr. Fiscella stated that the vending machines were ordered removed from the schools sometime between the first and second meetings. Mr. Gerst stated that he did not recall Mr. Valladares being questioned about other vending machines at the first meeting, and he did not know if other vending machines were discussed at the second meeting. Mr. Valladares testified that at the first meeting the District did not mention any other vending machines at School #5, and did not ask if he owned any other vending machines in the District. He stated that he removed the machine in School #5 before the July meeting, which he indicated was the first meeting. He said that he did so because Mr. Nazziola had left the school, and he was the one who had requested the machine. Since he was leaving, he thought that he should remove the vending machine from the school. This explanation does not hold water. Mr. Valladares had left the vending machine in School #8 even after Mr. Petrillo, the person with whom he had discussed buying the machine, left the school. It is clear that once Mr. Valladares got wind of the fact that machines were being impounded and he was under suspicion, he removed the machine from School #5. The respondent's

argument that at the time he was asked if he had another machine in the District he had already removed the machine, and therefore his answer was correct, is disingenuous. As the District pointed out, "whether he [Valladares] removed the machine at School #5 before or after meeting with District officials, he removed it to conceal its existence and avoid further potential punishment." If Mr. Valladares was forthcoming, he would have divulged the fact that he had been operating another machine in the District. He did not do so. Obviously, once the respondent realized that an investigation was underway, he attempted to cover his tracks. I therefore **CONCLUDE** that his failure to disclose the existence of the other vending machine in the District was an act of insubordination.

PENALTY

The question then becomes what punishment should be meted out to the respondent on Charge 6. The Board seeks Valladares' dismissal. Factors to be taken into account in making a penalty determination include the nature and circumstance of the incidents or charges, the teacher's (employee's) prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring. In re King, EDU 4241-00, Final Decision (February 25, 2002), <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>, (citing In re Suitt-Green, EDU 538-07, Final Decision (February 25, 2002), <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>). There is no doubt that Mr. Valladares was not above board when he did not reveal that he was operating another vending machine in the District. Having been alerted to the investigation of the vending machines, Mr. Valladares tried to cover his tracks by not being up front with the District and by removing the second vending machine without notifying the District. This behavior stands in sharp contrast to his otherwise unblemished record in over eight years of employment. While the District has argued and cited cases that stand for the proposition that one bad act is cause for removal of tenure and termination of position, the cases by and large dealt with theft by the employee. In this case, I found that the District did not prove that Mr. Valladares was guilty of theft. I also note that, based on Mr. Valladares' position as a custodian, the effect on the maintenance of discipline among the students and staff, should the respondent be returned to his position, would be minimal. On the other hand, the

respondent's argument that other employees who were also involved in the vending-machine incident were not disciplined is not persuasive. Mr. Valladares must be judged by his own actions and not those of other employees who may or may not be brought up on charges. Weighing all of these factors, I **CONCLUDE** that the proper penalty for Mr. Valladares' insubordination is forfeiture of his pay for a period of 120 days; he should thereafter be returned to his position as a custodian in the District.

ORDER

It is hereby **ORDERED** that Mr. Valladares forfeit 120 days of pay, following which he should be returned to his position as a custodian in the Belleville School District.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/19/12
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency:

6/19/12

Date Mailed to Parties:

6/19/12

jb

APPENDIX

WITNESSES

For Belleville:

Edward Appleton

Dora Cavallo

Vincent Fiscella

Lisa Kistner

Joseph Picardo

For Miguel Valladares:

John Faronea

Leonard Gerst

Gabriel Nazziola

Joseph Petrillo

Miguel Valladares

EXHIBITS

For Petitioner:

- P-1 Respondent's Interrogatory Responses and Attachments
- P-2 Contract between Board of Education and Pomptonian Food Services
- P-3 Letter of reprimand to respondent
- P-4 Tenure Charges

For Respondent:

- R-1 List of vending machines in District buildings as of July 2011
- R-2 Not in evidence
- R-3 Performance evaluation of Miguel Valladares dated November 24, 2008
- R-4 Performance evaluation of Miguel Valladares dated February 18, 2009
- R-5 Performance evaluation of Miguel Valladares dated November 30, 2009
- R-6 Performance evaluation of Miguel Valladares dated January 7, 2011

#307-12

DEBORAH BEARG, :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE CITY :
OF ELIZABETH, UNION COUNTY, :
RESPONDENT. :
_____ :

SYNOPSIS

Petitioner appealed the decision of the respondent Board to terminate her employment as a teacher through a reduction in force (RIF) at the end of the 2010-2011 school year. Petitioner was continuously employed by the Board from 1997 through June 2011. Petitioner contended that the Board offered teaching contracts to other school employees with less seniority than petitioner, in violation of her tenure and seniority rights. Petitioner filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue, and the matter is ripe for summary decision; petitioner was employed under tenure at the time of the RIF and plainly met the requirements of *N.J.S.A.* 18A:28-5; the Board gave no consideration whatsoever to the requirements of *N.J.S.A.* 18A:28-5 and *N.J.S.A.* 18A:28-10 prior to terminating petitioner's employment; and upon petitioner's termination, the Board retained elementary teachers with no prior experience in the district. The ALJ concluded that petitioner must be immediately reinstated to her position of employment, and must be compensated for all lost salary, benefits and emoluments, less mitigation, retroactive to the date of her termination.

Upon careful and independent review, the Deputy Commissioner – to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-33 – concurred with the ALJ's findings and conclusions and, accordingly, adopted the Initial Decision of the OAL granting summary decision to petitioner. The Commissioner ordered the Board to reinstate petitioner as an elementary school teacher with salary and all benefits retroactive to June 30, 2011, less any mitigation.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
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August 3, 2012

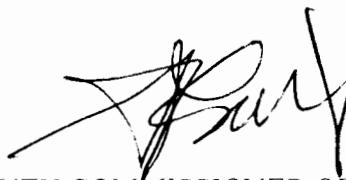
OAL DKT. NO. EDU 10851-11
AGENCY DKT. NO. 240-8/11

DEBORAH BEARG, :
 :
 PETITIONER, : COMMISSIONER OF EDUCATION
 :
 V. : DECISION
 :
 BOARD OF EDUCATION OF THE CITY :
 OF ELIZABETH, UNION COUNTY, :
 :
 RESPONDENT. :
 _____ :

The Deputy Commissioner – to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-33 – has reviewed the record of this matter and the Initial Decision of the Office of Administrative Law, wherein the Administrative Law Judge concluded that petitioner’s tenure rights were violated when respondent “RIF’d” her while retaining teachers with less seniority in the position of elementary education teacher.¹ As the record fully supports that conclusion, the Deputy Commissioner adopts the Initial Decision as the final decision in this case.

Accordingly, summary decision is granted in favor of petitioner. Respondent shall reinstate petitioner as an elementary school teacher with salary and all benefits retroactive to June 30, 2011, minus any mitigation.

IT IS SO ORDERED.²



DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/03/12

Date of Mailing: 8/06/12

¹ Neither party filed exceptions.

² This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, c. 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10851-11

AGENCY DKT. NO. 240-8/11

DEBORAH BEARG,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
CITY OF ELIZABETH,**

Respondent.

Stephen B. Hunter, Esq., for petitioner (Detzky and Hunter, attorneys)

Karen Murray, Esq., for respondent

Record Closed: June 6, 2012

Decided: June 20, 2012

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, Deborah Bearg, a teacher employed by the Board of Education of the City of Elizabeth (the Board), asserts that the Board terminated her employment effective June 30, 2011, in contravention of her tenure and seniority rights under

N.J.S.A. 18A:28-5 et seq. She seeks reinstatement and back pay retroactive to the date of her termination.

PROCEDURAL HISTORY

Bearg filed her appeal with the Commissioner of Education (the Commissioner) on August 22, 2011. An answer was filed on behalf of the Board, and the contested case was transmitted to the Office of Administrative Law (OAL), on September 13, 2011.

In or about June 2010, the Board terminated several-hundred employees pursuant to a reduction in force (RIF); more than eighty of these employees have pending petitions challenging their terminations as violative of the tenure laws. Discovery and settlement discussions relative to these cases have been the subject of bi-monthly status conferences between counsel and me. In June 2011, additional school district employees were RIF'd, among them Bearg. These additional petitions have been case-managed together with those filed in 2010. At one such status conference several claims, including that filed by Bearg, were discussed at length; it appeared to petitioners' counsel that seven petitioners had lengthy tenures in the district. Counsel questioned how it was determined that these teachers should be RIF'd while other, ostensibly less-senior staff members, had been retained by the district. Board counsel advised that he would investigate the matter.

Accordingly, a case-management Order dated November 22, 2011, provided as follows:

Seven petitioners were identified who appear to have long tenures in the district (Schwartz, Jones, Kologi, Simmons, Clayton, Meade and Bearg). By **December 9, 2011**, Mr. Lehman will advise me and counsel regarding the district's position as to these petitioners

[(C-1.)]

Via letter from counsel dated December 16, 2011, the Board advised that, “[t]he District’s position is that the said Petitioners were subject to a reduction-in-force due to budgetary reasons” (C-2.) I considered this statement to be non-responsive to my Order, and I so advised in correspondence dated December 20, 2011. (C-3.) I directed counsel to supply a substantive explanation “why the district RIF’d seven petitioners who appear to clearly have rights superior to retained staff members.”

That explanation came via letter from Board counsel dated January 13, 2012. (C-4.) Citing the expense of tenure charges, counsel stated that school administration is “of the belief that poor teachers should not be in the classroom, regardless of tenure.” Relative specifically to Bearg, counsel stated on behalf of the Board that she was RIF’d because,

[s]he is believed to live out of her car, despite receiving a full teacher’s salary. She attends any function where she can pocket free food. A DYFS complaint was dismissed and she refused to go for an independent exam at the Board’s expense. The undersigned had to request a school nurse to talk to her several times about personal hygiene, as all of the people near her complained regularly.

[(C-4.)]

Counsel noted that, “[t]he District cannot in good conscience subject the District’s students to potential physical and emotional harm.” Counsel went on to advise that “it does not take an accountant to see that the least productive, ineffective employees should be rified, as the law requires the best possible education for students.” It is noteworthy that at no time did counsel advise me that Bearg was chosen to be RIF’d because she was non-tenured.¹

Via letter dated January 19, 2011, I directed that counsel for Bearg file a motion for summary decision, and he did so on February 24, 2011. The Board filed its opposition to the motion on March 27, 2012. Bearg responded to that opposition with a supplementary certification and brief on April 17, 2012. Upon review of the submissions of the parties, via letter dated May 3, 2012, I directed that they supplement the record

¹ Indeed, the Board’s answer to the petition of appeal admitted that Bearg held her position under tenure.

with additional documents and factual details. They did so via letters and certifications. The record closed upon receipt of a final letter from counsel for the Board on June 6, 2012.

FINDINGS OF FACT

The material facts are not in dispute. I **FIND**:

Bearg is the holder of an instructional certificate issued by the New Jersey State Board of Examiners, bearing an endorsement as a teacher of elementary education. Her certificate was issued in 1977. Bearg was employed continuously by the Board from November 3, 1997, through June 30, 2011. From 1997 until the end of the 2005-2006 school year, Bearg served as a teacher in the "Division of Staff Development." It is uncontroverted that Bearg's function was to fill in for teachers who were absent from their classrooms because they were engaged in staff-development training.

The district has characterized Bearg's role during the first nine years of her employment as that of a "replacement" or "substitute teacher." Bearg urges in her supplemental certification that in actuality she performed all the responsibilities of any other classroom teacher during this time period. She points out that administration provided evaluations to her in October 2000, October 2001, October 2002, October 2003, May 2005, and March 2006, which expressly note that she is "tenured." Professional Improvement Plans (PIP) completed in 2003 and 2005 include a section denoted "for non-tenured" where the evaluator may recommend reappointment; although the forms are otherwise completely filled out, this portion is blank in Bearg's PIP, leading to the obvious conclusion that she was viewed as already holding tenure status.

During the years 2006-2009 there is no contention that Bearg served as anything but a regular classroom teacher, as follows:

- 2006-2007 – Teacher of Sixth Grade
- 2007-2008 – Teacher of Second Grade²
- 2008-2009 – Teacher of Preschool

Bearg was reemployed for the 2009-2010 school year. A contract was issued to her dated May 14, 2009, reemploying her for the entire school year, and assigning her as a pre-kindergarten teacher at the Albert Einstein Academy. A second, identical contract was issued to her on June 29, 2009. But come September, Bearg was told to report to the Imperial Building, a district administrative location, and to an assignment that was non-instructional.

The Board asserts that it paid Bearg to do absolutely nothing once it assigned her to the Imperial Building. Bearg replies that she engaged in “various professional duties including curriculum related matters affecting the district’s science department.” (Bearg certif. (May 23, 2012).) Thereafter, at its meeting of September 17, 2009, the Board placed Bearg on a “paid administrative leave effective September 18, 2009.” (Lehman certif., exhibit 3.) Bearg remained in this status, “assigned” to the district administration building (the Mitchell Building) with the citizens of Elizabeth again paying her to do absolutely nothing, until June 30, 2011. She then was advised that her contract for the 2011-2012 year was being rescinded “[d]ue to a continuing need to implement a reduction in force.” Notwithstanding the Board’s present contention that Bearg is nontenured, she was further advised that she would “be placed on a recall list in accordance with [her] tenure, certification and seniority rights.” (Lehman certif., exhibit 3 (March 26, 2012).)

The certification of counsel for the Board, dated May 24, 2012, renews the Board’s performance-related concerns, stating as follows:

When she was reporting to the Mitchell Building, as a result of complaints from other staff on administrative leave, there were serious concerns over [Bearg’s] performance, interactions with staff and students and her mental health . . . [Staff] began complaining to the District about bizarre and

² Bearg states that she served as a fourth-grade teacher this year; in any event the parties agree that Bearg taught full-time in an elementary classroom during the 2007-2008 school year.

unusual behavior exhibited by the Petitioner in their presence. These complaints included lack of personal hygiene, bizarre behavior in the administrative leave room, and information that Petitioner appeared to be living in her car.

[(Lehman certif. (May 24, 2012).]

The Board urges that it sought unsuccessfully to send Bearg for an independent medical examination. She replies with a letter from counsel dated June 29, 2010, which clearly agrees to the evaluation, albeit with certain stipulations as to when the evaluation will take place and what materials will be supplied to the evaluator. (Hunter letter, exhibit A (June 1, 2012).) Mr. Hunter notes, and Board counsel does not dispute, that to date he has received no reply to his letter.

Board counsel certifies that staff "with tenure achieved going back to 2002" were also RIF'd in 2011. More to the point, however, minutes of the meeting of the Board throughout the fall of 2011 reveal the appointment of several new hires in the area of elementary education shortly after Bearg was RIF'd. These include teachers who earned their college degrees as late as 2010. (Attachment to Spear certif.).

ANALYSIS AND CONCLUSIONS OF LAW

Bearg seeks relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential

materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that “if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, ‘Fanciful frivolous, gauzy or merely suspicious,’ he will not be heard to complain if the court grants summary judgment.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The “judge’s function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Brill, *supra*, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence “is so one-sided that one party must prevail as a matter of law,” the trial court should not hesitate to grant summary judgment. Liberty Lobby, *supra*, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. I **CONCLUDE** that this matter is ripe for summary decision. There are no material facts in dispute, and Bearg is entitled to the relief she seeks as a matter of law. Bearg challenges the good faith of the Board, asserting that her RIF was not the result of a need to effectuate economies; she further asserts that upon determining to RIF her the Board failed to give proper consideration to her tenure and/or seniority rights. While she is right on both counts, the facts reflect that this case is really about the bona fides of the Board’s decision to reduce force.

Tenure is a legislative status, earned by operation of law, and upon meeting the precise requirements of the tenure statute. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982); Zimmerman v. Newark Bd. of Educ., 38 N.J. 65 (1962); N.J.S.A. 18A:28-1 to -18. The tenure laws were “designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service.” These statutory protections notwithstanding, economic exigencies may necessitate the lay-off of tenured staff. N.J.S.A. 18A:28-9. But the law is unequivocal that such dismissals must be made “for reasons of economy or because of reduction in the number of pupils . . . or for other good cause”; and on the basis of seniority according to standards established by the Commissioner. N.J.S.A. 18A:28-10; *see* N.J.A.C. 6A:32-5.1; Howley v. Ewing Bd. of Educ., 1982 S.L.D. 1328,

1339, aff'd, 1983 S.L.D. 1554; Impey v. Shrewsbury Bd. of Educ., 142 N.J. 388, 398 (1995) (citing In re Maywood Bd. of Educ., 168 N.J. Super. 45, 55 (App. Div. 1979). The Commissioner has recognized that “[w]hile the Board is vested with extensive management power to employ, promote, transfer and dismiss, it must exercise that power within the constraints imposed by the tenure law . . . [t]o hold otherwise would render meaningless the protections afforded by the tenure system.” Smith v. Berlin Bd. of Educ., EDU 06584-03S, Initial Decision (August 6, 2004), aff'd, Comm’r (September 17, 2004), <http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>.

A presumption of correctness attaches to a local board’s decision to reduce staff. The petitioning teacher generally will not prevail where there exists any reasonable justification for the reduction in force, and absent proof of bad faith. See Klig v. Bd. of Educ. of the Borough of Palisades Park, 1975 S.L.D. 168, 173-174; Maywood, supra, 168 N.J. Super. 45. Accordingly, Bearg’s burden is a weighty one, but nonetheless one she has readily met. The Board averred in its formal answer, and initially informed me via letter, that it dismissed Bearg for reasons of economy. The Board’s real reason for dismissing Bearg was dissatisfaction with her performance. The Board reiterated that performance and mental-health concerns motivated its decision to RIF Bearg in counsel’s May 2012 certification.

Indeed, counsel’s January 13, 2012, letter reveals that the Board and its administration do not care for our tenure laws. Accordingly, they appear to believe that they can simply disregard the laws’ requirements. The Board, through counsel, is nothing if not candid; readily admitting that Bearg was “RIF’d” to avoid the expense and uncertainty of tenure charges. Counsel writes:

. . . the District cannot in good conscience subject its students to teachers who cannot teach. Further, this District’s experience with tenure charges is that it is a long, expensive process which, except for extreme physical abuse seems to result in poor, incompetent teachers being returned to the classroom.

[(C-4.)]

If the Board feels that Bearg acted in a manner that is inconsistent with her professional responsibilities, a statutory mechanism exists through which to seek her removal. N.J.S.A. 18A:6-10. To date, the Board has taken no steps to comply with the tenure charge procedures codified at N.J.S.A. 18A:6-10 et seq. and I **CONCLUDE** that Bearg remains deprived of the salary and benefits of her tenured position of employment, in clear violation of her rights. The Board further asserts that Bearg failed to agree to submit to a psychiatric examination, thus justifying its action in terminating her. This argument is the proverbial "red herring," as it is clear that the Board advised Bearg that it terminated her to effectuate economies, and for no other reason.³

The Board's contention that Bearg was untenured is devoid of merit. This argument was never asserted prior to the filing of the pending motion; is utterly disingenuous and inconsistent with the position taken by the Board in prior correspondence and other documents; and buttresses my conclusion that this Board has acted in bad faith. Indeed, if the Board perceived that Bearg lacked tenure why did it place her on a series of paid non-instructional reassignments rather than summarily terminate her when it became concerned about her performance, demeanor, and mental health? Moreover, why did the Board admit that she was tenured in its answer to the petition? In any event, it is uncontroverted that Bearg was employed for three years under her teacher of elementary education certificate during the years 2006-2007 through 2008-2009. She was reemployed in September 2009, reported to work and was paid under a contract for professional services. It is thus unnecessary to reach the issue of whether Bearg's service as an alleged replacement teacher was that of a substitute teacher within the meaning of N.J.S.A. 18A:16-1.1. I **CONCLUDE** that Bearg plainly has met the requirements of N.J.S.A. 18A:28-5, and that she was employed under tenure at the time of her RIF.

Finally, it is clear that this Board gave no consideration whatsoever to the requirements of N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-10 prior to terminating Bearg's employment. Upon her termination, the Board retained elementary teachers with no

³ If the Board was acting pursuant to its authority under N.J.S.A. 18A:16-4, I would have expected to have received a copy of a letter placing Bearg on a sick leave pending evidence of recovery, rather than a copy of a letter to her citing the need to effectuate economies.

prior experience in the district.⁴ I **CONCLUDE** that Bearg must be immediately reinstated to her position of employment, and be compensated for all lost salary, benefits and emoluments of employment, less mitigation, retroactive to the date of her termination.

ORDER

Bearg's motion for summary decision is **GRANTED**. The Board is **ORDERED** to reinstate Bearg to the position of teacher, with all salary, benefits and emoluments of this position, less mitigation, retroactive to June 30, 2011.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

⁴ The district argues that the scope of Bearg's seniority remains an issue for plenary hearing, even if she did have tenure. This argument is a non-starter. Berg's rights clearly superseded those of the non-tenured staff newly employed by the district in 2011 after she was terminated. See Capodilupo v. W. Orange Bd. of Educ., 218 N.J. Super. 510, 514 (App. Div.), certif. denied, 109 N.J. 514 (1987).

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

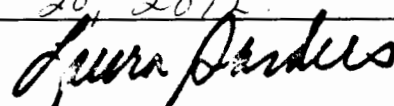
June 20, 2012

DATE



ELLEN S. BASS, ALJ

Date Received at Agency:

June 20, 2012


Date Mailed to Parties:

JUN 21 2012

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Judge's Exhibits:

- C-1 Order dated, November 22, 2011
- C-2 Letter dated, December 16, 2011
- C-3 Letter dated, December 20, 2011
- C-4 Letter dated, January 13, 2012

#308-12

MAUREEN MEADE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioner, who holds an instructional certificate with an endorsement as a teacher of social studies, appealed the decision of the respondent Board to terminate her employment through a reduction in force (RIF) at the end of the 2010-2011 school year. Petitioner was continuously employed by the Board from 2004 through June 2011. Petitioner contended that the Board offered employment for which she was qualified to other teachers who were untenured or had less seniority, in violation of her rights pursuant to *N.J.S.A. 18A:28-5 et seq.* Petitioner filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue, and the matter is ripe for summary decision; petitioner was employed under tenure at the time of the RIF and plainly met the requirements of *N.J.S.A. 18A:28-5*; the Board gave no consideration whatsoever to the requirements of *N.J.S.A. 18A:28-5* and *N.J.S.A. 18A:28-10* prior to terminating petitioner's employment; and upon petitioner's termination, the Board retained teachers of social studies with no prior experience in the district. The ALJ concluded that petitioner must be immediately reinstated to her position of employment, and must be compensated for all lost salary, benefits and emoluments, less mitigation, retroactive to the date of her termination.

Upon careful and independent review, the Deputy Commissioner – to whom this matter was delegated pursuant to *N.J.S.A. 18A:4-33* – concurred with the ALJ's findings and conclusions and, accordingly, adopted the Initial Decision of the OAL granting summary decision to petitioner. The Deputy Commissioner ordered the Board to reinstate petitioner as an elementary school teacher with salary and all benefits retroactive to June 30, 2011, less any mitigation.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
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August 3, 2012

OAL DKT. NO. EDU 14385-11
AGENCY DKT. NO. 322-10/11

MAUREEN MEADE,	:	
	:	
PETITIONER.	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF ELIZABETH, UNION COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.¹

Upon such review, the Deputy Commissioner – to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-33 – concurs with the Administrative Law Judge that the petitioner, Maureen Meade, is entitled to summary decision. Accordingly, respondent shall reinstate petitioner with salary and all benefits retroactive to June 30, 2011, minus any mitigation.

IT IS SO ORDERED.²


DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/03/12
Date of Mailing: 8/06/12

¹ The Elizabeth City Board of Education was granted an extension of time to file exceptions; however, the Board never submitted exceptions.

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36. (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 14385-11

AGENCY DKT. NO. 322-11/11

MAUREEN MEADE,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
CITY OF ELIZABETH,**

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld Cohen, attorneys)

Karen Murray, Esq., for respondent

Record Closed: April 12, 2012

Decided: May 7, 2012

BEFORE **ELLEN S. BASS, ALJ:**

STATEMENT OF THE CASE

Petitioner, Maureen Meade, a teacher employed by the Board of Education of the City of Elizabeth (the Board), asserts that the Board terminated her employment effective June 30, 2011, in contravention of her tenure and seniority rights under

N.J.S.A. 18A:28-5 et seq. She seeks reinstatement and back pay retroactive to the date of her termination.

PROCEDURAL HISTORY

Meade filed her appeal with the Commissioner of Education (the Commissioner) on October 31, 2011. An answer was filed on behalf of the Board, and the contested case was transmitted to the Office of Administrative Law (OAL), on November 22, 2011.

In or about June 2010, the Board terminated several hundred employees pursuant to a reduction in force (RIF); more than eighty of these employees have pending petitions challenging their terminations as violative of the tenure laws. Discovery and settlement discussions relative to these cases have been the subject of bi-monthly status conferences between counsel and me. In June 2011, additional school district employees were RIF'd, among them Meade. These additional petitions have been case managed together with those filed in 2010. At one such status conference several claims, including that filed by Meade, were discussed at length; it appeared to petitioners' counsel that seven petitioners had lengthy tenures in the district. Counsel questioned how it was determined that these teachers should be RIF'd while other, ostensibly less-senior staff members, had been retained by the district. Board counsel advised that he would investigate the matter.

Accordingly, a case management order dated November 22, 2011, provided as follows:

Seven petitioners were identified who appear to have long tenures in the district (Meade, Jones, Kologi, Simmons, Clayton, Meade and Bearg). By **December 9, 2011**, Mr. Lehman will advise me and counsel regarding the district's position as to these petitioners

[(C-1.)]

Via letter from counsel dated December 16, 2011, the Board advised that, "[t]he District's position is that the said petitioners were subject to a reduction-in-force due to

budgetary reasons” (C-2.) I considered this statement to be non-responsive to my order, and I so advised in correspondence dated December 20, 2011. (C-3.) I directed counsel to supply a substantive explanation “why the district RIF’d seven petitioners who appear to clearly have rights superior to retained staff members.”

That explanation came via letter from Board counsel dated January 13, 2012. (C-4.) Citing the expense of tenure charges, counsel stated that school administration is “of the belief that poor teachers should not be in the classroom, regardless of tenure.” Relative specifically to Meade, counsel stated on behalf of the Board that she was RIF’d because “[s]he had a DYFS complaint and after its dismissal . . . refused to obtain independent clearance at the Board’s expense. She is accused of belligerent behavior toward students, staff and supervisors and demonstrated the same over a year” Counsel went on to advise that “it does not take an accountant to see that the least productive, ineffective employees should be rified, as the law requires the best possible education for students.”

Via letter dated January 19, 2011, I directed that counsel for Meade file a motion for summary decision, and she did so on March 12, 2011. The Board filed a reply on April 12, 2012, at which time the record closed.

FINDINGS OF FACT

The material facts are not in dispute. I **FIND**:

Meade is the holder of an instructional certificate issued by the New Jersey State Board of Examiners, bearing an endorsement as a teacher of social studies. Her certificate was issued in 1988. Meade was employed continuously in the Elizabeth schools from September 2004 through June 30, 2011. She taught seventh grade social studies during the 2004-2005 school year and high school social studies from 2005 through 2008. Meade was again appointed to a position as a high school social studies teacher in September 2008. But, “[a]s a result of numerous complaints, [Meade] was removed from her teaching duties and assigned to administrative duty from April 22, 2009, until the end of the 2008-2009 school year.” (Murray Certif.) Meade returned to

an elementary school social studies classroom for the 2009-2010 school year, where she remained until May 11, 2010. The Board notes that Meade was then again placed on "administrative duty," due to "numerous additional complaints," and that she remained on paid status, but with no teaching responsibilities, until the date of her RIF in June 2011.

The certification of counsel filed in opposition to the pending motion notes that staff "who had achieved tenure as far back as 2002" were also RIF'd in 2011. More to the point, however, minutes of the meeting of the Board on October 3, 2011, also reveal the appointment of several new hires in the area of social studies in the fall of 2011, shortly after Meade was RIF'd. These include a teacher who earned her college degree in 2009, and another who earned a college degree in 2010. (Attachment to Oxfeld Certif.).

ANALYSIS AND CONCLUSIONS OF LAW

Meade seeks relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla,

'Fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. I **CONCLUDE** that this matter is ripe for summary decision. There are no material facts in dispute, and Meade is entitled to the relief she seeks as a matter of law. Meade challenges the good faith of the Board, asserting that her RIF was not the result of a need to effectuate economies; she further asserts that upon determining to RIF her the Board failed to give proper consideration to her tenure and/or seniority rights. While she is right on both counts, the facts reflect that this case is really about the bona fides of the Board's decision to reduce force.

Tenure is a legislative status, earned by operation of law, and upon meeting the precise requirements of the tenure statute. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982); Zimmerman v. Newark Bd. of Educ., 38 N.J. 65 (1962); N.J.S.A. 18A:28-1 to -18. The tenure laws were "designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service." These statutory protections notwithstanding, economic exigencies may necessitate the lay-off of tenured staff. N.J.S.A. 18A:28-9. But the law is unequivocal that such dismissals must be made "for reasons of economy or because of reduction in the number of pupils . . . or for other good cause"; and on the basis of seniority according to standards established by the Commissioner. N.J.S.A. 18A:28-10; see N.J.A.C. 6A:32-5.1; Howley v. Ewing Bd. of Educ., 1982 S.L.D. 1328, 1339, aff'd, 1983 S.L.D. 1554; Impey v. Shrewsbury Bd. of Educ., 142 N.J. 388, 398 (1995) (citing In re Maywood Bd. of Educ., 168 N.J. Super. 45, 55 (App. Div. 1979)). The Commissioner has recognized that "[w]hile the Board is vested with extensive management power to employ, promote, transfer and dismiss, it must exercise that power

within the constraints imposed by the tenure law . . . [t]o hold otherwise would render meaningless the protections afforded by the tenure system.” Smith v. Berlin Bd. of Educ., EDU 06584-03, Initial Decision (August 6, 2004), aff’d, Comm’r (September 17, 2004), <http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>.

A presumption of correctness attaches to a local board’s decision to reduce staff. The petitioning teacher generally will not prevail where there exists any reasonable justification for the reduction in force, and absent proof of bad faith. See Klig v. Bd. of Educ. of the Borough of Palisades Park, 1975 S.L.D. 168, 173-174; Maywood Bd. of Educ., supra. Accordingly, Meade’s burden is a weighty one, but nonetheless one she has readily met. The Board averred in its formal answer, and initially informed me via letter, that it dismissed Meade for reasons of economy. The Board’s real reason for dismissing Meade was dissatisfaction with her performance. Indeed, counsel’s January 13, 2012, letter reveals that the Board and its administration do not care for our tenure laws. Accordingly, they appear to believe that they can simply disregard the laws’ requirements. The Board, through counsel, is nothing if not candid; readily admitting that Meade was “RIF’d” to avoid the expense and uncertainty of tenure charges. Counsel writes:

. . . the District cannot in good conscience subject its students to teachers who cannot teach. Further, this District’s experience with tenure charges is that it is a long, expensive process which, except for extreme physical abuse seems to result in poor, incompetent teachers being returned to the classroom.

[(C-4.)]

But if the Board feels that Meade has acted in a manner that is inconsistent with her professional responsibilities, a statutory mechanism exists through which to seek her removal. N.J.S.A. 18A:6-10. To date, the Board has taken no steps to comply with the tenure charge procedures codified at N.J.S.A. 18A:6-10 et seq. and I **CONCLUDE** that Meade remains deprived of the salary and benefits of her tenured position of employment, in clear violation of her rights.

The Board's contention that Meade was untenured is so devoid of merit as to barely warrant response. The argument is disingenuous and buttresses my conclusion that this Board has acted in bad faith. Indeed, if the Board perceived that Meade lacked tenure why did it place her on a series of paid non-instructional reassignments rather than summarily terminate her when it began to receive "numerous complaints" about her performance and demeanor? In any event, it is uncontroverted that Meade was employed for more than three years and a day as a teacher of social studies, and that she held a proper certificate in full force and effect during that time. I **CONCLUDE** that Meade plainly has met the requirements of N.J.S.A. 18A:28-5, and that she was employed under tenure at the time of her RIF.

Moreover, it is clear that this Board gave no consideration whatsoever to the requirements of N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-10 prior to terminating Meade's employment. She had worked in the district for seven years; upon her termination, the Board retained teachers of social studies with no prior experience in the district. The Board unsuccessfully argues that Meade's lack of elementary seniority serves to defeat her claims.¹ Our courts have held that "seniority provides a mechanism for ranking all *tenured* teaching staff members so that reductions among the tenured force can be effected in an equitable fashion and in accord with sound educational policies." Capodilupo v. W. Orange Bd. of Educ., 218 N.J. Super. 510, 514 (App. Div.), certif. denied, 109 N.J. 514 (1987). Accordingly, the regulations specify precise categories of prior employment to which a tenured employee such as Meade may assert an entitlement in the event of a RIF. N.J.A.C. 6A:32-5.1.

But our case law recognizes that Meade's entitlements are more expansive than her seniority rights. A tenured staff member remains entitled to retention as against a non-tenured teacher, regardless of seniority. Our courts have held that "[t]o hold otherwise would be to defeat the purpose of tenure[,] which was to give a measure of security to teachers after the prescribed number of years of service." Id. at 515. Meade unequivocally held tenure; her tenure rights extended to any positions for which she was

¹ Having served at the secondary level under her social studies endorsement, it is clear that Meade has seniority in the secondary category under N.J.A.C. 6A: 32-5.1(l)(17). The seventh grade in which she served appears to have been departmentalized, and thus likewise is considered to be in the secondary seniority category.

qualified under the social studies endorsement to her instructional certificate. Accordingly, the retention in September 2011 of new hires to teach social studies clearly violated Meade's rights. This is the case regardless whether Meade earned elementary seniority. See Bednar v. Westwood Bd. of Educ., 1985 S.L.D. 627, aff'd, State Bd., 1986 S.L.D. 2993, rev'd and remanded, 221 N.J. Super. 239 (App. Div. 1987), certif. denied, 110 N.J. 512 (1988).

I **CONCLUDE** that Meade must be immediately reinstated to her position of employment, and be compensated for all lost salary, benefits and emoluments of employment, less mitigation, retroactive to the date of her termination.

ORDER

Meade's motion for summary decision is **GRANTED**. The Board is **ORDERED** to reinstate Meade to the position of teacher, with all salary, benefits and emoluments of this position, less mitigation, retroactive to June 30, 2011.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 7, 2012

DATE

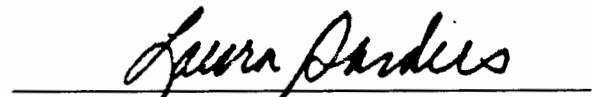
Date Received at Agency:

Date Mailed to Parties: *may 8, 2012*



ELLEN S. BASS, ALJ

May 7, 2012



**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

APPENDIX

Judge's Exhibits:

- C-1 Order dated, November 22, 2011
- C-2 Letter dated, December 16, 2011
- C-3 Letter dated, December 20, 2011
- C-4 Letter dated, January 13, 2012

OAL DKT. NO. EDU 4502-11
AGENCY DKT. NO. 40-2/11

JOSEPHINE ZANGRILLI, :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE :
TOWNSHIP OF EWING, MERCER :
COUNTY, :
RESPONDENT. :

The record of this matter, the proposed Settlement Agreement and Release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Deputy Commissioner – to whom this matter was delegated pursuant to *N.J.S.A. 18A:4-33* – approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/03/12

Date of Mailing: 8/06/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04502-11

AGENCY DKT. NO. 40-2/11

JOSEPHINE ZANGRILLI,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF EWING, MERCER
COUNTY,**

Respondent.

Michael B. Berman, Esq., for petitioner

Marc H. Zitomer, Esq., for respondent (Schenck, Price, Smith & King, LLP,
attorneys)

Record Closed: June 18, 2012

Decided: June 19, 2012

BEFORE JEFF S. MASIN, ALJ:

This matter involves a Petition of Appeal filed by Josephine Zangrilli (petitioner), with the Commissioner of Education seeking restoration of her sick, personal and vacation days from her employer, the Ewing Township Board of Education (respondent). The case was transmitted to the Office of Administrative Law ("OAL") from the Department of Education, Bureau of Controversies and Disputes, on April 15, 2011, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement of all issues in dispute and prepared a Settlement Agreement and Release, which is attached and fully incorporated herein, as well as a Certified Board Resolution approving the settlement.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

DATE

June 19, 2012

JEFF S. MASIN, ALJ

[Signature]

Date Received at Agency:

6/22/12

Date Mailed to Parties:

6/22/12

mjm

Attachments

SCHENCK, PRICE, SMITH & KING, LLP

220 Park Avenue

Florham Park, NJ 07932

(973) 539-1000

Attorneys for Respondent,

Ewing Township Board of Education

2012 APR -2 A 10:51

JOSEPHINE ZANGRILLI,

Petitioner,

v.

**EWING TOWNSHIP BOARD OF
EDUCATION,**

Respondent.

**BEFORE THE COMMISSIONER
OF EDUCATION**

OAL Docket No.: EDU 4502-11

Agency Ref. No.: 40-2/11

Administrative Action

**SETTLEMENT AGREEMENT
AND RELEASE**

WHEREAS, Petitioner filed a Petition of Appeal with the Commissioner of Education seeking restoration of certain sick, vacation and personal days that she utilized while she was out of work due to an alleged work-related injury; and

WHEREAS, the Board of Education denied the claims in the Petition of Appeal; and

WHEREAS, following good faith negotiations, Petitioner and the Board have reached a full and complete agreement to resolve this matter in its entirety and requiring both parties to fulfill certain obligations all of which the parties wish to memorialize in this Settlement Agreement;

NOW, THEREFORE, the Association and the Board hereby stipulate and agree to settle the above captioned matter upon the following terms and conditions:

1. The Board agrees to reimburse Petitioner for twelve sick (12) sick days utilized during the 2010-11 school year at her per diem rate of \$179.53 (\$46,679.00/260) for a total of \$2154.41. This sum shall be payable to the trust account of her counsel Michael B. Berman, Esq.

2. The Board agrees to restore eighteen (18) sick days to Petitioner's bank of days.
3. Petitioner, stipulates that, forthwith following the full execution of this Settlement and payment, she will withdraw, with prejudice, the Petition of Appeal in the above captioned matter.
4. In exchange for the above consideration, Petitioner, and her heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any claims or rights, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns arising in any way out of Petitioner's employment with the Board.
5. Petitioner and the Board both agree that the sole purpose of this Settlement is to amicably terminate litigation to avoid the time and expense of the continuation of this dispute, and that it is merely reflection of that goal. Therefore, the parties agree that this Settlement does not constitute an admission of wrongdoing or liability on the part of any party. Additionally, the parties agree that this Settlement is not to be construed as a past practice or precedent of any kind and may not be used in any subsequent legal or contractual proceeding for any purpose, including but not limited to its use as evidence of such past practice, precedent or liability or as proof of the truth of any of the allegations set forth in the above referenced Petition of Appeal, provided that either party may refer to and use this Settlement in any legal or contractual proceeding to enforce its terms and conditions.
6. This Settlement is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey.
7. The terms and conditions of this Settlement shall be construed according to their plain meaning, and shall not be construed in favor of or against either the Petitioner or the Board.
8. Petitioner and the Board represent that they have been represented by counsel during the litigation and negotiations and development of this Agreement and that each party fully understands the terms of this Agreement. Petitioner and Board represent that they are fully satisfied with the advice they received from counsel.
9. All parties are bound by this Settlement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, as well as the parties' heirs and the executors of their estates, will also be bound. This Settlement is made for the benefit of all the parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, employees, agents, attorneys, successors and assigns.

10. Petitioner and the Board understand and agree that this Agreement, its terms, and the matters discussed in negotiating its terms are confidential, to the extent permitted by law. Neither party may directly or indirectly, divulge, discuss, publicize, disclose or in any way communicate the fact of this Agreement or the terms of this Agreement, the discussion or circumstances surrounding the negotiation or execution of this Agreement to anyone without the express written authorization by an authorized representatives of the other party unless compelled to do so pursuant to law. The foregoing confidentiality obligations shall not apply to disclosure by Petitioner to her spouse, union, legal representatives and/or tax advisors, provided Petitioner first instructs them, and secures their agreement, to keep all such information in strict confidence.
11. This Settlement is subject to Board approval.
12. If this Settlement is not fully executed by all parties, then it shall become null and void and shall be of no effect.
13. This Settlement embodies the entire agreement between the parties hereto and supersedes any prior or contemporaneous agreement, representation or understanding, whether written or oral. This Settlement may not be modified except by written instrument executed by all the parties hereto.

IT IS THEREFORE STIPULATED AND AGREED BY THE PARTIES THE DAY
AND YEAR BELOW WRITTEN.

By: Josephine Zangrilli
Josephine Zangrilli

DATED: 3/5/12

EWING BOARD OF EDUCATION

Karen McKeon
Karen McKeon, President

DATED: 3/26/12

WITNESS: Peter Zangrilli

WITNESS: J. McKeon

EWING TOWNSHIP BOARD OF EDUCATION

District Administrative Offices
2099 Pennington Road
Ewing, NJ 08618

(609) 538-9800, ext. 1302—(609) 538-0041 (fax)

CERTIFIED BOARD RESOLUTION

I, Brian S. Falkowski, Board Secretary of the Ewing Township Board of Education, hereby certify that this is a true copy of the Resolution adopted at a regularly scheduled Board meeting on March 26, 2012.

Following is the Board vote on this Resolution

On motion by Ms. Benedetti, seconded by Mrs. Staub, the Board approved this Resolution by the following roll call vote:

YEAS: Mrs. Staub, Mr. Mack, Mr. Benedetti, Ms. Benedetti, Dr. Palmer and Mrs. McKeon

NAYS: None

ABSTENTION: Mr. White

MEMBERS ABSENT: Mr. Bradley and Mr. Ewell



Brian S. Falkowski
Board Secretary

SEAL

The Ewing Public Schools

Providing a Foundation for Life

BOARD OF EDUCATION
EWING PUBLIC SCHOOLS

Action Item: New Business

Board Meeting Date
March 26, 2012

Discussion Area: Finance & Operations

Subject: Resolution Approving Settlement—Josephine Zangrilli

Contact: Brian S. Falkowski, School Business Administrator

ACTION

1. BACKGROUND:

The Board must approve all Resolutions.

2. ADMINISTRATIVE CONSIDERATION/RECOMMENDATION:

RESOLVED, that the Board approves the settlement in the matter captioned Josephine Zangrilli v. Ewing Board of Education, OAL Dkt. No. EDU 4502-11, Agency Ref. No. 40-2/11, in accordance with the terms and conditions therein; and

BE IT FURTHER RESOLVED, that the Board President is authorized to sign the agreement on behalf of the Board.

3. FISCAL IMPACT:

None

4. BOARD ACTION REQUESTED:

Approval

Y.C. on behalf of minor child A.A.,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
BOROUGH OF SOUTH PLAINFIELD,	:	
MIDDLESEX COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal in February 2011 challenging the determination of the respondent Board that her niece, A.A., was not eligible for a free public education in the South Plainfield school district. Petitioner failed to appear at a November 2011 hearing in this matter, despite having received appropriate notice thereof. Accordingly, the Commissioner – by decision issued January 10, 2012 – dismissed the matter with prejudice but remanded the case to the OAL for supplementation of the record with regard to the amount of tuition counterclaimed by the Board. A hearing on this issue was conducted on June 25, 2012 at the OAL; the petitioner again failed to appear despite appropriate notice.

The ALJ found that: Y.C. enrolled her niece in respondent's schools on January 24, 2011; on March 7, 2011, Y.C. presented the respondent with proof of guardianship over A.A.; A.A. was ineligible for a free public education in South Plainfield for the period from January 24, 2011 to March 7, 2011; and the amount of tuition due for this period is \$2,828. The ALJ concluded that the Board is owed tuition reimbursement for A.A.'s period of ineligible attendance, and ordered petitioner to pay the respondent \$2,828.

After independent review and consideration, the Deputy Commissioner – to whom this matter was delegated pursuant to *N.J.S.A. 18A:4-33* – concurred with the findings and conclusion of the ALJ and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 3, 2012

OAL DKT. NO. EDU 503-12
 AGENCY DKT. NO. 33-2/11

Y.C. on behalf of minor child A.A.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE	:	
BOROUGH OF SOUTH PLAINFIELD,	:	
MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

This matter originally came before the Deputy Commissioner – to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-33 – as a challenge to respondent's determination that A.A. had been ineligible to receive a free public education from respondent between the dates of January 24, 2011 and March 7, 2011. In consequence of petitioner's failure to appear at the hearing scheduled for November 28, 2011 in the Office of Administrative Law (OAL), and her failure to provide an explanation for the non-appearance within the allotted time, the Deputy Commissioner upheld respondent's determination and remanded the case to the OAL for a determination as to the amount of tuition owing.

On June 25, 2012, a hearing was held in the OAL for that purpose. The record indicates that notice of the hearing was sent to petitioner, but she did not attend. Respondent's witness testified about respondent's daily tuition rate and about the number of days of A.A.'s ineligible attendance. The Administrative Law Judge (ALJ) found the testimony credible and

unrefuted, and concluded in a June 26, 2012 Initial Decision that the amount of tuition due for A.A. is \$2,828.00.

On July 12, 2012, two weeks after the second hearing in this case, a letter from petitioner was received in the Commissioner's office wherein she 1) stated that respondent's representative never told her that she would be liable for tuition until she secured legal custody of A.A., and 2) conceded that she "now recognize[s] that [she] must appear before the courts to better explain [her] circumstances." There is no indication that a copy of the letter was sent to petitioner or its counsel.

The Deputy Commissioner cannot consider petitioner's letter, as it is not competent evidence and was not a part of the record in the OAL.^{1 2} Nor has any legitimate explanation been offered for petitioner's non-participation in the proceedings prior to this date. Accordingly, the Deputy Commissioner adopts the Initial Decision as the final decision in this case. Petitioner is liable to respondent for tuition in the amount of \$2,828.00.

IT IS SO ORDERED.³


DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/03/12

Date of Mailing: 8/06/12

¹ If the letter was meant as an exception to the Initial Decision, it was untimely filed and therefore was not considered.

² Moreover, the Deputy Commissioner notes that even assuming, *arguendo*, that respondent's representative had never advised her that she might be liable for tuition, paragraph 6 of the petition signed by petitioner provides that she "understand[s] that if the Commissioner finds that [she has] abandoned or withdrawn this appeal and/or that the child/ren are ineligible for a free education in [respondent's] district, [she] may be assessed tuition costs"

³ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*.

Y.C., D/B/M, A.A. V.
SOUTH PLAINFIELD BDE

TARGET DUE
7-27-12 8-10-12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
Newark, NJ 07102
(973) 648-6008

**A copy of the administrative law
judge's decision is enclosed.**

**This decision was mailed to the parties
on JUN 27 2012**



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 00503-12

AGENCY DKT. NO. 33-2/12

Y.C., ON BEHALF OF MINOR CHILD, A.A.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE BOROUGH
OF SOUTH PLAINFIELD, MIDDLESEX
COUNTY,**

Respondent.

ON REMAND

OAL DKT. NO. EDU 02758-11

No appearance on behalf of the petitioner

Joseph L. Roselle, Esq., for respondent (Schenck, Price, Smith & King LLC,
attorneys)

Record Closed: June 25, 2012

Decided: June 26, 2012

BEFORE: **MUMTAZ BARI-BROWN, ALJ:**

STATEMENT OF CASE AND PROCEDURAL HISTORY

On February 10, 2011, petitioner Y.C. filed an appeal on behalf of A.A. and challenged the residency determination by respondent Board Of Education of the Borough of South Plainfield, Middlesex County (Board). A hearing was scheduled at

the Office of Administrative Law (OAL) for February 28, 2011. Petitioner received notice of the hearing but failed to appear and provided no explanation for the nonappearance. Consequently, the matter was returned to the agency pursuant to N.J.A.C. 1:1-14.4, Failure to appear.

The Acting Commission of Education dismissed the petition with prejudice but remanded the matter for supplementation on the amount of tuition counterclaimed by the Board.

A hearing was conducted on June 25, 2012 and the record closed on that date.

ISSUE

The issue in this proceeding is the amount of tuition owed by petitioner to the Board.

Mary Muglia is employed by respondent in the position Enrollment Secretary. Her duties include processing applications for student enrollment. Muglia testified that on January 24, 2011, Y.C. attempted to enroll A.A., her niece in the school district. Muglia informed Y.C. that under the regulations, A.A. was ineligible for free tuition. On March 7, 2011, Y.C. presented to the Board proof of guardianship over. The Board accepted A.A. application for enrollment to the school district, effective March 7, 2011.

Muglia calculated the tuition due from January 24, 2011 to March 7, 2011. The tuition for each student, grades nine to twelve, per school year (180 days) is \$18,140.00. Muglia applied the per diem rate of \$101.00 to the amount of days (28) A.A. attended school. Consequently, \$2,828.00 represents tuition owed for the period A.A. was ineligible.

The evidence presented by the Board was credible and unrefuted.

DISCUSSION AND CONCLUSION

The state of New Jersey provides that “public schools shall be free to . . . any child who is domiciled within the school district.” N.J.S.A. 18A:38-1(a). The domicile of a minor child follows that of his parents. See V.R. on behalf of A.R. v. Bd. of Ed. Of Hamburg, 2 N.J.A.R. 283, 286. N.J.S.A. 18A-38-1(b)1, reads in part:

Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person’s own child, upon filing by such other person with the secretary of the board of education of the District, if so required by the board, a sworn statement that he is domiciled in the District and is supporting the child gratis and will assume all personal obligation for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child’s parents or guarding with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economical hardship and that the child is not residing with the resident of the District solely for the purpose of receiving a free public education in the District. The statement shall be accompanied by documentation to support the validity of the sworn statement, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

I FIND AS FACT A.A. was ineligible for free public school education from the period of January 24, 2011 to March 7, 2011.

I CONCLUDE \$2,828.00 represents tuition owed by Y.C. to the Board.

ORDER

It is **ORDERED** that Y.C. reimburse the Board of Education of the Borough of South Plainfield, Middlesex County \$2,828.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 26, 2012
DATE

Date Received at Agency:

Date Mailed to Parties:
dr

JUN 27 2012

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ
6-26-12
Quora Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

VALERIE JONES,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
CITY OF ELIZABETH,	:	
UNION COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the decision of the respondent Board to terminate her employment as a teacher through a reduction in force (RIF) at the end of the 2010-2011 school year. Petitioner was continuously employed by the Board from 1997 through June 2011. Petitioner contended that the Board offered teaching contracts to other school employees with less seniority than petitioner, in violation of her tenure and seniority rights. Petitioner filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue, and the matter is ripe for summary decision; petitioner was employed under tenure at the time of the RIF and plainly met the requirements of *N.J.S.A. 18A:28-5*; the Board gave no consideration whatsoever to the requirements of *N.J.S.A. 18A:28-5* and *N.J.S.A. 18A:28-10* prior to terminating petitioner's employment; and upon petitioner's termination, the Board retained elementary teachers with no prior experience in the district. The ALJ concluded that petitioner must be immediately reinstated to her position of employment, and must be compensated for all lost salary, benefits and emoluments, less mitigation, retroactive to the date of her termination.

Upon careful and independent review, the Deputy Commissioner – to whom this matter was delegated pursuant to *N.J.S.A. 18A:4-33* – concurred with the ALJ's findings and conclusions and, accordingly, adopted the Initial Decision of the OAL granting summary decision to petitioner. The Deputy Commissioner ordered the Board to reinstate petitioner as an elementary school teacher with salary and all benefits retroactive to June 30, 2011, less any mitigation.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 3, 2012

OAL DKT. NO. EDU 12244-11
 AGENCY DKT. NO. 255-9/11

VALERIE JONES,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
CITY OF ELIZABETH,	:	
UNION COUNTY,	:	
	:	
RESPONDENT.	:	

The Deputy Commissioner – to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-33 – has considered the record of this matter and the Initial Decision of the Office of Administrative Law, wherein the Administrative Law Judge concluded that petitioner had earned tenure as an elementary education teacher in respondent’s district,¹ and that her tenure rights were violated when respondent 1) “RIF’d” her in June 2011, and 2) failed to recall her for service in September 2011, even as it hired nine new elementary education teachers.² As the record fully supports that conclusion, the Deputy Commissioner adopts the Initial Decision as the final decision in this case.³

¹ In a certification dated May 23, 2012, respondent’s Associate Counsel, Marvin Lehman, admits that petitioner achieved tenure in respondent’s district in September 2003.

² The identification of the new hires was presented in an un rebutted certification by NJEA Field Representative Jack Spear, with attached copies of excerpts from respondent’s September 15, 2011 and October 3, 2011 Supplemental Personnel Reports.

³ Respondent’s exceptions were reviewed and found to be without merit.

Accordingly, summary decision is granted in favor of petitioner. Respondent shall reinstate petitioner as an elementary school teacher with salary and all benefits retroactive to June 30, 2011, minus any mitigation.

IT IS SO ORDERED.⁴


DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/03/12

Date of Mailing: 8/06/12

⁴ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 12244-11

AGENCY DKT. NO. 255-9/11

VALERIE JONES,

Petitioner,

v.

BOARD OF EDUCATION OF THE

CITY OF ELIZABETH,

Respondent.

Gregory Syrek, Esq., for petitioner (Bucceri and Pincus, attorneys)

Karen Murray, Esq., for respondent

Record Closed: May 23, 2012

Decided: June 29, 2012

BEFORE **ELLEN S. BASS, ALJ:**

STATEMENT OF THE CASE

Petitioner, Valerie Jones, a teacher employed by the Board of Education of the City of Elizabeth (the Board), asserts that the Board terminated her employment effective June 30, 2011, in contravention of her tenure and seniority rights under

N.J.S.A. 18A:28-5 et seq. She seeks reinstatement and back pay retroactive to the date of her termination.

PROCEDURAL HISTORY

Jones filed her appeal with the Commissioner of Education (the Commissioner) on September 2, 2011. An answer was filed on behalf of the Board, and the contested case was transmitted to the Office of Administrative Law (OAL), on October 7, 2011.

In or about June 2010, the Board terminated several hundred employees pursuant to a reduction in force (RIF); more than eighty of these employees have pending petitions challenging their terminations as violative of the tenure laws. Discovery and settlement discussions relative to these cases have been the subject of bi-monthly status conferences between counsel and me. In June 2011, additional school district employees were RIF'd, among them Jones. These additional petitions have been case-managed together with those filed in 2010. At one such status conference several claims, including that filed by Jones, were discussed at length; it appeared to petitioners' counsel that seven petitioners had lengthy tenures in the district. Counsel questioned how it was determined that these teachers should be RIF'd while other, ostensibly less-senior staff members, had been retained by the district. Board counsel advised that he would investigate the matter.

Accordingly, a case-management Order dated November 22, 2011, provided as follows:

Seven petitioners were identified who appear to have long tenures in the district (Schwartz, Jones, Kologi, Simmons, Clayton, Meade and Bearg). By **December 9, 2011**, Mr. Lehman will advise me and counsel regarding the district's position as to these petitioners

[(C-1.)]

Via letter from counsel dated December 16, 2011, the Board advised that, "[t]he District's position is that the said Petitioners were subject to a reduction-in-force due to

budgetary reasons” (C-2.) I considered this statement to be non-responsive to my Order, and I so advised in correspondence dated December 20, 2011. (C-3.) I directed counsel to supply a substantive explanation “why the district RIF’d seven petitioners who appear to clearly have rights superior to retained staff members.”

That explanation came via letter from Board counsel dated January 13, 2012. (C-4.) Citing the expense of tenure charges, counsel stated that school administration is “of the belief that poor teachers should not be in the classroom, regardless of tenure.” Relative specifically to Jones, counsel stated on behalf of the Board that she was RIF’d because:

[s]he was routinely insubordinate and her classroom evidenced a total lack of control and showed no evidence of teaching or learning. She allowed students to come and goes [sic] as they wished and left students unsupervised; the DYFS allegations were of physical abuse.

[(C-4.)]

Counsel noted that, “[t]he District cannot in good conscience subject the District’s students to potential physical and emotional harm.” Counsel went on to advise that “it does not take an accountant to see that the least productive, ineffective employees should be riffed, as the law requires the best possible education for students.” It is noteworthy that at no time did counsel advise me that Jones was chosen to be RIF’d because she was non-tenured; in fact, to the contrary, counsel justified the District’s action by pointing out that the tenure charge process is protracted, costly, and produces uncertain results.

Via letter dated January 19, 2011, I directed that counsel for Jones file a motion for summary decision, and he did so on February 27, 2011. The Board filed its opposition to the motion on March 27, 2012. Jones responded with a supplementary certification and brief on April 4, 2012. Upon review of the submissions of the parties, via letter dated May 3, 2012, I directed that the Board supplement the record with additional documents and factual details. Counsel did so via letter and certification. The record closed on May 23, 2012.

FINDINGS OF FACT

The material facts are not in dispute. I **FIND**:

Jones is the holder of an instructional certificate issued by the New Jersey State Board of Examiners, bearing endorsements as an elementary school teacher and nursery school teacher. Her certificate was issued in 1981. Jones was employed continuously by the Board from November 3, 1997, through June 30, 2011.

In its initial opposition to Jones's motion the Board certified that she served as a replacement teacher, or substitute, until November 16, 2007. Jones related her employment history differently, urging that she was assigned as a regular classroom teacher a good bit earlier, so I asked the Board to supply me with her employment contracts. At that point, the Board's version of Jones's employment history changed dramatically. A review of the documents supplied, and the certifications of the parties, reveals that they cannot entirely agree on what grade Jones taught each year. But the salient concern for purposes of this motion; that is, whether Jones was employed as a tenure eligible teacher for three years and a day, is not controverted. The record reveals the following employment history in the Elizabeth Public Schools:

- November 3, 1997-June 1998: Replacement Teacher
- 1998-1999: Replacement Teacher
- 1999-2000: Replacement Teacher (per contract, although Jones contends she served as a First-Grade Teacher)
- 2000-2001: Teacher/Tutor Fourth Grade (per contract, although Jones contends that she served as a Third-Grade Teacher)
- 2001-2002: Fifth-Grade Teacher (per contract, although Jones contends that she served as a First-Grade Teacher)
- 2002-2003: First-Grade Teacher

- 2003-2004: First-Grade Teacher (contract simply states “ten month tenure,” additional documentation reflects that the assignment was to Fifth Grade)
- 2004-2005: First-Grade Teacher (contract simply states “tenure contract”)
- 2005-2006: Jones recalls that she was a replacement teacher, but she was issued a contract that stated “tenure contract”
- 2006-2007: Dual language, then Fifth-Grade Teacher (contract states First Grade)
- 2007-2008: First-Grade Teacher
- 2008-2009: First-Grade Teacher
- 2009-2010: Paid “administrative leave” (reported to Imperial and Mitchell Buildings)
- 2010-2011: Paid “administrative leave” (reported to Mitchell building)

In a certification submitted in opposition to the pending motion, counsel for the Board notes as follows:

Petitioner’s first tenurable position was during the 2000-2001 school year when she served as a Teacher-Tutor. During the 2001-2002 school year, Petitioner was appointed as a 1st grade Teacher. During the 2002-2003 school year, Petitioner was appointed as a 5th grade teacher. Thus, the earliest that Petitioner would have been eligible for tenure as an elementary school teacher would have been the second day of school during the 2003-2004 school year or September 2, 2003. That would have given her three years and one day of service in an elementary position and under the statute she would have achieved tenure.

[(Lehman Certif. (May 23, 2012).)]

The documentation supplied by the Board reveals that Jones indeed was appointed for the 2003-2004 year as a regular classroom elementary teacher, although the precise grade level appears to be the source of some confusion. Nonetheless, per counsel’s representation in his certification, all agree that at least as of September 2003, when she returned to the classroom, Jones had worked for the Board for three years and a day as regular classroom teacher.

When not serving as a regular classroom teacher, Jones served as a teacher in the "Division of Staff Development." It is uncontroverted that Jones's function was to fill in for teachers who were absent from their classrooms because they were engaged in staff development training. The district has characterized Jones's role when so assigned as that of a "replacement" or "substitute teacher." Jones urges in her supplemental certification that in actuality she performed all the responsibilities of any other classroom teacher during this time period.

Jones contends that she was assigned to a first-grade classroom for the 2009-2010 school year. But via letter dated August 20, 2009, she was advised to report to the Imperial Building, a district administrative location. Via Board resolution dated March 18, 2010, Jones was reassigned to the Mitchell Building, retroactive to January 29, 2010. According to counsel for the Board, these reassignments entailed no teaching responsibilities and have been characterized by the district as "administrative leave." But Jones continued to be paid until June 30, 2011. She then was advised via letter dated June 30, 2011, that her contract for the 2011-2012 year was being rescinded "[d]ue to a continuing need to implement a reduction in force." Notwithstanding the Board's present contention that Jones is non-tenured, she was further advised that she would "be placed on a recall list in accordance with [her] tenure, certification and seniority rights." (Jones Certif., Exhibit A.)

In addition to its performance-related concerns, the Board questioned Jones's fitness to teach; via resolution dated May 6, 2010, it directed that she submit to psychiatric and medical examinations. Counsel for the Board urges that Jones did not comply with this directive; Jones's counsel vigorously disagrees, stating that he requested a hearing before the Board, as was Jones's right, and received no reply to his request.

Minutes of the meeting of the Board throughout the fall of 2011 reveal the appointment of several new hires in the area of elementary education shortly after Jones was RIF'd. These include teachers who earned their college degrees as late as 2010. (Attachment to Spear Certif.)

ANALYSIS AND CONCLUSIONS OF LAW

Jones seeks relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered “if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” Our regulation mirrors R. 4:46-2(c), which provides that “[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.”

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that “if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, ‘fanciful frivolous, gauzy or merely suspicious,’ he will not be heard to complain if the court grants summary judgment.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The “‘judge’s function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence “is so one-sided that one party must prevail as a matter of law,” the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. I **CONCLUDE** that this matter is ripe for summary decision. There are no material facts in dispute, and Jones is entitled to the relief she

seeks as a matter of law.¹ Jones challenges the good faith of the Board, asserting that her RIF was not the result of a need to effectuate economies; she further asserts that upon determining to RIF her the Board failed to give proper consideration to her tenure and/or seniority rights. While she is right on both counts, the facts reflect that this case is really about the bona fides of the Board's decision to reduce force.

Tenure is a legislative status, earned by operation of law, and upon meeting the precise requirements of the tenure statute. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982); Zimmerman v. Newark Bd. of Educ., 38 N.J. 65 (1962); N.J.S.A. 18A:28-1 to -18. The tenure laws were "designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service." These statutory protections notwithstanding, economic exigencies may necessitate the lay-off of tenured staff. N.J.S.A. 18A:28-9. But the law is unequivocal that such dismissals must be made "for reasons of economy or because of reduction in the number of pupils . . . or for other good cause;" and on the basis of seniority according to standards established by the Commissioner. N.J.S.A. 18A:28-10; see N.J.A.C. 6A:32-5.1; Howley v. Ewing Bd. of Educ., 1982 S.L.D. 1328, 1339, aff'd, 1983 S.L.D. 1554; Impey v. Shrewsbury Bd. of Educ., 142 N.J. 388, 398 (1995) (citing In re Maywood Bd. of Educ., 168 N.J. Super. 45, 55 (App. Div. 1979)). The Commissioner has recognized that "[w]hile the Board is vested with extensive management power to employ, promote, transfer and dismiss, it must exercise that power within the constraints imposed by the tenure law . . . [t]o hold otherwise would render meaningless the protections afforded by the tenure system." Smith v. Berlin Bd. of Educ., EDU 06584-03S, Initial Decision (August 6, 2004), aff'd, Comm'r (September 17, 2004), <http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>.

A presumption of correctness attaches to a local board's decision to reduce staff. The petitioning teacher generally will not prevail where there exists any reasonable justification for the reduction in force, and absent proof of bad faith. See Klig v. Bd. of Educ. of the Borough of Palisades Park, 1975 S.L.D. 168, 173-174; In re Maywood Bd.

¹ The apparent inability to pin down what grade Jones taught in a given year or what her role was as a replacement teacher does not create a material factual dispute that necessitates plenary hearing. As will be addressed below, the record contains sufficient undisputed facts to determine that Jones held her position under tenure at the time she was RIF'd.

of Educ., supra. Accordingly, Jones's burden is a weighty one, but nonetheless one she has readily met. The Board averred in its formal answer, and initially informed me via letter, that it dismissed Jones for reasons of economy. The Board's real reason for dismissing Jones was dissatisfaction with her performance.

Indeed, counsel's January 13, 2012, letter reveals that the Board and its administration do not care for our tenure laws. Accordingly, they appear to believe that they can simply disregard the laws' requirements. The Board, through counsel, is nothing if not candid; readily admitting that Jones was "RIF'd" to avoid the expense and uncertainty of tenure charges. Counsel writes:

. . . the District cannot in good conscience subject its students to teachers who cannot teach. Further, this District's experience with tenure charges is that it is a long, expensive process which, except for extreme physical abuse seems to result in poor, incompetent teachers being returned to the classroom.

[(C-4.)]

If the Board feels that Jones acted in a manner that is inconsistent with her professional responsibilities, a statutory mechanism exists through which to seek her removal. N.J.S.A. 18A:6-10. To date, the Board has taken no steps to comply with the tenure charge procedures codified at N.J.S.A. 18A:6-10 et seq. and I **CONCLUDE** that Jones remains deprived of the salary and benefits of her tenured position of employment, in clear violation of her rights.²

The Board's contention that Jones was untenured is devoid of merit. This argument is disingenuous and buttresses my conclusion that this Board has acted in bad faith. Indeed, if the Board perceived that Jones lacked tenure why did it place her on a series of paid non-instructional reassignments rather than summarily terminate her when it became concerned about her performance, demeanor, and mental health? In

² The Board asserts that Jones failed to agree to submit to a psychiatric examination. This concern is the proverbial "red herring," as it is clear that the Board advised Jones that it terminated her to effectuate economies, and for no other reason. If the Board was acting pursuant to its authority under N.J.S.A. 18A:16-4, I would have expected to have received a copy of a letter placing Jones on a sick leave pending evidence of recovery, rather than a copy of a letter to her citing the need to effectuate economies.

any event, it is uncontroverted that Jones was employed for three years and a day as a regular classroom teacher and properly certificated during the years 2000-2001, 2001-2002, 2002-2003, and 2003-2004. It is thus unnecessary to reach the issue of whether Jones's service as an alleged replacement teacher was that of a substitute teacher within the meaning of N.J.S.A. 18A:16-1.1. I **CONCLUDE** that Jones plainly has met the requirements of N.J.S.A. 18A:28-5, and that she was employed under tenure at the time of her RIF.

Finally, it is clear that this Board gave no consideration whatsoever to the requirements of N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-10 prior to terminating Jones's employment. Upon her termination, the Board retained elementary teachers with no prior experience in the district. I **CONCLUDE** that Jones must be immediately reinstated to her position of employment, and be compensated for all lost salary, benefits and emoluments of employment, less mitigation, retroactive to the date of her termination.

ORDER

Jones's motion for summary decision is **GRANTED**. The Board is **ORDERED** to reinstate Jones to the position of teacher, with all salary, benefits and emoluments of this position, less mitigation, retroactive to June 30, 2011.

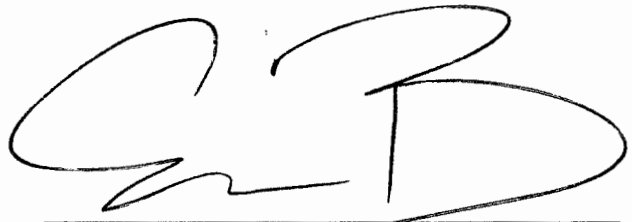
I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

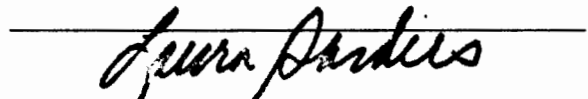
June 29, 2012

DATE



ELLEN S. BASS, ALJ

Date Received at Agency:



Date Mailed to Parties:

JUL - 2 2012

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Judge's Exhibits:

- C-1 Order dated, November 22, 2011
- C-2 Letter dated, December 16, 2011
- C-3 Letter dated, December 20, 2011
- C-4 Letter dated, January 13, 2012

OAL DKT. NO. EDU 939-12
 AGENCY DKT. NO. 372-12/11

U.K., on behalf of minor child, N.I.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF SOUTH BRUNSWICK,	:	
MIDDLESEX COUNTY,	:	
RESPONDENT.	:	
_____	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

It is well recognized that the Deputy Commissioner – to whom this matter was delegated pursuant to *N.J.S.A. 18A:4-33* – cannot award or direct the payment of counsel fees. Upon review, with the exception of the potential award of counsel fees provision, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/06/12
 Date of Mailing: 8/06/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 00939-12

AGENCY DKT. NO. 372-12/11

U.K. ON BEHALF OF MINOR CHILD N.I.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP

OF SOUTH BRUNSWICK, MIDDLESEX

COUNTY,

Respondent.

U.K., petitioner, pro se

John E. Collins, Esq. for respondent (Parker McCay, attorneys)

Record Closed: May 29, 2012

Decided: June 22, 2012

BEFORE **MICHAEL ANTONIEWICZ, ALJ:**

Petitioner challenges the residency determination of respondent Board of Education of the Township of South Brunswick. The Department of Education transmitted this matter to the Office of Administrative Law (OAL), where it was filed on

January 20, 2012, for determination as a contested case. At the hearing on May 29, 2012, the parties agreed to settle this matter.

A Settlement Agreement is attached and fully incorporated herein.

I have reviewed the record and the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

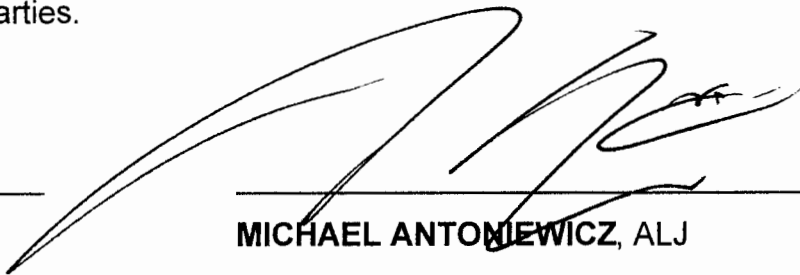
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey**

08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/22/12

DATE



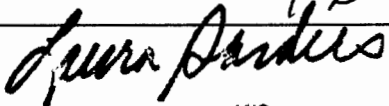
MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency:

Date Mailed to Parties:

JUN 27 2012

jb

6-27-12

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

U.K. o/b/o N.I.B.
v. Twp. of South Brunswick
BOE, Middlesex Co.

JAL Docket No
EDU 00939-2012

Settlement Agreement

It is hereby agreed that the
Petitioner's Appeal regarding the residency is withdrawn
on behalf of N.I.B. The South Brunswick
Board of Education shall permit N.I.B. to finish
out the school year 2011-2012. After this
withdrawal, the BOE shall determine the

OAL DKT. NO. EDU 2133-12
AGENCY DKT. NO. 20-1/12

C.G. and K.G. on behalf of minor child, M.G., :
PETITIONERS, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE :
BOROUGH OF SOUTH PLAINFIELD, :
MIDDLESEX COUNTY, :
RESPONDENT. :

Before the Commissioner¹ is a proposed settlement concerning the disciplinary record of petitioners' minor child. In consequence of his review of the settlement, and of the Initial Decision which recommends its approval, the Commissioner makes the following observation.

The first provision of the agreement states, in pertinent part:

Upon M.G.'s graduation from the South Plainfield School District the disciplinary record concerning this September 27th, 2011, incident shall be removed from the student's record.²

For the following reason, the phrase "upon M.G.'s graduation" is problematic.

N.J.A.C. 6A:32-7.8(b) allows student disciplinary records to be destroyed while the student is still enrolled in a district. However, pursuant to *N.J.A.C.* 6A:32-7.8(c), after the

² This provision is contingent upon M.G.'s successful completion of the remainder of his high school career without any further disciplinary infraction serious enough to warrant a suspension.

student has graduated or left the district, his records may be disposed of only in accordance with the Destruction of Public Records Law, *N.J.S.A. 47:3-15 et seq.* Records are classified by the State Records Committee into series and posted on a Records Retention and Disposition Schedule. Student disciplinary records have been assigned the Record Series Number 0012-0001. Records in that classification may not be destroyed until two years after the student's graduation or termination from the school system or age 23, whichever is longer.

Thus, if the intent of the parties is that M.G.'s disciplinary record be destroyed at the end of his high school career, it must be destroyed before M.G. graduates. Otherwise the disciplinary record must remain under respondent's control for at least two years.³

In summary, the Commissioner approves of the settlement terms and adopts the Initial Decision as the final decision in this case, so long as the settlement is implemented in a manner that is consistent with *N.J.A.C. 6A:32-7.8(b)* and (c).

IT IS SO ORDERED.



DEPUTY COMMISSIONER OF EDUCATION

Date of Decision 8/07/12

Date of Mailing 8/07/12

³ The Commissioner notes that, pursuant to *N.J.A.C. 6A:32-7.7(d)*, petitioners may place a statement in M.G.'s disciplinary record commenting on the information therein and/or setting forth reasons why they disagree with same. For as long as respondent maintains M.G.'s disciplinary record, those statements must be kept in M.G.'s file and disclosed to anyone who is authorized to view it.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2133-12

AGENCY DKT. NO. 20-1/12

C.G. AND K.G. ON BEHALF OF M.G.,

Petitioners,

v.

SOUTH PLAINFIELD BOARD OF EDUCATION, MIDDLESEX COUNTY

Respondent.

Peter J. Hendricks, Esq. for petitioners (Hendricks and Hendricks, attorneys)

Joseph L. Roselle, Esq., for respondent (Schenck Price Smith and King,
attorneys)

Record Closed: June 26, 2012

Decided: June 26, 2012

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 17, 2012 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof which is attached and fully incorporated herein

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The South Plainfield Board of Education has approved the settlement, as evidenced by the attached Board resolution dated June 19, 2012.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 26, 2012

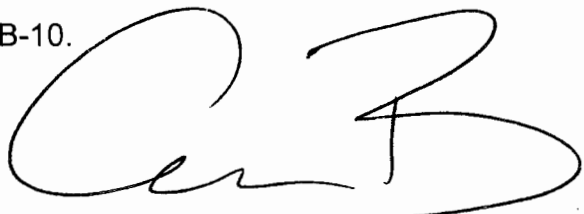
DATE

Date Received at Agency:

Mailed to Parties:

JUN 28 2012

/rr



ELLEN S. BASS, ALJ

6-28-12
John Sanders

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Deal 5/16/2012

EDU 02133-12

- Upon ^{M.G.'s} Graduation from the South Plainfield School District the disciplinary record concerning this Sept 27th, 2011, incident shall be removed from the Student's record

- PROVIDED, however, the student remains free from all disciplinary infractions warranting ~~suspension~~ - in school or out of school suspension.

- This Agreement is Subject to Board Approval.

- Upon Approval the Board President ^{or its designee} is Authorized to sign off on this Agreement on Behalf of the Board.

Charles Gruber
CHARLES GRUBER
Parent of Petitioner/
Petitioner

[Signature]
KIM GRUBER
Petitioner
Parent of Petitioner

John

Joseph Cirigliano

Asst. Principal

Board Designer

SOUTH PLAINFIELD PUBLIC SCHOOLS

125 Jackson Avenue
South Plainfield, New Jersey 07080-3509
Telephone: 908.754.4620
Website: spboe.org

Fax: 908-822-2453

Fax: 908-822-2848

Fax: 908-822-2516

Dr. Stephen Genco
Superintendent

Dr. Frank Cocchiola, Jr.
Interim Assistant Superintendent

Mr. James Olobardi
***Business Administrator/
Board Secretary***

June 19, 2012

Approval of Settlement Agreement in the Matter of C.G. and K.G. o/b/o M.G. v. South Plainfield Board of Education

RESOLVED, that the Board approves the settlement in the matter captioned C.G. and K.G. o/b/o M.G. v. South Plainfield Board of Education, OAL Dkt. No. EDU 02133-12, Agency Ref. No. 20-1/12, in accordance with the terms and conditions therein; and

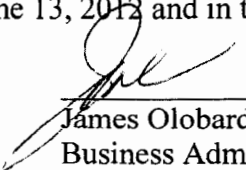
BE IT FURTHER RESOLVED that Joseph Cirigliano, Asst. Principal, is authorized to sign the agreement on behalf of the Board.

MOTION: Mrs. Miller
Absent: Mr. Sorrentino

SECOND: Mrs. Byrne

VOTE: 8-0

I certify the foregoing to be a true and correct abstract of a resolution passed at a meeting of the South Plainfield Board of Education held on June 13, 2012 and in that respect is a true and correct copy of its minutes.


James Olobardi
Business Administrator/Board Secretary

STATE BOARD OF EXAMINERS DKT. NO. 0708-164
AGENCY DKT NO. 1-2/12A

IN THE MATTER OF THE :
REVOCATION OF THE CERTIFICATE : COMMISSIONER OF EDUCATION
OF RICHARD DECKERT BY THE : DECISION
STATE BOARD OF EXAMINERS. :

Order of Revocation by the State Board of Examiners, December 2, 2009

For the Respondent-Petitioner, Richard Deckert, *pro se*

For the Petitioner-Respondent State Board of Examiners, Geoffrey N. Stark,
Deputy Attorney General (Jeffrey S. Chiesa, Attorney General of New Jersey)

The Commissioner¹ has thoroughly reviewed the record and the papers filed in connection with respondent's appeal of the State Board of Examiners' Order of December 2, 2009, revoking his Teacher of the Handicapped Certificate (certificate).

On November 19, 2008, the petitioner entered a guilty plea for Assault by Automobile, *N.J.S.A.* 39:4-50, and Driving While Intoxicated, *N.J.S.A.* 39:4-50, stemming from a motor vehicle accident where an occupant in the petitioner's car was killed, and he was sentenced to a four-year term of incarceration. On May 14, 2009, the Board of Examiners sent the petitioner an Order to Show Cause why his certificate should not be suspended or revoked. The petitioner filed an Answer on June 29, 2009. The Board of Examiners sent the petitioner a hearing notice on July 10, 2009, and on July 29, 2009, the petitioner's mother provided a response to the Board of Examiners.

The Board of Examiners voted to revoke petitioner's certificate at a meeting on October 22, 2009, finding that his convictions constituted conduct unbecoming a teacher. The

¹ This matter has been delegated to the Deputy Commissioner pursuant to *N.J.S.A.* 18A:4-33.

written decision was mailed to the petitioner on December 2, 2009 and re-sent to the petitioner on December 15, 2009.² On March 1, 2012, the petitioner filed a Petition of Appeal challenging the decision of the Board of Examiners.³

Upon such review, the Commissioner finds that the petitioner's March 1, 2012 petition was not timely filed in accordance with *N.J.A.C.* 6A:4-2.2. Pursuant to *N.J.A.C.* 6A:4-2.2., "[a]ppeals from final decisions of the Board of Examiners shall be filed within 30 days of the filing date of the decision from which appeal is taken." Moreover, under *N.J.A.C.* 6A:4-2.3(a), "[a] decision of the State Board of Examiners ... shall be deemed filed three days after the date of mailing to the parties." It is undisputed that on December 15, 2009, the Board of Examiners mailed its decision revoking the petitioner's certification, and as such the decision was deemed filed on December 18, 2009. As a result, the time for filing the appeal expired on January 18, 2010. It was not until two years later that the petitioner filed his appeal of the Board of Examiners' decision revoking his certification – well beyond the 30 day requirement contained in *N.J.A.C.* 6A:4-2.2.⁴ Accordingly, the petition of appeal is hereby dismissed as untimely.

IT IS SO ORDERED.⁵



DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/07/12

Date of Mailing: 8/07/12

² It is not clear from the record why the decision was re-sent to the petitioner.

³ By letter dated January 3, 2012 addressed to the Commissioner of Education, the petitioner expressed an interest in appealing the Board of Examiner's decision. Thereafter the petitioner filed a petition dated February 7, 2012. The petition however did not include proof of service on the Attorney General's Office in accordance with *N.J.A.C.* 6A:4-2.4(a)4. On March 1, 2012, the petitioner filed a petition that complied with *N.J.A.C.* 6A:4-2.4.

⁴ In his reply brief the petitioner recognized that his appeal was untimely, and stated that he had no justification for the delay.

⁵ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36.

IN THE MATTER OF : NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATE OF : STATE BOARD OF EXAMINERS
RICHARD DECKERT : ORDER OF REVOCATION

RECEIVED NJ DOE
2009 DEC 16 P 2:03
DOCKET NO: 0708-164

At its meeting on May 11, 2009, the State Board of Examiners reviewed information received from the Atlantic and Burlington County Prosecutors' Offices indicating that on November 19, 2008, Richard Deckert had pled guilty to charges of Assault By Auto and Driving While Impaired (2nd Offense.) Deckert was sentenced to four years in prison and fined. Deckert currently holds a Teacher of the Handicapped certificate, issued in January 2002. Upon review of the above information, at its May 11, 2009, meeting, the State Board of Examiners voted to issue Deckert an Order to Show Cause.

The Board sent Deckert the Order to Show Cause by regular and certified mail on May 14, 2009. The Order provided that Deckert's Answer was due within 30 days. Deckert filed an Answer on June 29, 2009. In that response, he indicated that becoming a teacher was "one of the happiest and proudest moments in my life." (Answer, p. 1.) Deckert also recalled that he was in a horrible automobile accident and learned after he emerged from a coma that his friend had been killed in the accident. (Answer, p. 2.) He claimed that "we were both ejected from the vehicle so determining who was driving is not 100 percent." (Answer, p. 2.) He stated that he pled guilty to a lesser third degree charge because "I was the owner of the vehicle and found to have a blood-alcohol level that was just over the legal limit." (Answer, p. 2.) Deckert added that knowing he may have contributed to a friend's death "will last a lifetime." (Answer, p. 2.) Deckert hoped to return to the classroom after completing his sentence so he could help teach students "to not make any of the mistakes I've made in life." (Answer, p. 2.)

Thereafter, pursuant to *N.J.A.C. 6A:9-17.7(e)*, on July 10, 2009, the Board sent Deckert a hearing notice by regular and certified mail. The notice explained that it appeared that no

material facts were in dispute, and thus, Deckert was offered an opportunity to submit written arguments on the issue of whether the conduct addressed in the Order to Show Cause constituted conduct unbecoming a certificate holder. It also explained that upon review of the charges against him and the legal arguments tendered in his defense, the State Board of Examiners would determine if his conviction warranted action against his certificate. Thereupon, the Board of Examiners would also determine the appropriate sanction, if any. Deckert was also provided the opportunity to appear before the Board to testify on the sanction issue.

On July 30, 2009, Deckert's mother responded and indicated that her son was "learning a lesson knowing [his friend] lost his life due to the horrible accident they were both in." (Hearing Response, p. 1.) She stated that teaching special needs children meant everything to her son and asked for leniency. (Hearing Response, p. 1.)

The threshold issue before the State Board of Examiners in this matter, therefore, is whether Deckert's conviction constitutes conduct unbecoming a certificate holder. At its meeting of October 22, 2009, the State Board of Examiners considered the allegations in the Order to Show Cause and Deckert's responses. The Board of Examiners determined that no material facts related to Deckert's offense were in dispute since he never denied that he had pled guilty to the offense charged and had been sentenced accordingly. Thus, the Board of Examiners determined that summary decision was appropriate in this matter. *N.J.A.C. 6A:9-17.7(h)*. It is therefore ORDERED that the charges in the Order to Show Cause are deemed admitted for the purpose of this proceeding.

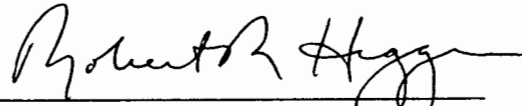
The State Board of Examiners must now determine whether Deckert's conviction, as set forth in the Order to Show Cause, represents just cause to act against his certificate pursuant to *N.J.A.C. 6A:9-17.5*. The Board finds that it does.

The State Board of Examiners may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or

other just cause. *N.J.A.C. 6A:9-17.5*. "Teachers... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Moreover, the Commissioner has long held that teachers serve as role models for their students. Deckert's actions are inexcusable and certainly prevent him from laying claim as a role model to students.

Unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). In this instance, Deckert's conviction for Assault By Auto and Driving While Impaired demonstrates egregious behavior that warrants revocation.

Accordingly, on October 22, 2009, the Board of Examiners voted to revoke Richard Deckert's Teacher of the Handicapped certificate. On this 2nd day of December 2009 the Board of Examiners voted to adopt its formal written decision and it is therefore ORDERED that the revocation of Deckert's certificate be effective immediately. It is further ORDERED that Deckert return his certificate to the Secretary of the State Board of Examiners, Office of Licensure, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.



Robert R. Higgins, Secretary
State Board of Examiners

Date of Mailing: 12/4/09

Appeals may be made to the Commissioner of Education pursuant to *N.J.S.A. 18A:6-38.4*.

RRH:MZ:

OAL DKT. NO. EDU 9474-12
 AGENCY DKT. NO. 194-7/12

JOHN MICHAELS,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION ON
	:	
NEW JERSEY STATE DEPARTMENT	:	APPLICATION FOR EMERGENT RELIEF
OF EDUCATION, OFFICE OF	:	
CRIMINAL HISTORY REVIEW,	:	
	:	
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33 – concurs with the ALJ, for the reasons thoroughly set forth in the recommended Order, that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*



DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/08/12
 Date of Mailing: 8/08/12

* Pursuant to *P.L.* 2008, c. 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 9474-12

AGENCY DKT. NO. 194-7/12

JOHN MICHAELS,

Petitioner,

v.

**NEW JERSEY DEPARTMENT
OF EDUCATION, OFFICE OF
CRIMINAL HISTORY REVIEW,**

Respondent.

John Michaels, petitioner; pro se

Geoffrey N. Stark, Deputy Attorney General, for respondent (Jeffrey S.
Chiesa, Attorney General for New Jersey, attorney)

Record Closed: July 20, 2012

Decided: July 23, 2012

BEFORE **ROBERT BINGHAM II**, ALJ

STATEMENT OF THE CASE

Petitioner John Michaels applies for emergent relief, challenging his disqualification from employment by respondent, New Jersey Department of Education,

Office of Criminal History Review (the Department), based upon a prior criminal conviction pursuant to N.J.S.A. 18A:6-7.1.

PROCEDURAL HISTORY

On June 25, 2012, the Department permanently disqualified petitioner from employment. Petitioner requested an emergent hearing and the Department of Education transmitted the case, as an emergent matter, to the Office of Administrative Law (OAL), where it was filed on July 16, 2012, for determination as a contested case pursuant to N.J.A.C. 6A:3-1 et seq. and N.J.S.A. 52:14B-1 to -15. On July 20, 2012, an emergent hearing was held and the record was closed at the conclusion of the proceedings.

FACTUAL DISCUSSION

The material facts are undisputed. Accordingly, I **FIND AS FACT** the following.

On June 22, 2012, Michaels began his employment as a substitute custodian/maintenance employee for the Egg Harbor Township School District (the District). (P-1.) An Army veteran and father of two grown children, he was off to a good start on his new job. (P-1, P-2.) However, a routine background fingerprint search revealed a prior criminal history. (J-1.) Specifically, on November 9, 1990, in New Jersey Superior Court, Atlantic County, he was convicted of possession of narcotics paraphernalia, in violation of N.J.S.A. 2C: 36-6, for which he received a probationary sentence that was extended for one year on January 14, 1994. (J-2.)¹ Also, on November 8, 1984, he was convicted of possession of a controlled dangerous substance in Mineola County, New York,² for which he received a three-year probationary sentence. (J-3.) By letter dated June 25, 2012, the Department

¹ Although the parties described charges as having been dismissed, it appears that petitioner plead guilty to a disorderly person's offense, N.J.S.A. 2C: 36-6, and any dismissal was as to indictable charges only. (J-1, J-2, P-1.)

² The court of jurisdiction is unknown.

permanently disqualified Michaels from employment, citing reference to the above convictions.

LEGAL ANALYSIS AND CONCLUSION

The standards which must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 6A:3-1.6 and Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the Crowe test. The application of the above standard to the facts in this case yields the conclusion that petitioner has not met, as he must, all of the above criteria for emergent relief.

Irreparable Harm

Michaels argues that he will suffer irreparable harm if relief is not granted because he will face unemployment, lack of income, loss of benefits and probable foreclosure on his home. The Department argues that financial loss is insufficient to constitute irreparable harm and that there has been no showing that any such harm would be imminent.

Under Crowe, "harm is generally irreparable in equity, if it cannot be redressed adequately by monetary damages." Crowe v. DeGioia, supra, 90 N.J. at 133. In Morton v. Beyers, 822 F.2d 364 (3rd Cir. 1987), the petitioner claimed that job loss would result in irreparable harm, considering his need to pay his mortgage, car loan, child's college tuition and credit card payments. Noting that "the claimed injury . . . is purely economic in nature and thus compensable in money," the Third Circuit stated:

Although we are not insensitive to the financial distress suffered by employees whose wages have been terminated, we do not believe that loss of income alone constitutes irreparable harm. Indeed, the Supreme Court has observed that an insufficiency of savings or difficulties in immediately obtaining other employment -- external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself -- will not support a finding of irreparable injury, however severely they may affect a particular individual.

[Id. at 372, citing Sampson v. Murray, 415 U.S. 61, 92 n. 68, 39 L. Ed.2d 166, 94 S. Ct. 937 (1974).]

Although Michaels may reasonably anticipate financial hardship, there is no showing of an absolute inability to obtain other employment. Moreover, he has demonstrated neither the type of injury nor any extraordinary circumstances to establish irreparable harm. What is more, there is no competent evidence that any such harm would be imminent. I therefore **CONCLUDE** that petitioner has not shown immediate harm that would constitute irreparable injury justifying issuance of injunctive relief.

Right to Underlying Claim Must be Settled

Petitioner asserts that the remoteness of his convictions should entitle him to demonstrate proof of rehabilitation, and thereby an opportunity to maintain his employment, as was allowed under the statute in effect when the convictions occurred.

The presence of a conviction for an enumerated offense identified during a criminal history record check disqualifies one from employment with a board of education under the supervision of the Department of Education. N.J.S.A. 18A:6-7.1. The enumerated offenses include any "offense involving the manufacture, transportation, sale, possession, distribution or habitual use of a 'controlled dangerous substance' as defined in the 'Comprehensive Drug Reform Act of 1987,' N.J.S.A. 2C:35-1 et seq. or 'drug paraphernalia' as defined pursuant to N.J.S.A. 2C:36-1 et seq.". N.J.S.A. 18A:6-7-1(b). And foreign convictions for offenses substantially similar to those proscribed in New Jersey constitute disqualifying convictions under N.J.S.A. 18A:6-7.1(d).

N.J.S.A. 18A:6-7.1 was amended by L. 1998, c. 31, § 5, effective June 30, 1998, before which time subsection (e) of N.J.S.A. 18A:6-7.1 stated that:

an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation.

[L. 1998, c. 31, § 5.]

The 1998 amendment revised this section to state that:

an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act without an opportunity to challenge the accuracy of the disqualifying criminal history record.

[Ibid.; N.J.S.A. 18A:6-7.1(e).]

Through this revision, the legislature eliminated the ability of disqualified persons to avoid disqualification upon proof of rehabilitation and instead limited their recourse to only challenging the accuracy of the criminal history record information.

The statute is applied prospectively to “criminal record checks conducted on or after the effective date of P.L.1998, c.31. . .”, which was June 30, 1998. N.J.S.A. 18A:6-7.1(g). Thus, the date of the criminal background check is the determining factor as to which version of the statute applies. In Cidoni v. Bd. of Ed. of the City of Camden and Dept. of Ed., Office of Criminal History, EDU 6088-03, Initial Decision (Jan. 11, 2006), adopted, Comm'r. (Feb. 27, 2006) <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>, the administrative law judge (ALJ) found that the statute was clear on its face and that the petitioner was properly disqualified after a criminal record check uncovered a conviction from 1984, well before the statute’s 1998 effective date. Id. The ALJ and the Commissioner both held that it was the date that the criminal record check is conducted which controls, regardless of the date of petitioner’s offense. Id. If the prior conviction is a disqualifying offense at the time the criminal record check is conducted, the school employee is disqualified. Id.

Under N.J.S.A. 18A:6-7.1, Michaels is disqualified from employment because the background check that revealed two proscribed convictions occurred well after the 1998 effective date of the statute, which mandates disqualification regardless of when the conviction occurred. And N.J.S.A. 18A:6-7.1 does not offer a waiver or an appeal process by which demonstration of rehabilitation can overcome permanent disqualification.

Accordingly, I **CONCLUDE** that the law is settled, but not in petitioner’s favor. In this case, disqualification is mandatory and petitioner has no legal recourse by which to present proof of rehabilitation and thereby maintain his employment.

Reasonable Probability of Prevailing on the Merits

Michaels also argues that that there is a reasonable likelihood of success on the merits because the disqualifying conviction from Atlantic County was dismissed and the New York conviction is so remote that, had it been in New Jersey, it would have been expunged or the “statute of limitations would have run.” The Department argues that

Michaels cannot prevail on the merits because the governing statute unequivocally mandates disqualification for employment of anyone with a qualifying conviction, and he does have such a conviction.

As indicated above, a conviction for an enumerated offense identified during a criminal history record check disqualifies one from employment with a board of education under the supervision of the Department of Education. N.J.S.A. 18A:6-7.1. If the prior conviction is a disqualifying offense at the time the criminal record check is conducted, the school employee is disqualified, regardless of the date of the conviction. Cidoni, supra.

Michaels has a 1984 conviction for drug possession and a 1990 conviction for possession of drug paraphernalia, both of which are enumerated offenses that disqualify one from employment under N.J.S.A. 18A:6-7.1. Even if, for the sake of argument, he only had the 1984 conviction from New York, an offense sufficiently comparable to a disqualifying offense in New Jersey under N.J.S.A. 2C:35-1 et seq., the criminal record check in this matter was conducted in June 2012, approximately fourteen years after N.J.S.A. 18A: 6-7.1 became effective. Under the circumstances, the law mandates disqualification from employment regardless of when the conviction occurred.

Accordingly, I **CONCLUDE** that petitioner has not shown that he would have a reasonable probability of prevailing on the merits.

Relative Hardship to the Parties

The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief in order to preserve the status quo pending a full hearing on the merits. Michaels argues that his financial hardship would be greater than any harm faced by the Department. The Department, on the other hand, argues that it would suffer the greater harm because the public has a greater

interest in preventing persons with certain criminal convictions from working in the state's public schools. It is for that reason, that the legislature imposed permanent disqualification on individuals with such convictions.

On balance, I must agree that the greater harm would be to respondent because of the implications for the public interest. Accordingly, I **CONCLUDE** that petitioner has not shown that he would suffer a greater harm if relief were denied.

ORDER

Therefore, I hereby **ORDER** that petitioner's application for emergent relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

July 23, 2012

DATE



ROBERT BINGHAM II, ALJ

bdt./

APPENDIX

EXHIBITS

Joint:

- J-1 Letter notice of disqualification, dated June 25, 2012
- J-2 Judgment of Conviction from New Jersey Superior Court, Atlantic County
- J-3 Addendum A to letter notice of disqualification, dated June 25, 2012

For Petitioner:

- P-1 Letter of John Michaels, dated July 5, 2012
- P-2 Letter of John Michaels, dated July 9, 2012

For Respondent:

None

WITNESSES

For Petitioner:

None

For Respondent:

None

O.C., on behalf of minor child O.C.-B., :

PETITIONER, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE :
TOWNSHIP OF HILLSIDE,
UNION COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of his son in April 2012. A hearing at the Office of Administrative Law (OAL) was held on June 15, 2012, but petitioner failed to appear despite having received appropriate notice and provided no explanation for his nonappearance. Counsel for the Board did appear on June 15, 2012, and the ALJ conducted a hearing at which the Board presented *ex parte* proofs in support of its claim for tuition reimbursement.

The ALJ found that: petitioner failed to appear and prosecute his appeal of the Board's decision; the Board produced evidence at hearing that O.C. did not reside at the address where he purported to live; the Board presented *ex parte* proofs demonstrating that it is entitled to tuition reimbursement in the amount of \$6,773. The ALJ concluded that the determination of the Board that O.C. was not domiciled in Hillside during the 2011-2012 school year should be upheld, and accordingly dismissed the petition and granted the Board's counterclaim for tuition in the amount of \$6,773.

The Deputy Commissioner, to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-33, concurred with the ALJ's findings and conclusion, and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 5973-12
AGENCY DKT. NO. 89-4/12

O.C., on behalf of minor child O.C.-B.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF HILLSIDE,	:	
UNION COUNTY,	:	
RESPONDENT.	:	

Upon review of the record of the instant residency dispute and the Initial Decision of the Office of Administrative Law (OAL), the Commissioner¹ concurs with the Administrative Law Judge (ALJ) that petitioner has failed to prove that the respondent Board of Education erred in its determination that petitioner and his minor child were not domiciled in respondent's school district during the 2011-2012 school year.² The Commissioner further concludes that the ALJ was correct in finding that respondent provided un rebutted evidence that it is due tuition in the amount of \$6773.00.

Accordingly, the petition is dismissed and respondent's counterclaim for tuition in the amount of \$6773.00 is hereby granted.

IT IS SO ORDERED.³



DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/08/12
Date of Mailing: 8/08/12

¹ This matter has been delegated to the Deputy Commissioner pursuant to *N.J.S.A.* 18A:4-33.

² Indeed, although timely notice of the hearing in this matter was sent to the address that petitioner provided to the OAL – clearly stating that it was scheduled for June 15, 2012 – petitioner did not attend the hearing and consequently provided no evidence to support the allegations in his petition. Nor did he subsequently provide any explanation for his absence.

³ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, c. 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 05973-12

AGENCY REF. NO. 89-4/12

O.C., ON BEHALF OF MINOR CHILD, O.C.-B.,¹

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF HILLSIDE, UNION COUNTY,**

Respondent.

O.C., on behalf of O.C.-B., pro se (Failure to Appear)

Derlys M. Gutierrez, Esq., for respondent (Adams, Stern, Gutierrez &
Lattiboudere, attorneys)

Record Closed: June 15, 2012

Decided: July 5, 2012

BEFORE JESSE H. STRAUSS, ALJ:

¹ The caption transmitted to the Office of Administrative Law inadvertently designated O.C.-B. as the parent and O.C. as the minor child. According to the pro se residency appeal, O.C. is the parent and O.C.-B. is the minor child.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner O.C. appeals the determination of the respondent, Hillside Township Board of Education, that he is not domiciled in its district. The Board counterclaims for tuition reimbursement.

Petitioner filed an appeal with the Department of Education on April 5, 2012. The Board filed an answer and cross-petition for tuition reimbursement on May 4, 2012, and the contested case was transmitted to the Office of Administrative Law (OAL), where it was filed on May 8, 2012. I scheduled a hearing for June 15, 2012, and a Notice of Plenary Hearing dated May 29, 2012, was sent to the parties advising them of the hearing date. The Notice of Plenary Hearing was sent to petitioner at the address listed in his pro se appeal. Counsel for the Board appeared on June 15, 2012. Petitioner failed to appear. I conducted a hearing on June 15, 2012, at which time the Board presented ex parte proofs in support of its claim for tuition reimbursement. Petitioner has provided me with no explanation for his failure to appear.

FINDINGS OF FACT

At hearing, the Board offered documentary evidence (R-1 to R-5) and the testimony of its residency investigator Alexander Munoz and residency coordinator Matthew Leonardis in support of its claim for tuition reimbursement. Based on the documentary and testimonial evidence presented to me, I find the following **FACTS**:

During the 2011-2012 school year, O.C.-B. attended the Hillside Public Schools. The Board initiated an investigation after O.C. was unable to produce adequate proofs of residency. Munoz observed the two-family home where O.C. purported to live with O.C.-B. from 6:00 a.m. to 9:00 a.m. on fifteen occasions between February 15, 2012, and June 14, 2012. He did not observe O.C.-B. exit the residence on any of those occasions although the child was present at school on each of those occasions. On January 17, 2012, Munoz knocked on the apartment door and learned that the apartment was occupied by a tenant other than O.C. On June 7, 2012, Munoz again knocked on the apartment door and discovered that the apartment was vacant. He took

photographs of the vacant apartment. (R-2.) On June 15, 2012, Munoz received an e-mail from Theodore Frank, the owner of the house where O.C. purported to live, and learned that O.C. had not lived at those premises since June 2011. (R-3.)

The Board is seeking tuition reimbursement for a total of 100 days since Munoz began his investigation in January 2012, during which time O.C.-B. attended school in the District. The annual per-pupil cost for students in grades one through five is \$12,193. The daily tuition rate for such a student is \$67.73. This is calculated by dividing the per-pupil cost by 180. Accordingly, the amount of tuition sought by the Board for O.C.-B.'s period of ineligible attendance is \$6,773.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Public schools are required to provide a free education to individuals between the ages of five and twenty years who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is that of her parent, custodian or guardian. P.B.K. ex rel minor child E.Y. v. Bd. of Educ. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection.

Petitioner has failed to appear and prosecute his appeal of the Board's decision. He has failed to advise me of the reason for his nonappearance. Therefore, I **CONCLUDE** that the determination of the Board that O.C. was not domiciled in Hillside

during much of the 2011-2012 school year should be upheld and the petition of appeal should be dismissed pursuant to N.J.A.C. 1:1-14.4.

The Board asserts that it is entitled to be reimbursed for tuition for the period of O.C.-B.'s ineligible enrollment in its schools. Where, as here, the evidence does not support the claims of the alleged resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

If an appeal to the Commissioner is filed, where the appellant does not sustain the burden of demonstrating entitlement to attend the schools of the district, or abandons the appeal through withdrawal, failure to prosecute or any means other than settlement agreeing to waive or reduce tuition, the Commissioner may order assessment of tuition for any period of a student's ineligible attendance in a school district, including the 21-day period for filing of an appeal and the period during which the hearing and decision on appeal were pending.

N.J.S.A. 18A:38-1(b) requires that tuition be calculated on the basis of 1/180 of the total annual per-pupil cost to the district multiplied by the number of days of ineligible attendance.

In accordance with N.J.A.C. 1:1-14.4(d), I accepted ex parte proofs from the Board relative to its tuition claim. The Board's proofs are convincing and its calculations are consistent with the requirements of N.J.S.A. 18A:38-1(b) and N.J.A.C. 6A:22-6.2(a). Therefore, I **CONCLUDE** that the Board has demonstrated an entitlement to tuition reimbursement in the amount of \$6,773.

ORDER

Based on the foregoing, I **ORDER** that the petition of appeal be **DISMISSED WITH PREJUDICE**. I further **ORDER** that the Board's application for tuition reimbursement is **GRANTED** in the amount of \$6,773.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 5, 2012
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency:

7/5/12

Date Mailed to Parties: July 6, 2012

Lucia Pardo
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

Alexander Munoz

Matthew Leonardis

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

None

For Respondent:

- R-1 Residency Investigation Report by Alexander Munoz re: O.C.-B.
- R-2 Set of Photographs of Vacant Apartment
- R-3 E-mail Frank to Munoz, June 15, 2012
- R-4 Hillside BOE Tuition Calculation Rates for 2011-2012 School Year
- R-5 Hillside BOE School Calendar for 2011-2012 School Year

318-12

KIM J. SLIVKA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF MONMOUTH	:	DECISION
COUNTY VOCATIONAL SCHOOL DISTRICT,	:	
MONMOUTH COUNTY,	:	
	:	
RESPONDENT	:	
	:	
AND	:	
	:	
PETER BORSCHARDT, LAURA GESIN,	:	
ANDREW JUDKIS AND	:	
MARYANNE RODRIGUEZ,	:	
	:	
INTERVENORS	:	

SYNOPSIS

Petitioner – a tenured teacher holding an instructional certificate with endorsements in General Business Studies and Elementary Education – asserted that the respondent Board’s action in terminating her employment in a Reduction in Force (RIF) violated her tenure and seniority rights. Petitioner was employed by the Board from April 2000 until June 2010, when her position was eliminated. Petitioner was rehired by the Board in January 2011 as a retirement replacement, and taught through June 30, 2011; subsequently, petitioner retired in July 2011. The Board contended that petitioner was not appropriately certified for the positions held by less senior employees (the Intervenors) who were retained after the RIF; all of these individuals possessed the Teacher of Computer Science Technology (CST) endorsement which was required for teaching the rigorous curriculum offered in the Board’s five specialized and selective Career Academies. Petitioner had never worked in these academies, but rather had taught a population of general education vocational students and classified students in the district’s traditional vocational education schools.

The ALJ found, *inter alia*, that: the Board’s decision regarding certification requirements for teachers in its highly technical career academies was not arbitrary and is justified by the regulations; the Board’s determination that petitioner’s comprehensive business endorsement is not adequate for the technically oriented curriculum offered in the career academies is within its discretionary powers, and case law provides that such a decision by a local board of education should be honored. The ALJ concluded that petitioner failed to establish that she has the appropriate certification to claim seniority entitlement over any of the intervenors, all of whom hold the CST endorsement, and that the Board’s determination was not arbitrary or capricious. Accordingly, the ALJ dismissed the petition.

Upon independent review, the Deputy Commissioner – to whom this matter was delegated pursuant to N.J.S.A. 18A:4-33 – concurred with the ALJ’s findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 7317-10
AGENCY DKT. NO. 120-6/10

KIM J. SLIVKA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF MONMOUTH	:	DECISION
COUNTY VOCATIONAL SCHOOL DISTRICT,	:	
MONMOUTH COUNTY,	:	
	:	
RESPONDENT	:	
	:	
AND	:	
	:	
PETER BORSCHARDT, LAURA GESIN,	:	
ANDREW JUDKIS AND	:	
MARYANNE RODRIGUEZ.	:	
	:	
INTERVENORS	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner and respondents requested, and were granted, extensions of time within which to file exceptions and replies, respectively. Such exceptions – filed in accordance with the adjusted timelines – were fully considered by the Commissioner¹ in reaching his determination herein.²

Petitioner's exceptions replicate the arguments advanced in her post-hearing and reply briefs below. In that these arguments were fully considered and addressed in the Administrative Law Judge's (ALJ) decision, they will not be revisited here.

¹ This matter has been delegated to the Deputy Commissioner pursuant to *N.J.S.A.* 18A:4-33.

² The grant of such extensions, however, necessitated that the Commissioner seek an extension of time within which to issue his final decision in this matter.

Upon a comprehensive review and reasoned consideration of the record – which included transcripts of the hearing conducted at the OAL on October 25 and 26, 2011 – the Commissioner determines to adopt the recommended decision of the ALJ. In so determining, the Commissioner finds that the record in this matter reveals the following:

Petitioner, a tenured teaching staff member who was subject to a Reduction In Force (RIF), effective June 30, 2010, charges that the Board retained non-tenured or less senior staff in subject areas where she was certified, thereby violating her tenure and seniority rights.² Specifically, petitioner claims entitlement to have taught the following courses during the first semester of the 2010-11 school year over individuals who were retained to teach them: 1) Communications Technology, 2) Computer Literacy Related Instruction, 3) Computer Applications, 4) Computer Information Technology, 5) Introduction to E-Commerce, 6) Animation, 7) Introduction to Animation, 8) Software Applications, and 9) Web Design.

Petitioner possesses an instructional certificate with a General Business Studies endorsement.³ Petitioner began employment with the District April 1, 2000:

- During the period April 1, 2000 through June 30, 2006 she taught Computer Information Technology courses in the Share Time Program⁴ at the Hazlet and then the Keyport school buildings and provided in-class support at 5 different Share Time buildings.

² It is noted that although petitioner was rified effective June 30, 2010, she subsequently was reemployed by the Board – in January 2011 – when she returned to work following the retirement of another teacher. Petitioner subsequently retired from employment with the Board effective July 2011. As such, petitioner seeks salary and emoluments she would have received for the first semester of the 2010-11 school year (September-December 2010) had she not been – as she maintains – improperly rified.

³ She additionally has a teacher of elementary education endorsement which has no bearing in this matter.

⁴ The Share Time program allowed students to attend their home school for half a day and receive vocational training during the other half of the day.

- During the period September 1, 2006 through June 2010 she taught office occupation courses and computer literacy courses in the Career Center⁵ campus.

In addition to its schools for the classified and general education vocational population at which petitioner taught, the District additionally operates five Career Academies – offering Career and Technical Education (CTE) programs which students are competitively selected to attend after submitting applications and taking exams.⁶ All of the courses to which petitioner claims seniority entitlement were solely offered at one of three of the District's Career Academies, *i.e.*, High Technology High School, The Academy of Allied Health and Science or Communications High School. Petitioner has never taught any course at the advanced educational Career Academies of the District.

Because the District views the career and technical programs at the Career Academies as sequential, rigorous, integrated and challenging, it has uniformly taken the position that computer technology teachers in these schools must have extensive knowledge and experience in technology and computer science which it believes is evidenced by the possession of a Teacher of Computer Science Technology endorsement, which the district sees as a robust and sophisticated endorsement demanding a solid background in computer science to acquire it and, therefore, the only “appropriate” endorsement to teach these courses. Each of the

⁵ The Career Center is a special needs school attended exclusively by classified students.

⁶ The Academy of Allied Health & Science – designed for students whose interest is in the health science and medical areas; Biotechnology High School – focuses students on a college preparatory program related to biological research technologies and is suited for students interested in careers in pharmaceutical and biological research; Communications High School – designed for students interested in various communication technologies including computer applications, graphic design and publishing and network technologies; High Technology High School – a pre-engineering college preparatory program with an emphasis on technology, mathematics and science; and the Marine Academy of Science & Technology – which provides an educational program for students interested in marine and environmental science. See Exhibit R-7

intervenors who taught courses at issue in this matter has tenure and possesses the "appropriate" endorsement; petitioner does not have this endorsement.

For the reasons comprehensively presented on pages 18-24 of his Initial Decision, the Commissioner concurs with the ALJ's conclusion that:

[i]n the exercise of its judgment, no doubt in consultation with its expert employees, both past and present, who have testified in this case and whose expertise is deemed to be substantial, the Board of Education has determined that one teaching courses in the career academies, where the career paths are not oriented toward "business" as that relates to the more traditional office-type positions, must have an endorsement that is more technically oriented, with a broader focus on the technology and its use in these career paths than is suggested by the types of courses that are authorized to be taught by one holding a comprehensive business endorsement. That judgment seems justified by the regulations, by the focus which *N.J.A.C.* 6A:9-9.2(a)9i(1) provides for the endorsement that Ms. Slivka holds. Again, this is not to say that she is not capable of actually teaching at least some of the courses at the Academy taught by the intervenors. But as the case law provides, the Commissioner, as well as the courts, are loath to interfere in such educational judgments. There appears nothing here that smacks of arbitrariness. The determination of the school district that Slivka's CTE is not the "appropriate" CTE for these courses should be honored. (Initial Decision at 24)

As petitioner does not have the "appropriate" endorsement to teach the courses at issue here at the Academies, her seniority claim of entitlement must fail.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.⁸



DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/08/12

Date of Mailing: 8/08/12

⁸ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 07317-10

AGENCY DKT. NO. 120-6/10

KIM J. SLIVKA,

Petitioner,

v.

**BOARD OF EDUCATION OF MONMOUTH
COUNTY VOCATIONAL SCHOOL
DISTRICT, MONMOUTH COUNTY,**

Respondent,

and

**PETER BORSCHARDT, LAURA GESIN,
ANDREW JUDKIS AND MARYANNE
RODRIGUEZ,**

Intervenors.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Sanford D. Brown, Esq., for respondent (Brown & Connelly, L.L.C., attorneys)

Sanford R. Oxfeld, Esq., for intervenors (Oxfeld Cohen, P.C., attorneys)

Record Closed: March 30, 2012

Decided: May 17, 2012

BEFORE **JEFF S. MASIN, ALJ:**

Kim J. Slivka was employed as a teacher by the Board of Education of Monmouth County Vocational School District (Board), but was the subject of a Reduction In Force (RIF) which caused her to lose her position, effective June 30, 2010. She was not employed by the Board again until January 2011, when she returned to work following the retirement of another teacher. Ms. Slivka retired in July 2011 and therefore did not teach after June 30, 2011. In this contested case, she argues that she was improperly bumped from her teaching position in June 2010, and seeks the benefits that she would have received had she not been bumped out of work during the first semester of the 2010-2011 school year. As her claim could affect the rights of other teachers, notice was provided as per my Order to other teachers who might be affected if Slivka were successful in her challenge to the Board's determination. Four intervenors were admitted into the case. A hearing was held on October 25 and 26, 2011. After receiving transcripts, counsel filed briefs and replies, which prompted a telephone conference with counsel regarding an issue that required clarification. Additional briefs and replies were submitted and the record closed on March 30, 2012.

Kim Slivka holds a B.A. degree in Business Administration and a Masters of Arts in Education. She holds an instructional certification with endorsements as a teacher of elementary education and general business studies. The General Business Studies endorsement, which is numbered 1320, no longer exists, but it is "grandfathered" into the "Comprehensive Business" endorsement, numbered 1300. N.J.A.C. 6A:9-9.2. The intervenors in this case, all teachers in the district, each hold a Computer Science Technology endorsement. Ms. Slivka has seniority over any of the intervenors. However, as will be explained, the Board and the intervenors contend that she is not qualified to teach the courses that were available during the first semester of the 2010-2011 school year, as she does not have the appropriate endorsement to do so. She disputes this assertion.

The Board operates several schools, amongst which are three schools, each of which has a particular career orientation: The Academy of Allied Health and Science, Communications High School, and High Technology High School. Board witnesses

former Superintendent Dr. McAndrew and current Superintendent McCaskill each testified that at each of these "Career Academies", the academic curriculum is clustered around a career theme. Each of these schools has been established in accordance with approvals received from the New Jersey Department of Education as Career Technical Education (CTE) Programs.

Ms. Slivka graduated from Texas State University in 1982 and obtained her Masters in 2002. She has received training from Microsoft and was certified in Microsoft Excel, Microsoft Power Point and Microsoft Access. Prior to 2000, Ms. Slivka worked outside of the education field, owning her own flooring store and fabrication shop, where she was responsible for finance and marketing; setting up an accounting process using Peachtree Software Program; working for a botanicals company in the accounting department and then doing database development using Act software and working as a loan officer for a mortgage company. She started at Monmouth Vocational in April 2000. While working in the school district, she taught Computer Information Technology from 2000 through 2006. This was first taught in the Share Time program in the district's building in Hazlet, where cosmetology and auto mechanics were taught.¹ Later, the course was moved to a school located in Keyport. In this course, Word, Excel, Power Point, Access, Publisher, Microsoft Money, Adobe Photoshop, and Microsoft Front page were utilized. Each year there would be some upgrading of the materials, software and, sometimes, the computers. In 2005-2006, she was assigned to "in-class support" in the shared time buildings, working on assignments as generated by the school principal, also doing computer information technology "part time" as "they were in the process of closing the course down." She worked that year in five different share time buildings and assisted students and teachers with their "technology needs", assisting students with using the computer and helping them work on their projects, their spread sheets for keeping time and helping teachers "with e-mail programs" and getting them "proficient on the computer." In 2006-2007, Ms. Slivka was transferred to the career center where she taught "office occupations", described as a basic office skills course teaching students how to use copy machines, fax machines and computers. Macintosh computers were utilized, with

¹ The Share Time program allowed students to attend their home school for half a day and receive vocational training during the other half of the day.

software including Word, Excel, Power Point, Adobe, In Design, Illustrator and Photo Shop. Students were taught how to make spreadsheets, how to create databases, graphics, how to manipulate objects and how to use office equipment. She was also tasked to take some students who were not being challenged enough and work with them in the computer lab, where they worked on Windows-based computers toward Word Specialist certification, which she believes four or five of the students achieved by the end of the school year. In 2007-2008, she was assigned to the computer literacy center, which had as a course philosophy "the ability to use computers, to perform a variety of tasks is becoming fundamental to the learning process." Again, programs used were Word, Excel, Power Point. This course was conducted in the Career Center in Freehold, as was the office occupations course. In 2008-2009, she again taught these two courses in the same location. She was a leader of the technology team in the building during 2009-2010. This involved an attempt to develop a plan to assist teachers with integrating more technology into their programs.

Referring to her expert witnesses' report for a list of courses taught in the Monmouth Vocational School District and to the Board approved, course curriculum, Ms. Slivka was asked to comment upon her knowledge of and ability to teach the software programs utilized in these courses. So, for instance, she identified as used in the "Introduction to E Commerce" course and "Web Design" course, "Cold Fusion" as the scripting language inside "Dream Weaver"; "Flash" as a macro media software. She could teach these "immediately." In the "Introduction to Animation" course, she contended that she was "familiar" with "Final Cut Pro" and "I Stop Motion" and was "able to teach those immediately." She also could teach "Alice." She was not familiar with "Light Wave 7.5" listed as utilized in the "Introduction to Animation" course. She could teach "Flash" and "Adobe After Effects" "immediately." She is familiar with "office software and photo manipulation software" utilized in the this course.

On cross-examination, Slivka acknowledged that she had no endorsement as a Teacher of Computer Science Technology. The courses that she was asked to comment upon as to whether she could teach them and was familiar with the software utilized in these courses were all taught at the Vocational School District Academies.

She believed that some of the computer classes actually overlapped what she had taught, such as the "Software Applications" taught at the High Tech High School by intervenor Peter Borschardt, which she said was ninety-five percent of what she taught. She was unfamiliar with the "cluster program, the career technical education program" operated at High Tech High School. However, her review of the curriculum for the "Software Applications" course showed her that "it overlaps tremendously." The philosophy of the course, described in the Board approved curriculum, refers to "multitudes of engineering and daily challenges that can be solved through the use of a general computing device. . . . The study of application software will give the learners the tools he or she needs to solve engineering problems and communicate thoughts through the power of computing." Slivka acknowledged that she had no engineering degrees nor had she ever taught engineering. She had taught several of the software programs listed for the course, such as Microsoft Office, Adobe Photo Shop and Hyper-text Mark Up Language, but she had not taught others, such as Cascading Style Sheets and Adobe Dreamweaver or Alice Programming Language.

The petitioner agreed that the courses that were taught at Hazlet or at Keyport when she was teaching in those locations on the Shared Time program were auto body, auto mechanics, cosmetology and dental assistant, and, in later years, another allied health program. When she taught at the Career Center, every student attending was classified. The variety of courses at the Career Center included auto mechanics, horticulture, bakery and health occupations.

Martha O. DeBlieu, who was admitted to testify as an expert witness for Ms. Slivka regarding certification standards and the courses one is authorized to teach pursuant to such certifications as one may possess, is employed by the New Jersey Education Association as its Associate Director for Education Research and Issues Analysis, responsible for understanding and covering issues before the State Board of Education.² Since 1985, she has been familiar with licensing issues due to her long-standing involvement with reporting on these for the Association and first as a contact,

² The Board and intervenors object that Ms. DeBlieu is not actually an expert in the determination of what courses Ms. Slivka is authorized to teach. In part, the question is related to the parties differing understanding of the nature of the courses themselves, that is, are they educational technology or technology education courses? This will be addressed in the decision, and the admissibility and/or the weight and credibility of DeBlieu's opinions will be considered.

and later as the primary contact, for members and staff of the Association regarding licensing and certification issues. As such, she has worked with the regulations and with personnel at the Department of Education concerning the licensing regulations and amendments thereto. This includes contact with the agency's Director of Licensure and Credentials. As a part of her advisory responsibilities, she was required to know the requirements for being able to teach various teaching assignments, including the teaching of computer subjects, a subject that has "come up frequently." In her capacity, Ms. DeBlieu fields inquiries from attorneys, field representatives and persons from other states, as well as the general public. Since September 2009, she has served as the staff contact with the NJEA certification, evaluation and tenure committee, which monitors developments related to these areas and recommends policy to the NJEA Delegate Assembly.

DeBlieu testified concerning a memorandum issued on July 25, 1985 by Leo Klagholz, then the DOE's Director of Teacher Preparation and Certification, in which Klagholz addressed the work of a task force formed to study certification in computer education. In that memo, Klagholz notes that no certificate existed for teaching computer education. Teachers of computer education were required to have a New Jersey Instructional certificate. Non-binding guidelines issued in the memo provided that teachers with any instructional endorsement "may use the computer as an instructional tool to enhance instruction at any grade level" and that "Teachers who hold any instructional endorsement and who have some preparation in computer education may teach courses in this area at the secondary level. The following preparation was considered important by the task force" There followed a listing of matters deemed either "essential" or "additional preparation." The memo ends: "Again, however, your decisions in this regard are not currently regulated by the state, except that your computer education teachers must possess an instructional certificate."

The witness noted that Ms. Slivka had a general business endorsement to her instructional certificate and that the DOE understood this to mean that under that endorsement the specific course work authorized included a series of topics as listed in the so-called "Matrix" or the "Cross-Walk," a document that carries the title of "Job and

Certification Match File." The endorsement for general business studies is numbered 1320. Among the courses that one with the endorsement can teach are business law, banking and finance technology, banking and insurance principles, business mathematics, clerical office practices, travel marketing. Also, the matrix includes that "Computer Literacy/Applications/Programming" can be taught by anyone holding a certificate coded between 1000 and 2682. As the general business code is 1320, Slivka is authorized to teach these courses. There is nothing in the matrix which prohibits a teacher so authorized from teaching in a regular high school or a vocational high school. There is, however, a distinction in the administrative code between "educational technology" and "technology education." Such programs as computer network systems, computer service technicians, computer systems engineering and computer technology are "technology education."

"Educational technology" means the implementation of technology as an integral part of the instructional process across all curriculum areas that supports a learner centered environment.

.....

"Technology education" means instruction by a teacher holding the Technology Education endorsement and covering New Jersey Core Curriculum Content Standard (NJCCCS) 8.2 and the International Technology Education Association (ITEA) standards. The ITEA standards are published in "Standards for Technological Literacy,"(c) ITEA, incorporated herein by reference, as amended and supplemented and are available at <http://www.iteaconnect.org/TAA/PDFs/xstnd.pdf>. The ITEA standards recognize the increasing reliance of modern society on a range of technologies, stress the incorporation of technological study into all aspects of the curriculum, and promote experiential learning about technology development, use, maintenance, and impact on the individual, environment, economy, and society as a whole. Examples of the topics that can be taught under NJCCCS 8.2 and the ITEA standards include, but are not limited to, the nature of technology; technology and society, engineering and technological design; abilities for a technological world; energy and power; information and communication; and transportation, manufacturing and construction technologies. A technology education

endorsement does not provide an endorsement to teach educational technology and/or computer and information skills.

[N.J.A.C. 6A:9-2.1.]

DeBlieu understands these definitions to mean that educational technology is "basically the use of computers and computer software. Technology education is more along the lines of engineering . . . it is not about the use of computers and software. It's about the technological end of the computer. That's basically in that computer design and software design. . . . A person with a general business studies endorsement can teach educational technology but not technology education." DeBlieu testified

So there is a distinction between the course that is teaching about how to use computers and software that's available in the mass market versus a course that's teaching a technological, very career specific technological software about a career that happens to be using computers in the course of that.

THE COURT: So if I'm taking, and this is purely hypothetical, if I'm teaching an engineering course, wherever I'm teaching that engineering course and I'm using engineering software that helps design buildings, and I happen to be using a computer and the techniques of using a computer, that's the kind of educational technology that you're referring to as opposed to the technology education.

THE WITNESS: Well, the technology education person would be using that software, the engineering software. They're not teaching the person how to use computers.

THE COURT: Right.

THE WITNESS: They're using the computer and the software in the course of teaching the course. It's not that they're teaching a person how to use a computer or necessarily how they're employing that career specific software in terms of that particular career.

...

BY MR. FRIEDMAN: So does that mean, to try to put this in sort of a non-computer person's or lay person's terms, that, for example, Ms. Slivka could not teach an engineering course merely because there were computers, and even if she knew about those computers, but she could teach a computer course primarily geared toward computers.

- A. Yes, and in teaching a computer course, she could have assigned individuals to do a paper on a career, but that's different than the actual using of a specific career specific software in which you're learning about that particular - - you're basically learning how to do that career as opposed to learning about how to operate, use the computer and use mass market software.

Ms. DeBlieu reviewed the syllabi and course descriptions of courses being offered in the district and opined about whether Ms. Slivka could teach them under her endorsement. She premised her review in part upon N.J.A.C. 6A:9-5.20, which provides

(a) Every teacher shall demonstrate knowledge and understanding of computers and other educational technology resources and tools as defined by the New Jersey Professional Standards for Teachers.

(b) Every teacher shall integrate into the classroom appropriate educational technology resources and digital tools related to the content area being taught.

(c) The school administrator may assign an individual to provide instruction in the use of educational technologies, computers, and other digital tools if the individual:

1. Demonstrates proficiency in the uses of educational technologies, computers, and other digital tools and understands their common applications in an educational setting;

2. Demonstrates knowledge and understanding of the integration of such technologies and digital tools into the curriculum;

3. Demonstrates understanding of the legal and ethical issues surrounding the use of educational technologies and digital tools in PK-12 schools; and

4. Holds a CE, CEAS or standard certificate in an instructional field.

[Ibid.]

DeBlieu concluded that Ms. Slivka could teach the course in Computer Literacy Related instruction, a twelfth grade course at the Career Center, because it was a basic computer literacy course involving the understanding of the basic concepts regarding the use of hard and soft-ware. It had no specific career tie-in. It involved the use of materials regularly available to the general public. Similarly, Introduction to Animation, (P-9), described as part of the career cluster for "Arts/Audio/Video Tech & Communications", and taught at the Wall location, is a basic course, as animation is used in a variety of ways, including in websites and online. The course is basic and she could teach it with her endorsement.

Slivka could teach Introduction to E Commerce (P-10), also part of the career cluster for these same areas and for Information Technology, taught at Communications High School. Here, the reason is not only that her instructional certificate and endorsement are appropriate, but also that she has a business and marketing background. P-11, Software Applications, taught in the ninth grade at High Technology High School, is another basic computer course; not an engineering or a technology education course. Instead, it appears to deal with basic technology and skills. Communications Technology, (P-5), a ninth grade course at Communications High School, "is a basic computer course on using the McIntosh computer and certain types of software that I guess market software that's available and is, you know, just basic software that can be used by anybody." Computer Applications I, (P-6), a ninth grade course at the Academy of Allied Health and Science, is again basic, with a limited portion of the course related to a research project that relates to the Science/Health element, but the course is basically "learning how to use the computer and the computer, regular computer software that every student should be able to know."

DeBlieu was less assertive about Slivka's ability to teach Web Design, P-12, because while she could teach it, she would have to know the software.

Dr. Brian McAndrew, who holds a doctorate in vocational administration, was employed by the Monmouth County Vocational School District from 1969 until his retirement in 2009. He served as the District's school superintendent for twenty years. Dr. McAndrew was at one time responsible for reviewing the credentials of all employees in the county who were applying for the vocational technical certification or for employment by the District. He was president of the New Jersey Council of County Vocational Schools and served on the Council until his retirement in 2009. Thereafter, he was employed as a part-time consultant to the Council and has been actively involved with the DOE's Division of Career and Technical Education in providing guidance regarding vocational education matters. He was admitted as an expert in matters relating to education, vocational education, curriculum development and the Administrative Code as it relates to curriculum.

Dr. McAndrew explained that the three academies within the District must meet Federal guidelines issued under the Perkins Act.³ Dr. McAndrew noted that the approvals for these three academies issued by the New Jersey Department of Education was for Career and Technical Education programs which had to provide curriculum that would "meet appropriate industry-approved and/or state or nationally-recognized skill standards and the New Jersey Core Curriculum Content Standards." As a part of the Program of Study Approval for each of the academies, the DOE directed, as noted on page 10 of the Approval for the Academy of Allied Health and Science, but also for the other academies, that "A course required of every student enrolled in the district or agency, such as 'Introduction to Careers', 'Computer Literacy', and/or 'Keyboarding', is **not** acceptable for inclusion." The approved curriculum for, as an example, the Academy of Allied Health and Science, includes such courses as "Computer Applications I" and "Principles of Computer Technology." In his response to Ms. DeBlieu's report, McAndrew contended that Slivka did not hold the correct credential for teaching this course. He testified that "a credential for business studies" was inappropriate.

³ The Carl D. Perkins Career and Technical Education Act, as amended by Public Law 109-270, is codified at 20 U.S.C. 2301 et seq.

Basically, because it is a business certificate credential, okay, and that is what it's all about. That's why teachers get - - teachers who are involved in business studies basically will get that type of credential to teach typically types of course work that would be back in the 20th century, typing, stenography. Now it will get involved in the Microsoft types of business types of courses, the types - - types of things that basically upgrades what a student would need to know coming out of school that is interested in being an administrative secretary or something along those type of lines. Okay and so it is - - it's a business credential and that's why we employed Mrs. Slivka in the first place. . . We have no employee or at least during when as - - as I was superintendent we have had no employee working in any of the five career academies with a business certificate. It's just not appropriate. . . The certificate we have consistently used is the computer science technology because that's basically the state of the art and that's what everyone has concurred within terms of what would be the appropriate certification because of the nature of the sequential types of course work that is being - - being taught in those particular schools.

The witness explained that in a program of study at a career academy, students have little choice in what courses they must take, due to the "thematic" nature of the school. The courses are "basically interwoven with the theme, even the academic course work is interwoven within the theme so that students in their English courses will basically also use literature . . . in terms of the theme of that particular school and as a result we are very clear in terms of how and what we need to teach each of these course works that we offer."

McAndrew noted that Slivka could teach "what we all consider to be those traditional business type of courses to prepare young people for office types of working technologies. . . . The only expertise that she's presented is that she has a certificate in Microsoft studies. That's it. . . ."

The witness referenced the Klagholz letter and the evolution of computer usage in schools since 1985. He referred to N.J.A.C. 6A:9-2.8, which addresses

"technological literacy" as a part of the larger regulation, N.J.A.C. 6A:9-2, that discusses "teaching endorsements and authorizations" which are "grouped" in (a)1 through 9 . . . within the relevant CCCS.

i. Computer and information literacy: There is no separate endorsement for educational technology and tools or for computer and information literacy except where career and technical endorsements occur for the related career clusters and career education and for consumer, family and life skills (see N.J.A.C. 6A:9-5.20). The New Jersey Core Curriculum Content Standards require that teachers integrate the use of computer and information technology into their instruction; and

ii. Technology education. This endorsement authorizes the holder to teach technology education in all public schools with the exception of approved vocational programs. Technology education includes content aligned with the CCCS and the Standards for Technology Literacy published by the International Technology Education Association, Copyright 2000, incorporated herein by reference, available <http://www.iteaconnect.org/TAA/Publications/STL/STLMainPage.htm>. Examples of the topics that can be taught under this endorsement include: the nature of technology; technology and society; engineering and technological design; abilities for a technological world; energy and power; information and communication; and transportation, manufacturing and construction technologies

Dr. McAndrew commented that the concept represented here is that in the absence of a separate endorsement for educational technology, the Klagholz letter and the regulation allow a district to utilize personnel to provide computer related matters, but "If you have a career technical education program that's - it's going to require a career technical education certificate."

On cross-examination, McAndrew agreed that in order to teach in the academy setting it is not required that a teacher holding a certificate as a teacher of computer science technology, hold any other endorsement that is for any of the endorsement specifically related to the career-path subjects included in the career curriculum. So, for

instance, a teacher teaching web design in the health academy need not hold any health-related subject matter endorsement to teach web design at that school. McAndrew tried to explain why the lack of any such health-related endorsement is not important. He said, "They're all related to the career. They - - they have the endorsement that's appropriate to teach the course work that they're teaching."

The witness could not point to any specific document or regulation that said that N.J.A.C. 6A:9-5.20 does not apply to either career cluster or vocational technical schools. He argued that in reference to the matrix, it was necessary to understand that document in reference to the Administrative Code. McAndrew claimed that while he was familiar with the matrix, he had never used it.

In an attempt to further clarify how Dr. McAndrew distinguished between the sort of coursework that he believed Ms. Slivka could teach and that which she could not, i.e., the career cluster courses that he argued could only be taught by someone holding a CTE, I entered into a series of questions with him.

Q. But is it fair to say that a course called "Computer Applications One" taught in the Academy of Allied Health and Science is not teaching a academic course per se, maybe that's the wrong word. It's not teaching a, you know, English, history, science, math, philosophy. It's teaching something about computers that you can then use in all these other areas, correct? And it's - -

A. Yes.

Q. - - it's important to those other areas especially today to be able to use that technology, correct?

A. Yes, at a high level.

Q. But the course is teaching about how to use computers, correct, and the software that goes with the computers?

A. How to utilize what the computers do.

Q. Right. Okay and computer information technology again is not teaching - - while, it may be related to a lot of

the - - I hate to use the word "academic," but academic courses, that is really a course that's dealing again with a tool. It's teaching you something in regard to the use and the application of that tool so that you - - you didn't take that information and use it in the subject matter areas, correct?

A. A tool to basically teach the information with the thematic theme at a high level.

Q. Now the person who teaches computer information technology, if they have the - - if they have the computer technology endorsement and they're teaching that course, we're not expecting that that individual is teaching any of those other academic subjects, correct? And they don't have the endorsement for it, correct?

A. Yes, sir.

Q. So they're basically teaching a computer course because they have a computer degree - - a - - a computer endorsement, correct?

A. Yes

...

Q. . . . I mean, again would - - would a teacher of computer systems technology be teaching about the use and application - - about the use and manipulation through software of computers?

A. In that context, yes.

Q. And so that would be a - - opposed to a course teaching an academic subject they're really teaching computer there, correct?

A. In that context, yes.

The witness acknowledged that the approvals received from the State for the CTE programs did not specify the kind of endorsements required to teach the courses.

Timothy McCorkell is the current Superintendent of the Monmouth Vocational School District. He was in that position at the time that budget cuts necessitated the

RIF here in question. A structured learning advisor position in business education in the shared time division,⁴ who worked with students performing internships in the field, had to be eliminated due to the cuts and reductions in the number of internships available. This resulted in bumping which impacted Ms. Slivka. He affirmed that due to her not holding a computer science technology endorsement, Slivka would not have been considered for teaching any of the courses at the academies. Persons holding such an endorsement were "on a separate seniority list." This arrangement was created before he became superintendent. He understood that the certification was considered to be "more robust" and that it

allows those teachers to teach all aspects of technology and it gives the teachers the ability as technology changes as it does overtime and curriculums need to be revised. It's not a limiting certification, plus it's also considered a CTE certification and all of these programs are approved for appropriate for a program of study approval process.

In managing the RIF, Superintendent McCorkell applied the decision made before his incumbency that the certificate of computer science technology" was the appropriate certificate "to be utilized in the career academies for teaching technology." Asked to expand upon the nature of the relationship between the teachers holding the computer science technology certification and other teachers in the academy buildings, he said

they're working with all the teachers in the building, the thematic teachers particularly on integrating what they're teaching with the theme of the school. So if that was High Technology High School it would be the engineering theme or the medical theme or the communications technology. So there is a direct relationship and in fact in some cases, for instance High Technology High School, while the courses, the curriculums are stand alone if you view them in fact the actual application of the curriculum in practice is teachers work together in integrated units. So at High Technology High School the software applications curriculum that was being discussed, the - - that teachers work with the biology

⁴ McCorkell was unsure of the exact title of the position.

teacher, also works with the humanities teachers in an integrated approach.

McCorkell noted that as a result of this arrangement the computer science technology endorsement was necessary, as "they are considered to be technical courses." A person can obtain this certification if they have either a bachelors or masters degree in computer science or appropriate industry experience, meaning at least four years "working in the field."

McCorkell could not point to anything in the CTE application that indicated that Slivka's endorsement was not appropriate to teach in the CTE program. However, in further explanation of the need for this endorsement, McCorkell noted that as technology is constantly changing, it was the District's decision to require the CTE endorsement,

because they needed to have teachers who could expand into these other areas as robotics has become in a more and more - - a mainstay in all the schools. You needed teacher who could teach all of the aspects of technology and software applications and everything that went in, but the computer science technology teacher, I used the word, robust. It gives the ability to teach any and all of those courses.

Counsel for the Board directed the witness to examine Bate Stamp pages 000666 and 000667 of the Computer Applications I course curriculum, P-6. He queried McCorkell as to how this document demonstrated the integrated approach of teaching at the academies, more specifically in this instance the Academy of Allied Health and Science, and how the computer application course was so interrelated with the thematic approach. The witness pointed to the language on page 000667

Improving communication skill being a primary goal of all programs at Academy of Allied Health and Science, writing and vocabulary will be emphasized in each of the three program components.

McCorkell acknowledged, however, that improvement of communications skills was a primary goal for all students, regardless of the career or work that they might pursue. He was asked if there was anything in this description of the course that indicated that "in regard to learning the computer applications skills that are being taught here that the skills . . . are more specific to the health and science area as opposed to more generally applicable . . . is there anything in here that specifically indicates that the course . . . is only applicable . . . or is geared to what's being taught in this course" He was also queried as to whether there was anything to distinguish what was being taught in the course from a similar Computer Applications One course being taught elsewhere in the district, McCorkell replied that "it's tailored [sic] made to the deeds [sic, probably he said needs] of the student at Allied" However, he acknowledged that he had not reviewed the curriculum for some time.

Discussion

In New Jersey, the statutes and regulations governing the teaching profession identify certifications and endorsements which establish the legal right for teachers to teach specific courses of instruction. All of these legal provisions import into the decision making process for boards of education constraints upon the board's discretion, but it is still true that despite this important overlay of laws, within the confines of the legal structure boards retain some discretion in how they allocate their resources and what choices they make in delivering education to their students. As the New Jersey Supreme Court put it in Denney v. Bd. of Educ., 131 N.J. 636, 643, "courts cannot supplant educators" and therefore, unless educational judgments are "palpably arbitrary or depart from governing law", judges and even the Commissioner of Education must refrain from interfering in these professional choices. Here, the Board's witnesses have argued that in operating its highly-rated Academies the Board has maintained a consistent judgment that only persons with "advanced," "robust," more specialized endorsements for computer science technology should teach computer-related course in the career-oriented academies. The petitioner argues that she holds

an endorsement that is legally sufficient to permit her to teach in these schools, to teach these courses. The Board contends that even if it is the case that her endorsement is perhaps within the legal parameters that would permit her to do so, its judgment is neither arbitrary nor capricious, and therefore should be upheld. It maintains that Ms. Slivka's seniority rights do not afford her any claim to these positions, because its judgment that her endorsement is not the appropriate one for these teaching assignments is a proper choice, even if not the only legally correct one.

N.J.A.C. 6A:9-11.2 provides

(a) Career and technical education endorsements authorize the holder to teach career and technical education programs in all public schools. Specific career and technical education endorsements are based on the candidate's Department-approved employment experience, bachelor's degree or associate's degree. Endorsements are organized under the following career clusters and are listed on the Department's website:

[Ibid.]

The Board and Intervenors point to language contained on page 9 of each of the approvals for the Academies, which reads, "Secondary teachers for each of the required CTE Program or CTE Program of Study's courses are required to hold the appropriate New Jersey certificate(s) and instructional endorsement(s) issued by the NJDOE Office of Licensure and Credentials." Intervenors read this to "indicate that teaching staff members instructing students in the CTE program courses must be appropriately certificated with appropriate CTE endorsements in order to properly teach the career-oriented courses at the vocational academies." However, the plain language of the statement does not say that the "appropriate New Jersey certificate(s) and instructional endorsement(s) must be "CTE endorsement(s)." That reading by the Intervenors assumes that "appropriate endorsement" equals "CTE endorsement". Indeed, they themselves recognize that the Administrative Code may not in fact reflect their position with clarity. To the extent that they contend that a teacher must possess a CTE certification to teach in a CTE program such as exists in the academies, they admit that this "may not be clearly stated in the Administrative Code."

The Board and Intervenor's position here is staked upon the argument that in a highly integrated teaching model such as they represent the academies are, where every part of the instruction is utilized to at least some degree to advance the thematic mission and to prepare the students for the career(s) that presumably flow from the training that they receive in this CTE educational setting, the teaching that the intervenors perform and which they claim Ms. Slivka is not capable of performing with her endorsement, is of a special character. But what the record as developed shows is that the expressions about the integrated and sequential nature of the training, as it involves the course work taught by the intervenors, are all very generalized. None of the intervenors testified; none explained the details of this at all. Dr. McAndrew and Mr. McCorkell's testimony was likewise quite theoretical and general. The concept is that these teachers are not simply teaching basic computer skills, using basic software, to do basic functions, but that they are teaching more sophisticated ideas, concepts, functions, manipulations, usages of advanced, possibly non-mass market, career-related software, that one with a more basic understanding of the usual hardware and, I suspect more importantly, usual software is simply not capable of. All this may be true, but the record does not demonstrate that. More specifically, in their brief, the intervenors note that in the Web Design course, students are not simply taught to use Dreamweaver, Flash and Cold Fusion "for the sake of learning the programs for general use; rather, these software programs are integrated into the academy's theme and focused on developing the student's career-oriented education at Communications High School." That statement is in accord with the testimony, but it does not actually explain with any specificity what the intervenors are able to do in the course of their instruction to advance this thematic concept that the petitioner is not. And by that, I mean not whether any given teacher is familiar with a particular software program, but what is it that these teachers, with their computer science technology endorsement, can do, as a result of that endorsement, that Slivka is unable to do with her general business studies endorsement.

This said, and while perhaps the record could have been more detailed, I note that the Board's expert witnesses were certainly highly qualified and, especially in the

case of Dr. McAndrew, he has a long-standing history and great knowledge of the development of career-oriented education that cannot be overlooked in understanding both his opinion and the Board's policy and its determination in this particular instance. The expert testimony does provide some context for the decision that is worthy of credit.

Having noted the Board's explanation as to why Ms. Slivka cannot teach at the Academies, and the lack of informative detail that might make clear the actual facts arising from the theoretical core of the Board and intervenors' position, it is nevertheless necessary to go back to the Administrative Code to determine whether the Board's assertion that the petitioner's endorsement is not the "appropriate" CTE endorsement is correct. In regards to determining whether a teacher has the correct credentials the

relevant inquiry . . . is not what a person can teach, but what a person may teach. The answer must be found in the regulations and the case law, not in a review of the endorsement holder's college transcript. Accordingly, in the context of tenure and seniority rights following a RIF, any discussion concerning who is more suited to teach a particular course or who is more qualified is unnecessary and inappropriate. If a rifed teacher has an endorsement which authorizes, i.e., permits, her to teach a course, she may exercise her tenure and seniority rights to claim it.

[Ulrich v. Board of Education of the Monmouth-County Vocational School District, 96 N.J.A.R.2d (EDU) 290, 293 (Duncan, ALJ), adopted, Comm'r Final Decision, 96 N.J.A.R. 2d (EDU)295].

The first inquiry then is whether Ms. Slivka holds a career and technical endorsement (CTE). Her endorsement was originally General Business Studies. N.J.A.C. 6A:9-11.2 addresses "Career and technical education certification requirements."

"(a) Career and technical education endorsements authorize the holder to teach career and technical education programs in all public schools. Specific career and technical education endorsements are based on the candidate's Department-approved employment experience, bachelor's degree or associate's degree. Endorsements are

organized under the following career clusters and are listed on the Department's website: (Emphasis added.)

[Ibid.]

The parties are not in accord as to the exact meaning of the regulation's reference to the Department's website for an organized list of endorsements. Indeed, the website has much information. Initially at least, it has a list entitled, "List of New Jersey Licensure and Credentials Career and Technical Educators." The Intervenor's claim that the reference in the Code must be to this, and not to the "CTE Certificate Crosswalk Chart Current and Former Career and Technical Vocational-Technical Certificates." The petitioner specifically contends that the "Crosswalk" is referenced in the Code and therefore is a part thereof. The allegedly relevant portion of the "Crosswalk" is reproduced here.

<i>Business, Management & Administration</i>	Business: Comprehensive Business	1300	Business Education	1300	Business Organization and Management
	<i>Continued</i>		Social Business Studies	1329	
<i>Business, Management & Administration</i>	Business: General Business Studies	1320	Certificate no longer offered. Grandfathered into #1300, Comprehensive Business		
<i>Business, Management & Administration</i>	Business: Computer Applications and Business-Related Information Technology	1304	Business: Computer Applications and Business-Related Information Technology	1304	Business or Commercial Arithmetic
<i>Business, Management & Administration</i>	Business: Finance/Economics/Law	1302	Economics	2334	Consumer Education

In actuality, it seems that both of these elements are necessary to properly understand the endorsements as they currently exist. As an example, there is a current endorsement for "Business: Comprehensive Business," number 1300. There was a previous endorsement, no longer offered, for "Business: General Business Studies",

numbered 1320. The latter has been grandfathered into the former, a fact that the chart notes. That being said, then a look at the listing for CTE Licensure and Credentials includes the "Business: Comprehensive Business" endorsement, which we know includes those who held the prior General Business Studies endorsement. The list of current endorsements is not a fully functional list if it is not understood to incorporate such grandfathered defunct endorsements. As such, to the extent that N.J.A.C. 6A:9-11.2 notes the listing of endorsements on the DOE website it can be understood to reference and thereby incorporate both the list and the chart. And based upon this information, it is clear that Ms. Slivka does hold a CTE endorsement. Yet, the Board and intervenors contend that despite this fact, she does not have the "appropriate" CTE endorsement, that her Business: Comprehensive Business" endorsement (as that incorporates the former Business" General Business Studies) is not the endorsement appropriate to the career training that occurs in the Academies. As such, her endorsement is not one that establishes that Slivka "may" teach." Ulrich, supra at 293.

That said, what courses may one with a grandfathered endorsement of General Business Studies teach? More to the point, what may one holding a Business: Comprehensive Business endorsement teach? N.J.A.C. 6A:9-9.2(a) provides:

The teaching endorsements and authorizations in (a)1 through 9 below are grouped within the relevant CCCS.

.....

9. Career education and consumer, family and life skills:

i. Business education/business-related technologies: Endorsements in these content fields authorize the holder to teach business education and business-related technologies in all public schools.

(1) Comprehensive business: This endorsement authorizes the holder to teach accounting, banking and insurance, business computer applications, business law, business communications, business mathematics, economics and finance, entrepreneurship; international business; keyboarding; business management; business organization,

marketing; office administration/office systems technology;
and exploration in business related careers.

In reviewing this list of courses that one with the Comprehensive Business endorsement is authorized to teach, it seems apparent that the central element of the group is that the courses are related to "business." In the exercise of its judgment, no doubt in consultation with its expert employees, both past and present, who have testified in this case and whose expertise is deemed to be substantial, the Board of Education has determined that one teaching courses in the career academies, where the career paths are not oriented toward "business" as that relates to the more traditional office-type positions, must have an endorsement that is more technically oriented, with a broader focus on the technology and its use in these career paths than is suggested by the types of courses that are authorized to be taught by one holding a comprehensive business endorsement. That judgment seems justified by the regulations, by the focus which N.J.A.C. 6A:9-9.2(a)9i(1) provides for the endorsement that Ms. Slivka holds. Again, this is not to say that she is not capable of actually teaching at least some of the courses at the Academy taught by the intervenors. But as the case law provides, the Commissioner, as well as the courts, are loath to interfere in such educational judgments. There appears nothing here that smacks of arbitrariness. The determination of the school district that Slivka's CTE is not the "appropriate" CTE for these courses should be honored.

I **CONCLUDE** that Ms. Slivka has failed to establish that she has the appropriate CTE endorsement to bump any of the intervenors who hold a CTS endorsement. The Board of Education's decision to have only persons with CTS endorsements teach computer courses in the Academies is not arbitrary. Ms. Slivka's petition for relief is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

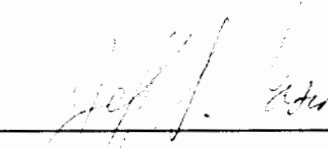
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 17, 2012

DATE



JEFF S. MASIN, ALJ

Date Received at Agency:

Date Mailed to Parties:

mjm

WITNESSES

FOR THE PETITIONER:

Martha D. DeBlieu

Superintendent Dr. McAndrew

Superintendent McCaskill

Dr. Brian McAndrew

FOR THE RESPONDENT:

Timothy McCorkell

EXHIBITS

FOR THE PETITIONER:

- P-1 Certificates of Kim J. Leiner
- P-2 Job description of Teacher, adopted November 7, 1996
- P-3 Certification of Kim Leiner as Microsoft Office Specialist Master
- P-4 Animation course description, approved July 15, 2008
- P-5 Communications Technology course description, approved July 15, 2008
- P-6 Computer Applications I course description, approved July 1, 2008
- P-7 Computer Information Technology Course Curriculum, February 5, 2000
- P-8 Curriculum For: Computer Literacy Related Instruction, approved August 2007
- P-9 Introduction to Animation, Revised June 2004
- P-10 Introduction of E Commerce, Revised June 2005
- P-11 Software Applications, approved July 1, 2008
- P-12 Web Design, Revised June 2004
- P-13 Curriculum Vitae of Martha O' DeBlieu
- P-14 Analysis of relevant courses at Monmouth County Vocational School District re:
Kim Slivka by Martha O. DeBlieu
- P-15 August 14, 2011, letter to Richard A. Friedman from Martha O. DeBlieu
- P-16 Answers to Interrogatories from respondent dated November 4, 2010
- P-17 2010-2011 school year schedules

- P-18 August 15, 2006, letter to Kim Slivka from Brian D. McAndrew
- P-19 Professional Development Plans for Kim Slivka
- P-20 Teacher Observation Reports for Kim Slivka
- P-21 Job and Certification Match File - General Education
- P-22 Curriculum For: Office Occupations Training Curriculum
- P-23 July 25, 1985, Memo from Leo Klagholz Re: Guidelines for Teaching Computer Education

FOR THE RESPONDENT:

- R-1 April 5, 2000, Interview package for Kim Leiner
- R-2 Letter from Brian McAndrew to Timothy McCorkell Re: Report, Petition of Appeal, KJS
- R-3 Response to Report Prepared by Martha O. DeBlieu Re: Kim Slivka by Brian McAndrew
- R-4 Resume of Brian D. McAndrew
- R-5 October 8, 2010, Initial Interrogatories and Demand for Production of Documents
- R-6 Information sheet regarding petitioner and intervenors
- R-7 Article from App.com Career Academies
- R-8 Resume of Timothy M. McCorkell

OAL DKT. NO. EDU 8092-11
 (EDU 12414-09 ON REMAND)
 AGENCY DKT. NO. 315-11/09

GARDEN STATE SCHOOL BUS
 CONTRACTORS ASSOCIATION AND
 JAVIER FERNANDEZ,

PETITIONERS,

V.

COMMISSIONER OF EDUCATION

BOARD OF DIRECTORS OF THE PASSAIC
 COUNTY EDUCATIONAL SERVICES
 COMMISSION, K&M TRANSPORTATION,
 INC. AND BONDEX INSURANCE
 COMPANY,

DECISION

RESPONDENTS.

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A. 18A:4-33* – approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/08/12
 Date of Mailing: 8/09/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8092-11

AGENCY DKT. NO.: 315-11/09

ON REMAND FROM

OAL DKT. NO. EDU 12414-09

**GARDEN STATE SCHOOL BUS
CONTRACTORS ASSOCIATION and
JAVIER FERNANDEZ,**

Petitioners,

v.

**BOARD OF DIRECTORS OF THE PASSIAC
COUNTY EDUCATIONAL SERVICES
COMMISSION, K&M TRANSPORTATION,
INC. and BONDEX INSURANCE COMPANY.**

Respondent.

Charles M. Fisher, Esq., for petitioner, Garden State School Bus Contractors
Association (Windels, Marx, Lane & Mittendorf. attorneys)

Derlys Gutierrez, Esq., for respondent, Passaic County Educational Services
Commission (Adams, Stern, Gutierrez & Lattibourde, LLC, attorneys)

Robert Brotman, Esq., for respondent, K&M Transport

Derek Popeil, Esq., for Bondex Insurance Company, (Dreifus, Bonacci &
Parker, attorneys)

Record Closed: June 28, 2012

Decided: July 2, 2012

BEFORE **JEFFREY A. GERSON**, ALJ:

On July 8, 2011 this matter was remanded to the Office of Administrative Law (OAL) for findings as directed by the Appellate Division of New Jersey Superior Court pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone status conference was scheduled for 7/2/12 but was adjourned because the parties advised the undersigned that the matter had been settled. The Stipulation of Settlement indicating the terms of settlement was forwarded to the Office of Administrative Law on June 28, 2012 and is attached hereto.

have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the Signatures of the parties or their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

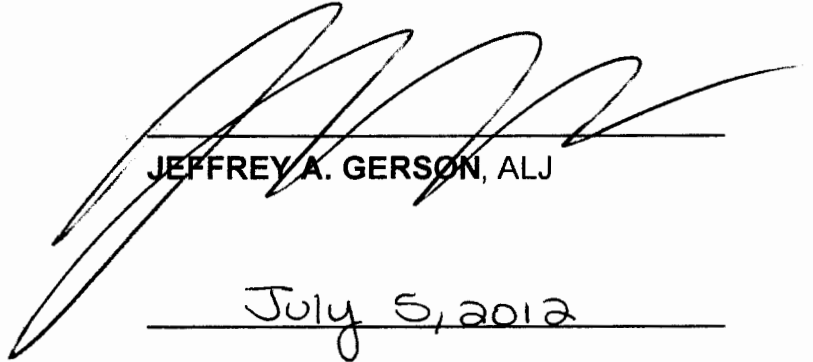
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

DATE

July 2 12

JEFFREY A. GERSON, ALJ



Date Received at Agency:

July 5, 2012

Date Mailed to Parties:
sej

July 5, 2012



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DREIFUSS BONACCI & PARKER, LLP.

26 Columbia Turnpike

Florham Park, NJ 07932

973-514-1414

Attorneys for Respondent, Bondex Insurance Company

2012 JUN 28 10 30 AM

GARDEN STATE SCHOOL BUS
CONTRACTORS ASSOCIATION and
JAVIER FERNANDEZ,

Petitioners,

vs.

PASSAIC COUNTY EDUCATIONAL
SERVICES COMMISSION, K&M
TRANSPORTATION, INC. and BONDEX
INSURANCE COMPANY,

Respondents.

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY

AGENCY REF. NO.: 315-11/09

OAL Docket NO.: EDUOT 12414-2009N

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement"), executed this 25 day of June, 2012, by and between, Petitioners Garden State School Bus Contractors Association and Javier Fernandez ("Petitioners"), Passaic County Educational Services Commission ("PCESC"), K&M Transportation, Inc. ("K&M"), and Bondex Insurance Company ("Bondex") (collectively, the "Parties") (PCESC, K&M, and Bondex collectively referred to as "Respondents").

WITNESSETH:

WHEREAS, on or about July 21, 2009, PCESC solicited bids for student transportation services to be carried out during the 2009-2010 school year; and

WHEREAS, K&M submitted its bid for twenty-nine routes; and

WHEREAS, as part of its bid package, K&M provided a bid bond from Bondex, identifying K&M as the principal and PCESC as the obligee, in an amount that was not to exceed five percent of K&M's bid; and

WHEREAS, on August 5, 2010, PCESC opened the bids and determined that K&M was the lowest numerical bidder on eight of the twenty-nine routes for which it submitted bids; and

WHEREAS, K&M subsequently informed PCESC that it only had sufficient vehicles to carry out services on two of the bus transportation contracts; and

WHEREAS, PCESC awarded K&M contracts on Route Nos. 3025 and 3026; and

WHEREAS, the Petitioners objected to the award of the two contracts and asserted that PCESC should have made a claim on K&M's bid bond issued by Bondex; and

WHEREAS, PCESC disagreed and the Petitioners filed the within action; and

WHEREAS, K&M and Bondex assert that the action of the Petitioners was not timely filed; and

WHEREAS, the Petitioners, K&M and Bondex have been involved in litigation culminating in a decision dated June 27, 2011, in which the Superior Court of New Jersey, Appellate Division, reversed the decision of the Commissioner of Education and remanded the matter "for a determination by the Commissioner on whether PCESC should now be ordered to issue [a demand for forfeiture of the bid bond] to Bondex"; and

WHEREAS, the Parties wish to avoid the expense and disruption of further litigation over these issues and are prepared to settle their differences as to the subject matter of this lawsuit.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and for good and valuable consideration, the sufficiency of which is hereby acknowledged, and intending to be legally bound, the Parties agree as follows:

1. In consideration of the mutual promises contained herein, Bondex and K&M each agree to pay to PCESC the sum of Four Thousand and 00/100 United States Dollars (\$4,000.00) for

a total of Eight Thousand and 00/100 United States Dollars (\$8,000.00) (hereafter the "Settlement Amount") as set forth below.

2. The Bondex portion of the Settlement Amount shall be payable to PCESC and delivered to The Law Office of Adams Stern Gutierrez & Lattiboudere, LLC, no later than May 18, 2012. A copy of the check(s) and letter(s) transmitting same shall be contemporaneously provided to all counsel listed below.

3. The K&M portion of the Settlement Amount shall be payable to PCESC and delivered to The Law Office of Adams Stern Gutierrez & Lattiboudere, LLC, no later than May 18, 2012. A copy of the check(s) and letter(s) transmitting same shall be contemporaneously provided to all counsel listed below.

4. The Law Office of Adams Stern Gutierrez & Lattiboudere, LLC shall hold the checks in escrow until all funds are received.

5. PCESC shall distribute the entire Settlement Amount of Eight Thousand and 00/100 United States Dollars (\$8,000.00) to the six districts that were not serviced by K&M in the form of credits for the 2012-2013 school year. These credits shall be distributed to the subject districts no later than September 15, 2012. In addition, no later than September 15, 2012, PCESC shall provide a schedule showing the amount of the credit(s) distributed to each of the subject districts to all counsel listed below.

6. Upon K&M's and Bondex's full compliance with the obligations set forth in the preceding paragraphs, including payment and clearance of the full Settlement Amount set forth in Paragraph 1, K&M and Bondex shall have no further obligation and this matter shall be dismissed as to K&M and Bondex. Upon PCESC's full compliance with the obligations set forth

in the preceding paragraphs, including, but not limited to, those set forth in Paragraph 5, this matter shall be dismissed as to PCESC.

7. In consideration of, effective upon, and subject to the payment of the Settlement Amount by Bondex to PCESC, the Petitioners and PCESC hereby fully release, remise, and forever discharge Bondex from any and all claims, demands, actions, and causes of action of every kind, nature, and description (including any claims for bad faith, breach of contract, breach of duty, statutory or regulatory violation, or punitive, exemplary or extra-contractual damages of any type) whether known or unknown, suspected or unsuspected, and whether founded in fact or in law that the Petitioners and/or PCESC may have had, may now have, or may hereafter have arising out of or in connection with the Bid Bond issued by Bondex and any of the allegations as set forth in the petition.

8. In consideration of, effective upon, and subject to the payment of the Settlement Amount by K&M to PCESC, the Petitioners and PCESC hereby fully release, remise, and forever discharge K&M from any and all claims, demands, actions, and causes of action of every kind, nature, and description (including any claims for bad faith, breach of contract, breach of duty, statutory or regulatory violation, or punitive, exemplary or extra-contractual damages of any type) whether known or unknown, suspected or unsuspected, and whether founded in fact or in law that the Petitioners and/or PCESC may have had, may now have, or may hereafter have arising out of or in connection with the Bid Bond issued by Bondex and any of the allegations as set forth in the petition.

9. In consideration of, effective upon, the execution of this Agreement, Bondex hereby fully releases, remises, and forever discharges K&M from any and all claims, demands, actions, and causes of action of every kind, nature, and description (including any claims for bad

faith, breach of contract, breach of duty, statutory or regulatory violation, or punitive, exemplary or extra-contractual damages of any type) whether known or unknown, suspected or unsuspected, and whether founded in fact or in law that Bondex may have had, may now have, or may hereafter have arising out of or in connection with the Bid Bond issued by Bondex and any of the allegations as set forth in the petition.

10. In consideration of the Settlement Amount as set forth in paragraph 1, the Petitioners hereby fully release, remise, and forever discharge PCESC from any and all claims, demands, actions, and causes of action of every kind, nature, and description (including any claims for bad faith, breach of contract, breach of duty, statutory or regulatory violation, or punitive, exemplary or extra-contractual damages of any type) whether known or unknown, suspected or unsuspected, and whether founded in fact or in law that the Petitioners may have had, may now have, or may hereafter have arising out of or in connection with any of the allegations as set forth in the petition.

11. In consideration of the voluntary dismissal of Petitioners' petition and other consideration in this Agreement (the sufficiency of which is hereby acknowledged), Respondents (PCESC, K&M, and Bondex), hereby fully release, remise, and forever discharge Petitioners, their agents, attorneys, employees, servants, predecessors, successors, representatives, officers, directors, and affiliates, from any and all claims, demands, actions, and causes of action of every kind, nature, and description (including any claims for bad faith, breach of contract, breach of duty, statutory or regulatory violation, or punitive, exemplary or extra-contractual damages of any type) whether known or unknown, suspected or unsuspected, and whether founded in fact or in law that Respondents may have had, may now have, or may hereafter have arising out of or in connection with the any of the allegations as set forth in the petition.

12. All notices, consents and other communications given or required under this Agreement shall be in writing and shall be deemed to have been duly given when (a) delivered on a business day by UPS or similar overnight courier to, or (b) when successfully transmitted by telecopier and a confirming copy transmitted by mail to the party for whom intended, at the address set forth below, or such other address as may be furnished by such party by notice in the manner provided herein; provided however, that any notice of change of address shall be effective only upon receipt.

IF TO BONDEX:

Derek A. Popeil, Esq.
DREIFUSS BONACCI & PARKER, LLP.
26 Columbia Turnpike
Florham Park, NJ 07932

IF TO PETITIONERS:

Charles M. Fisher, Esq.
Windels, Marx, Lane & Mittendorf
One Giralda Farms
Suite 380
Madison, New Jersey 07940

IF TO PCESC:

Derlys M. Gutierrez, Esq.
Adams Stern Gutierrez & Lattiboudere, LLC
The Legal Center
1037 Raymond Blvd, Suite 900
Newark, New Jersey 07102

IF TO K&M:

Robert Brotman, Esq.
1139 East Jersey Street
Elizabeth, NJ 07201

13. Each party will bear its own costs, including but not limited to legal fees and expenses in connection with the Lawsuit, the matters set forth in this Agreement, and the negotiations for and preparation of this Agreement.

14. a. Entire Agreement and Successors in Interest. This Agreement contains the entire agreement among the Parties with regard to the matters set forth herein and supersedes any prior written or oral agreements, understandings or arrangements, and shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, successors, and assigns of each.

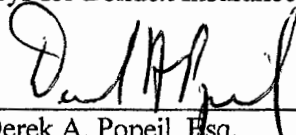
b. Authority. The persons executing this Agreement represent and warrant that they have the authority to sign on behalf of their respective Parties. This Agreement is subject to final approval of the Passaic County Educational Services Commission Board of Trustees.

c. No Third-Party Beneficiaries. This Agreement is solely for the benefit of the Petitioners, PCESC, K&M and Bondex. No provisions of this Agreement shall in any way inure to the benefit of, provide a release to or create any rights whatsoever in any third person or entity (including the public at large) unless expressly provided for herein.

13. This Agreement may be executed in one or more counterparts, each of which shall be an original but all of which shall constitute one and the same agreement.

Dated:

Dreifuss Bonacci & Parker, LLP
Attorneys for Bondex Insurance Company

By: 
Derek A. Popeil, Esq.

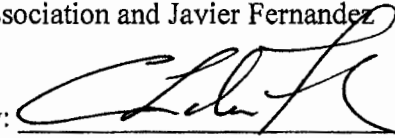
Adams Stern Gutierrez & Lattiboudere, LLC
Attorneys for Passaic County Educational
Services Commissioner

By: _____
Derlys M. Gutierrez, Esq.

Robert Brotman
Attorneys for K&M Transportation, Inc.

By: _____
Robert Brotman, Esq.

Windels, Marx, Lane & Mittendorf
Attorneys for Garden State School Bus
Association and Javier Fernandez

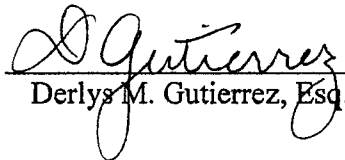
By: 
Charles M. Fisher, Esq.

Dated:

Dreifuss Bonacci & Parker, LLP
Attorneys for Bondex Insurance Company

By: _____
Derek A. Popeil, Esq.

Adams Stern Gutierrez & Lattiboudere, LLC
Attorneys for Passaic County Educational
Services Commissioner

By:  _____
Derlys M. Gutierrez, Esq.

Robert Brotman
Attorneys for K&M Transportation, Inc.

By: _____
Robert Brotman, Esq.

Windels, Marx, Lane & Mittendorf
Attorneys for Garden State School Bus
Association and Javier Fernandez

By: _____
Charles M. Fisher, Esq.

Dated:

Dreifuss Bonacci & Parker, LLP
Attorneys for Bondex Insurance Company

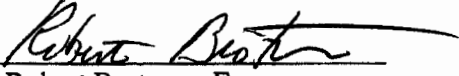
Adams Stern Gutierrez & Lattiboudere, LLC
Attorneys for Passaic County Educational
Services Commissioner

By: _____
Derek A. Popeil, Esq.

By: _____
Derlys M. Gutierrez, Esq.

Robert Brotman
Attorneys for K&M Transportation, Inc.

Windels, Marx, Lane & Mittendorf
Attorneys for Garden State School Bus
Association and Javier Fernandez

By: 
Robert Brotman, Esq.

By: _____
Charles M. Fisher, Esq.

IN THE MATTER OF THE TENURE :
HEARING OF CORY FORMAN, : COMMISSIONER OF EDUCATION
CLEARVIEW REGIONAL SCHOOL : DECISION
DISTRICT, GLOUCESTER COUNTY. :

SYNOPSIS

The petitioning school district certified tenure charges of unbecoming conduct against respondent – a tenured physical education and special education teacher – for allegedly pushing a student, T.E., into a trophy case in the gym hallway, slapping the same student in the stomach with the back of his hand, and telling the student that if he deleted the cell-phone photograph taken of the red mark on his stomach, respondent would give him grades of 100 for the rest of the year. Respondent contended that his actions, all of which occurred in a single school day, were not what the Board alleged. The Board asserted that respondent's alleged misconduct warranted dismissal from his tenured position.

The ALJ found, *inter alia*, that: based on a security video and the testimony of witnesses, T.E.'s assertion that the respondent actively shoved him into a trophy case is not credible; rather, T.E. was shoving and grabbing at respondent and the overall momentum of the horseplay sent T.E. backward into the trophy case; based on the testimony of respondent's expert witness regarding the photograph of the alleged handprint on T.E.'s stomach, together with the testimony of students who witnessed the classroom episode that followed the trophy incident, respondent's contact with T.E. amounted to a "light slap"; respondent's joking offer to give T.E. "100s" for the rest of the year – while not serious – was inappropriate, as was respondent's tolerance of student provocation and horseplay; respondent's responses to his students' misbehaviors were improper for a teacher and in fact encouraged other students to misbehave; and respondent cared deeply about his students and had no malicious intent, but simply failed to appreciate the inappropriateness of the horseplay at issue in this matter. The ALJ concluded nonetheless that – given current precedents and ongoing efforts through the anti-bullying laws to change how students conduct themselves in relation to each other – the loss of respondent's tenure was the appropriate penalty.

Upon independent review of the record, the Commissioner¹ – while concurring with the ALJ that the Board has established that respondent is guilty of unbecoming conduct – rejected the ALJ's penalty recommendation as he found, *inter alia*, that the ALJ failed to conduct the requisite analysis of the factors to be taken into account in determining the appropriate penalty in a tenure case (*In re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967)), and instead determined that the respondent should be removed from his tenured position in light of the anti-bullying legislation. The Commissioner determined that removal is an unduly harsh penalty given all of the circumstances existing in this matter, and is not justified because the proven conduct does not establish respondent's unfitness to discharge the duties of his position, nor was respondent's behavior "premeditated, cruel or vicious, or done with the intent to punish." (*In re Fulcomer*, *supra*, at 421) The Commissioner concluded that the loss of respondent's increment for one year, along with the 120 days salary withheld pursuant to N.J.S.A. 18A:6-14 following the certification of tenure charges, is a sufficient penalty to impress upon respondent the seriousness of his errors in judgment displayed in this matter. Accordingly, the Initial Decision of the OAL – as modified with respect to the penalty – was adopted as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
--

August 8, 2012

¹ This matter was delegated to the Deputy Commissioner pursuant to N.J.S.A. 18A:4-33.

OAL DKT. NO. EDU 10976-11
AGENCY DKT NO. 250-8/11

IN THE MATTER OF THE TENURE :
HEARING OF CORY FORMAN, : COMMISSIONER OF EDUCATION
CLEARVIEW REGIONAL SCHOOL : DECISION
DISTRICT, GLOUCESTER COUNTY. :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the respondent, Cory Forman, and the Board of Education's (Board) reply thereto.

This case involves tenure charges brought by the Board against the respondent, a special education and gym teacher in the Clearview Regional School District. The Board charged the respondent with unbecoming conduct based on three episodes that occurred throughout the course of a school day, including two incidents of physical contact with a student, T.E.¹ The Administrative Law Judge (ALJ) found that the respondent was guilty of unbecoming conduct, and recommended that the respondent be removed from his tenured position.

In his exceptions, the respondent maintains that the ALJ correctly determined that each of the tenure charges was without merit. The respondent cites to the ALJ's discussion of the three incidents in the Initial Decision in an effort to argue that she effectively found that the charges were not sustained. The respondent points out that the ALJ did not find that he pushed

¹ The specific tenure charges are as follows:

Charge One – respondent intentionally and forcefully pushed a student, T.E., into the trophy case in Pioneer Hall, in view of other students and staff members;
Charge Two – respondent intentionally and forcefully slapped the same student, T.E., in the stomach with the back of his right hand, in view of other students in the class; and
Charge Three – respondent told T.E. that if he deleted the photograph T.E. took of his injury, respondent would give him "100s" for the rest of the school year.

T.E. into the trophy case, that he forcefully and intentionally slapped T.E. in the stomach or that he promised to give T.E. 100s for the rest of the school year if he would delete the cell phone photograph.

Respondent also takes exception to the ALJ's determination that the mutual camaraderie that existed between the respondent and the students merited the harsh and severe penalty of termination. Respondent maintains that the penalty recommended by the ALJ is excessive and that a lesser penalty is appropriate in light of the relevant case law and the analysis required under *In re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967). Specifically, the respondent contends that he jokes around with the students, and he was joking around with T.E. on the day of the incidents that led to the tenure charges. Further, the respondent stresses in his exceptions that he had no malicious intent in connection with the joking. The respondent also points out that he has no disciplinary history, he is remorseful for his conduct, and he recognizes that the joking improperly blurred the student-teacher relationship.

Finally, the respondent claims that the ALJ erred in applying the anti-bullying legislation to this case. The respondent contends that the tenure charges do not allege any violations of N.J.S.A. 18A:37-13 *et seq.* and that the statute was not in existence at the time of the alleged incidents. Further, the respondent maintains that there was no evidence presented suggesting that he ever bullied any students. As a result the respondent contends that an appropriate penalty in this case would be the loss of 120 days salary.

In reply, the Board urges the Commissioner to adopt the ALJ's determination that the respondent engaged in conduct unbecoming a teaching staff member and the penalty recommended. The Board maintains that the ALJ correctly determined that the respondent's unbecoming conduct warrants the dismissal of respondent from his tenured teaching position,

emphasizing the fact that the respondent twice laid hands on a student. In its reply, the Board further cited to the Initial Decision to support the assertion that the ALJ correctly concluded that the inappropriate, bullying-type behavior that took place significantly outweighed any mitigating factors.

Upon a comprehensive review of the record in this matter, which included the transcripts of the hearing conducted at the OAL on January 19 and 20, 2012, the Commissioner² concurs with the ALJ that the Board has established that respondent is guilty of unbecoming conduct. The ALJ's finding in connection with the characterization of respondent's behavior as unbecoming conduct is fully supported by the record and consistent with applicable law.

With respect to the three incidents outlined in the tenure charges, the ALJ found that: while T.E. was shoving and grabbing at the respondent, their feet touched and the overall momentum sent T.E. backward into the trophy case; the respondent lightly slapped T.E. in the stomach; and there was a discussion of grades in relation to the posting of a photograph of T.E.'s stomach on Facebook. Despite the assertion made by the respondent in his exceptions, the ALJ did not determine that each of these charges was without merit, but rather she made findings related to the severity of each incident. The term "unbecoming conduct" is elastic and broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services." *Karins v. City of Atlantic City*, 152 N.J. 532, 554 (1988). Behavior rising to the level of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." *Hartman v. Police*

² This matter has been delegated to the Deputy Commissioner pursuant to N.J.S.A. 18A:4-33.

Dep't of Ridgewood, 258 N.J. Super. 22, 40 (App. Div. 1992) (citing *Asbury Park v. Dep't of Civil Serv.*, 17 N.J. 419, 429 (1955)). The record demonstrates that the totality of the respondent's behavior amounted to conduct unbecoming a teaching staff member.³

Turning to the appropriate penalty, the Commissioner recognizes that the factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, any evidence as to provocation, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring. *In re Hearing of Kittell, Little Silver School District*, 1972 S.L.D. 535, 541; *Fulcomer, supra*, 93 N.J. Super. at 422. In the case at bar, the ALJ did not recommend termination based on the *Fulcomer* factors, but instead determined that the respondent should be removed from his tenured position in light of the anti-bullying legislation. It is without question that the anti-bullying legislation is extremely important and the effective implementation of the statute is paramount; however, the existence of the statute alone does not serve as an avenue to automatically remove a teacher from a tenured position without conducting the requisite *Fulcomer* analysis.

The Commissioner finds that based on all of the circumstances and considerations existing in this matter, the removal of respondent from his tenured position is an unduly harsh penalty. The dismissal of the respondent from his teaching position is not justified

³ The ALJ specifically concluded,

Physical wrestling with a student in a hallway was unbecoming conduct. Students should not be stomping each other's feet, or grabbing each other's arms in a hallway between classes, and a teacher that signals that such engagement is appropriate by wrestling himself or by allowing a passing student to stomp on his feet is neglecting his duty. Laughing and joking about the fact that a student went tumbling into a trophy case was inappropriate, and invading that young man's physical person a second time, minutes later, now in a classroom, was misconduct. Finally, the joking references to "100s" in an atmosphere where the students easily could have linked it to a form of blackmail were completely inappropriate, also constituting conduct unbecoming. (Initial Decision at 16).

in this case because the proven conduct does not establish his unfitness to discharge the duties and functions of his position as a teacher. Nor is there is any indication that the respondent's behavior will have any long term effects on the maintenance of discipline among the students and staff in the Clearview Regional School District. Additional mitigating factors include the fact that T.E. and the respondent were joking around when the light slap occurred, T.E. initiated the contact and was grabbing the respondent during the trophy case incident and there was no evidence to suggest that the respondent seriously offered T.E. 100s if he deleted the cell phone photograph. Importantly, the respondent's behavior was not "premeditated, cruel or vicious, or done with the intent to punish." See, *In re Fulcomer, supra*, 93 N.J. Super. at 421. Finally, the respondent has acknowledged that he did not handle the situations properly and that it is inappropriate for him to maintain such relaxed relationships with his students.⁴

Although dismissal in this case is not warranted for the reasons discussed above, the Commissioner recognizes that the charges in this matter are serious in nature. It is without question "that teachers carry a heavy responsibility by their actions and comments in setting examples for the pupils with whom they have contact." *In the Matter of the Tenure Hearing of Blasko, School District of the Township of Cherry Hill*, 1980 S.L.D. 987, 1003. Respondent himself admitted that he did not conduct himself properly by cultivating relationships with the students that did not convey proper boundaries. Moreover respondent's unprofessional conduct led to two incidents where there was unnecessary physical contact with a student, which is never condoned even if it is characterized as horseplay. Although there was no evidence that respondent bullied the students, his demeanor and approach resulted in an overall environment that is not appropriate to a school setting.

⁴ The ALJ determined that the "respondent testified compellingly as to his remorse about the conduct, and to his understanding that the joking was inappropriate, and that what he intended as a means of building a spirit of camaraderie blurred the student-teacher relationship unacceptably." (Initial Decision at 18-19).

Therefore, the Commissioner finds and concludes that the loss of respondent's increment for one year, along with the 120 days salary withheld pursuant to *N.J.S.A.* 18A:6-14 following the certification of tenure charges, is a sufficient penalty to impress upon respondent the seriousness of his errors in judgment displayed in this matter. Accordingly, the Initial Decision of the OAL, as modified with respect to the penalty, is adopted as final decision in this matter.

IT IS SO ORDERED.⁵



DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/08/12

Date of Mailing: 8/09/12

⁵ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36. (*N.J.S.A.* 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10976-11

AGENCY DKT. NO. 250-8/11

**IN THE MATTER OF THE TENURE HEARING
OF CORY FORMAN, CLEARVIEW REGIONAL
SCHOOL DISTRICT, GLOUCESTER COUNTY.**

Frank P. Cavallo, Jr., Esq., for petitioner Clearview Regional School District,
Gloucester County (Parker McCay, attorneys)

Michael C. Damm, Esq., for respondent Cory Forman (Selikoff & Cohen,
attorneys)

Record Closed: March 16, 2012

Decided: April 12, 2012

BEFORE **LAURA SANDERS**, ACTING DIRECTOR & CHIEF ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Cory Forman (or respondent) is employed by the Clearview Regional School District, Gloucester County, (or Board) in the position of tenured teacher. On August 25, 2011, the Board, pursuant to N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1, certified charges of unbecoming conduct constituting cause for dismissal in relation to a trio of incidents on May 11, 2011. Forman contends that his actions were not what the Board alleges, and, therefore, no disciplinary action was warranted.

The Board charges Forman with having pushed a student into a trophy case. Additionally, he is charged with slapping the same student in the stomach with the back of his right hand, leaving a large red handprint on the student's stomach. Lastly, the Board alleges that Forman told the student that if he deleted the cell-phone photograph of the red mark, he would give him grades of 100 for the rest of the year.

Following receipt of respondent's answer to the charges on September 14, 2011, the Commissioner of Education forwarded the matter to the Office of Administrative Law. N.J.S.A. 18A:6-16. The matter was heard on January 19 and 20, 2012. The record closed on March 16, 2012, with the submission of briefs.

FACTUAL DISCUSSION

The Trophy-Case Incident

In support of its allegation that Forman pushed student T.E. into a trophy case, the Board offered a security video, plus testimony from T.E. and two teachers who also appear on the video.

At no point does the video show Forman pushing the student; rather, both the student and Forman testified that whatever happened occurred when they are not visible to the camera. The relevant portion begins with T.E. dancing around, then grabbing Forman's arm and stepping deliberately on Forman's foot. Forman ignores this, and proceeds down the hallway, where another student for no apparent reason also steps on his foot. No one at hearing could identify that student. Forman does not react to this either, but continues to the end of the hallway, where for a short period he stands, surveying the students who are starting to change classes. He then returns to the far end, next to T.E., and briefly his lower legs are visible, but his upper torso is leaned forward, out of the picture.

T.E. testified as follows:

Me and a friend were in the gym hallway and Mr. Forman approached us and he told us to get behind the green line, we then proceeded to get behind the green line and then he came up to me and he tried to step on my sneakers and he did and he asked me if my sneakers were new and I said they were relatively new and then he proceeded to step on them, after that I got shoved into a trophy case by him. After that he went to the gym hallway doors and then he proceeded just to look at me and then he came back trying to step on my sneakers and that's when I backed up, I was putting my hands up and I said, "I don't want any trouble," and then the bell rang.

[Tr. 1, January 19, 2012, at 68–69.]

Shown the video at time stamp 9:01:41, T.E. testified that Forman tried to step on his sneakers for a second time, and that he put up his hands, saying, "Hey, I don't want any trouble," but that Forman came very close to him, which made him feel uncomfortable. (Id. at 75.)

Michael Lerch, a health and physical education teacher who has occasionally socialized with Forman, identified himself crossing the hallway on the video between the times stamped 9:01:37 and 9:01:42. On the video, he suddenly turns and looks behind him. He testified that he heard "a loud bang" into what he believed to be the trophy case. (Id. at 109.) He said it was a quick glance, and he "didn't really observe what was going on." (Id. at 110.)

Robyn Gray, a health and physical education teacher, is shown on the video entering the hall at 9:02:19. She said that when she walked by T.E. and Forman, T.E. "was standing with his back against the wall and Mr. Forman was right in front of him, you know, separated by a couple of inches right in front of T., and as I was walking by T. said to me, 'Mrs. Gray, he's abusing me, he's abusing me.' So at that time, I said to T. that, 'You're supposed to be in the locker room until the bell rings so you need to go down to the locker room. If you were in the locker room where you belonged then we would not be in this situation, so please go down to the locker room.'" (Id. at 119.)

She testified that her impression at the time was that T.E. knew he was supposed to be somewhere else, and was trying to defuse a situation. Gray said that the “abusing-me” comments were made in “a sing-songy” manner, and “kids mess around and say things of that nature, so it didn’t concern me that he was actually being abused.” (Id. at 120.) She repeated more than once that at no point did she think T.E. was in danger, and that generally Forman had a friendly relationship with students. But, she said, because Forman “is a big guy and they were very close when I walked by,” she thought T.E. was intimidated. (Ibid.) From her perspective, she felt that Forman “was intimidating the student. He was too close, it was out of my comfort zone.” (Id. at 121.) She also said that “in general the male teachers have more of a—almost like a fatherly kind of—where kids like to mess around and joke around, where the female teachers don’t get that much.” (Id. at 116.)

Forman testified that at 9:01:41 he turned to face T.E., who began pushing up against him. He said, “and then he dropped his hands and he stepped back and then—and he stepped into the trophy case and my foot went forward—and I went forward and our—our—our feet touched and I went into the—my foot hit the bottom of the trophy case causing it to slide.” (Tr. 2, January 20, 2012, at 165.) According to Forman, T.E.’s foot stomp and grab occurred after the trophy-case collision. When Forman returned from the other end of the hall later, he and T.E. were laughing and joking and gave each other a fist pound and then walked away. (Id. at 169.) The fist pound occurred at 9:02:42. Forman acknowledged that in speaking to the superintendent of schools, he did not give precisely the same description of the incident. (Id. at 224.) He maintained that he told the superintendent their feet touched and then he stepped back, but he acknowledged that he did not tell the superintendent that the youth was pushing or leaning on him. (Ibid.)

Based on the video and the testimony, I do not find credible T.E.’s assertion that Forman actively shoved him into the trophy case. The single most salient feature of the video is the impunity with which students mount minor assaults on Forman. Had he just aggressively shoved a student into a case, other students would not be strolling around the halls or feeling free to stomp him in fun. As Forman acknowledged that he had

engaged in horseplay with students on multiple occasions, a better explanation is that this particular round went too far. Gray's testimony that Forman wound up close enough to intimidate T.E. was highly credible. Therefore, I **FIND** as **FACT** that T.E. was shoving and grabbing at Forman, who was leaning forward. When T.E. dropped his arms, their feet did touch, and the overall momentum sent T.E. backward into the trophy case.

The Slapping Incident and the Grading Comment

In the spring term of 2011, Forman, who is a certified special education teacher, taught T.E. for physical education, followed immediately by mathematics, which was a small consumer-math course for students with disabilities. The District alleges that it was in this class, just after the hallway incident, when Forman slapped T.E.'s stomach so hard that it left a vivid handprint. The District presented a photograph taken from a cell-phone picture as evidence of the strike, along with testimony from T.E. and several other math students, including the person who identified herself as the photographer.

T.E. testified that when math class started, Forman initially logged onto his computer, then came over and asked T.E., who was still standing up, if he was tough, telling him to put his hands up. T.E. objected, saying, "Well, we just did this in the hallway, why do you want to do this?" T.E. testified, "[a]nd then he got real close to me, like he—like to talk to me and I said, 'Well, can you get out of my face?' And he was like—this is what he did in the hallway, talking to all of the other students and I guess trying to make them laugh and everything and then he turned around and that's when he backhanded me and went back to his computer." (Tr. 1 at 77.) T.E. demonstrated with a sweeping motion to the right. After that, T.E. said, he was in pain, so he lifted his shirt. Another student, M., saw a mark on his stomach, and M. "made a big deal about it in front of all the students and that's when she said, 'Give me your phone, give me your phone so you can see it from my point of view,' and I said, 'Here you go,' and then she took the picture and I'm like, 'Oh, yeah, it is really bad.'" (*Id.* at 80.) T.E. said the photo was taken perhaps two seconds after respondent struck him, maybe less.

T.E. testified that he and a couple of other students were saying, “‘Oh, we should just put it on Facebook,’ and that’s when Mr. Forman said, “No, no, don’t do that,’ he must [have] said it like three times.” (Id. at 81.) T.E. said that after Forman saw the photograph and heard the comments, “He told me to hit him back to get even and he also said, ‘If you delete that photo I’ll give 100s in the grade book for the rest of the year,’ and I said, ‘No, that’s all right.’” (Id. at 82.) T.E. said that he did not talk to anyone at school that day. He said he did not report the incidents in the hallway and classroom “because the next day, I would have had to go to [Forman’s] math class and then I would have pretty much felt scared and everything and if he found out, he could have maybe hit me or escalated it to [a] certain degree.” (Id. at 83.)

A male student, C.T., who was present in the math class that day said that everyone was joking around at the beginning of class, and he noticed nothing until he heard another student say, “Oh, my God.” He looked up and saw a handprint on T.’s stomach. (Id. at 129.) He recalled T.E. saying he would put the photo on Facebook and the teacher saying, “No, don’t put it on Facebook, I could lose my job.” (Id. at 130.) At no point did respondent seem angry.

Another male student, A.J.R., said he remembered “Mr. Forman and T. kind of joking around and Mr. Forman just gave a slap on the stomach and that’s about it.” He described the motion as “a joking around kind of slap . . . not hard.” He recalled observing a red mark on T.’s stomach “a little bit.” He had no recollection of the teacher saying anything about grades or anybody talking about putting the photo on Facebook. (Id. at 136.)

M.C. testified that at the beginning of math class, everybody was kidding around. She was sitting down, and in front of her, T. was standing up. “Mr. Forman was sitting down and they were talking and then something—and then they were messing around and he went like—and Mr. Forman went like this, kidding around with him. He didn’t hit him hard or anything, it was just like, you know, playing around. And Mr. Forman asked if he was going to take that down to the—like we were asking him if he was going to—everyone was asking . . . , ‘Are you going to take that down to the office?’ Like it was nothing serious, you know, and he was like, ‘No, no, no, I’m not taking it down to the

office because it's not a big deal.” (*Id.* at 145.) Later, she said the other students were all asking T.E. if he were going to take the picture to the office, “because that’s the kind of person he is, you know, if—the smallest thing turns into the biggest thing.” (*Id.* at 149.) Then T.E. told everyone he deleted the picture.

M.C. described Forman’s action as not a hit because it was not hard, “kind of like a slap, like a softer slap, . . . a light slap.” (*Id.* at 147.) T.E. lifted his shirt and asked her and another girl if his stomach was red. M.C. said that when she saw his stomach, “I said it was like real red because I guess his skin was—he has like sensitive skin, so his skin got real red but—and he asked me to take a picture and I said, ‘Sure,’ you know.” (*Ibid.*) She couldn’t recall whether P-3 was the photo she took, but was sure she had seen the photo before. M.C. and other classmates were asking T.E. whether he was going to take the picture to the office, and he said he had deleted it. M.C. testified, “And kidding around Mr. Forman was like, ‘I’ll give a 100 if you delete the picture and don’t show the office,’” and T. said he had deleted it, it was not a big deal, and they were just messing around. (*Id.* at 149, 150.)

A fourth student, J.M., recalled that T. and the teacher were standing together “talking about like the whole incident like about the shoes and stuff, the sneakers, and then they were like playing around with each other, like joking around and that’s when that happened, the incident, . . . Mr. Forman backslapped T. in the stomach.” (*Id.* at 158–59.) She saw the red marks on T.’s stomach, and T. asked her to take a picture, which she refused to do. J.M. said that following M.C.’s taking of the photograph, “T. said he was going to put the picture on Facebook with his phone and Mr. Forman said, ‘Don’t put it on Facebook,’ and Mr. Forman told him to delete the picture and T. said he was going to delete the picture and then Mr. Forman said he would change his grade to 100 if he deleted the picture.” (*Id.* at 160.) She said the teacher and T. were laughing, not being serious, “until he hit him.” (*Id.* at 161.) She said T. continued to look at his stomach on and off through class, and the mark remained for awhile, but not through the end of class.

Respondent testified that when he got to the math class that morning, T.E. was sitting on his desk, joking about “what happened downstairs with my foot sliding into the

trophy case.” (Tr. 2 at 173.) Forman turned his computer on, then went over to T.E., where they started joking together about what had happened. He said T.E. stood up and said, joking, with his arms up, “Come on, Forman. You want to go? Let’s go. Come on. You want to go?”

Forman said his response was “a hand gesture for him to . . . sit down and I accidentally brushed his shirt.” (*Ibid.*) He described the gesture as “a brush,” “non-confrontational.” (*Id.* at 174.) He then returned to his computer. Several minutes later, he heard T.E. joking and laughing, saying, “Oh, I’m going to take a picture. I’m going to make this look like a bear claw and put it on Facebook.” (*Id.* at 175.) Forman told him, “T., you know that if you take a picture you need to delete it because of classroom policy, especially if you’re going to take a picture to put on Facebook.” (*Id.* at 176.) Forman had not seen the picture and did not even know a picture was taken. A few minutes later, “T. stated that, ‘If you change my 70 to a 100 on my last assignment I won’t tell anyone.’” Forman responded, “You want me to change your grade to 100?” The class then went on as usual. (*Ibid.*) He categorically denied striking T.E., or having a reason to believe his action caused the mark. He also said there was no logical reason to discuss changing T.E.’s grade, because the teenager was an A–B student anyway. (*Id.* at 177.) In retrospect, he said he now realized that he should not have allowed the students to form “these joking relationships with me because [they] can lead to misunderstandings.” (*Id.* at 181.)

The District offered a copy of the cell-phone photograph that various students identified as the one taken on May 11, 2011. The photograph (P-3) shows a lifted t-shirt, revealing a bare stomach with one red mark that looks like an outlined finger complete with fingernail, two tube-shaped outlines, and a fourth mark looking more like a red triangle.

On one hand, the photo is dramatic. The marks do resemble the outline of a little finger, fourth and third fingers of about the same length, and a slightly removed triangle shape that looks like a claw. Inside the red outlines, the skin is normal-colored.

The petitioner's argument is that T.E. had red marks; therefore, Forman must have slapped him hard enough to cause them right through the shirt. But this is not a problem-free causation argument for several reasons. The first is that the other students did not testify to witnessing a slap of substantial magnitude. None of them heard a slapping sound, and apparently the marks were gone by the end of class. Additionally, there was expert testimony indicating that the marks are not consistent with being struck by a hand, essentially because the pattern is akin to a negative. The red should be inside, where the force is said to have contacted the flesh, not outside outlining normal color.

Forman presented testimony regarding the handprint photograph from a trauma expert. This testimony was the subject of a motion to exclude, based on the opinion being no more than a net opinion, which would render it inadmissible.

Brad Bendesky, M.D., is a specialist in emergency medicine, meaning the treatment in the emergency room of trauma, acute conditions, and "the first hour of almost any medical condition that exists." (Tr. 2 at 51.) He is the supervising physician at Mercy Hospital and Mercy Fitzgerald Hospitals in Philadelphia and also part of the peer-review committee, which examines the appropriateness of care in mortality cases. In addition to his employment at Mercy Health Systems, he is an assistant professor at Drexel University College of Medicine, supervising medical residents and students rotating through the emergency room. He also is a clinical-skills-examination note grader for the National Board of Medicine. He is board certified in emergency medicine and a fellow of the American Academy of Emergency Medicine. He published an article, "Axioms in emergency medicine, always splint and file wrist injuries with scaphoid tenderness," on treatment of complicated wrist and hand injuries in 1999. He was admitted as an expert in emergency medicine and treatment of blunt-force injuries to the torso.

Dr. Bendesky did not examine T.E.'s actual injury; in fact, there is no evidence that any parent, teacher, or physician ever saw the injury. The physical evidence of its existence consists of the cell-phone photograph, which was downloaded onto a computer and enlarged. In the absence of other information, Dr. Bendesky examined

the photograph. He said that he has done this on perhaps twenty or twenty-five other occasions where medics who have taken pictures at accident scenes have brought them to him, in the interest of learning what caused the injuries they witnessed.

Dr. Bendesky said that the marks in the photograph are not consistent with the injuries he sees in the emergency room. "The appearance of the borders of the mark being so prominent and well delineated and red, that's considered erythema which is just another term for redness. To have it so erythematous on the outside of the wound with no central erythema is not something that I would expect to see from a flat blunt force impact between a hand and an abdomen." (Id. at 72.) Blunt force from a hand "would be more of a confluent consistent erythema—red—red mark upon the abdomen and not outlined on the borders." (Id. at 73.) Put another way, "you wouldn't have a— a sharply red area and then a pale area right next to one another when two flat—two flat surfaces or two skin surfaces are meeting like that." (Ibid.)

He used the example of someone falling against an irregular object such as a wire hanger, which would have a cookie-cutter effect. "People that are struck with wire hangers[,] you see an outline of the mark and . . . central clearing where—where it's not red in the middle, but those were objects where you would expect that the impact would create a much greater force on the periphery of the wound than it would in the central part of the wound." (Id. at 74.) He compared that to the effect of a cookie cutter, a metal object with a hollow center that concentrates the force on the edges. With a cookie cutter, "the metal would create a mark on the body because that's where it's impacting the greatest creating more trauma and more redness and the central area that is hollow would not . . . create damage at that area, and not release the . . . chemicals that would create that red mark on the . . . body." (Ibid.) In his work as an emergency-room specialist, he has never seen a mark of that appearance resulting from a slap to a stomach. (Id. at 75.)

The doctor said that he could not rule out 100 percent that a backhanded slap caused the appearance of injury depicted in the photography. (Id. at 80–81.) He was careful to note, "I'm not testifying that there was [a] slap or there wasn't a slap. What I'm testifying to is that the described trauma of a backhand . . . to a clothed abdomen

would not create that mark in particular.” (*Id.* at 82.) He said his view was not based simply on his having examined patients with stomach slaps on at least a dozen occasions, but also on “the patho-physiologic properties of the human body and what we know happens when there’s impact upon . . . the body and what chemicals are released in the skin and in what amount and in what shape.” (*Ibid.*) Dr. Bendesky explained that when the body is impacted by trauma a range of injuries can occur. The least severe would be a mild red mark that would go away in a few minutes. Red marks that are left longer reflect “basically increased blood flow to the skin, that’s a release of histamine and other inflammatory factors in the skin that are reacting to the trauma and then up to bruising, which is liberation of blood from the muscles because the . . . impact was even greater than just . . . a minor impact to, you know, lacerations and ripping of the skin from more severe blunt force trauma.” (*Id.* at 85.) He said he could not think of a circumstance that would create an outline mark from the described trauma. He went on to state that in his opinion, based upon a reasonable degree of medical probability, if there were a slap it would not create that specific mark. (*Id.* at 83.)

The Board moved to disqualify Dr. Bendesky’s opinion from admission into evidence on grounds that it constituted a net opinion. The Board argued that he never examined the patient, that he was not qualified as an expert in reviewing photographs to determine cause of injury, and that he needed to produce a report, treatise or professional document to support his conclusion. Anderson v. A.J. Friedman Supply Co., Inc., 416 N.J. Super. 46 (App. Div. 2010), certif. denied, 205 N.J. 518 (2011).

A judge, like a jury, may hear expert testimony in its role as fact-finder, and “[a] judge sitting on a bench trial is in the best position to determine if expert testimony on a particular issue will assist that judge.” N.J. Div. of Youth and Family Servs. v. Z.P.R., 351 N.J. Super. 427, 439 (App. Div. 2002) (citing Wilkerson v. Pearson, 210 N.J. Super. 333 (Ch. Div. 1985)). The OAL’s rules provide that testimony of an expert witness in the form of opinions or inferences is admissible if such testimony will assist the judge to understand the evidence or determine a fact in issue, and the judge finds that the opinions or inferences are: 1. based on facts and data perceived by or made known to

the witness at or before the hearing; and 2. within the scope of the special knowledge, skill, experience or training possessed by the witness. N.J.A.C. 1:1-15.9(b).

However, there are limits. In Polzo v. Essex County, 196 N.J. 569, 582 (2008) (quoting State v. Townsend, 186 N.J. 473, 491 (2006)), the New Jersey Supreme Court summarized the rules governing expert opinion testimony: “[W]hile ‘Rule 702 permits a qualified expert witness to testify “in the form of an opinion or otherwise,” N.J.R.E. 703 ‘addresses the “*bases of opinion testimony by experts.*”’”

Rule 703 is intended to permit expert opinion based on “facts or data derived from (1) the expert’s personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts in forming opinions on the same subject.”

[Polzo, supra, 196 N.J. at 583 (quoting Townsend, supra, 186 N.J. at 494).]

“The corollary of [Rule 703] is the net opinion rule, which forbids the admission into evidence of an expert’s conclusions that are not supported by factual evidence or other data.” Ibid. Polzo explains that Townsend states, “Simply put, the net opinion rule ‘requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion.’” Ibid. In Polzo, the Supreme Court then determined that an expert’s evaluation of how long a roadway depression had been in place was a net opinion, because it did not explain why he believed that to be the case. (Id. at 583, 584.)

The case cited by petitioner, Anderson, supra, 416 N.J. Super. 46, is one of many in which courts have utilized the fact that a physician has not directly examined the patient as one of several factors in determining that an opinion is an inadmissible net opinion. Additionally, lack of direct experience in a medical area has been used to disqualify opinions where a treating physician could not otherwise offer medical studies to support his theory about the cause of a medical condition. See, e.g., Spandet v. Bucknam, 2011 N.J. Super. Unpub. LEXIS 879 (App. Div. 2011). Finally, the mere assertion by a physician that something is a birth defect as opposed to a mental and nervous condition has been found insufficient where it lacked explanation, reasoning,

facts, or supporting data. J.S. v. State Health Benefits Comm'n, 2010 N.J. Super. Unpub. LEXIS 453 (App. Div. 2010).

However, “[e]vidential support for an expert opinion is not limited to treatises or any type of documentary support, but may include what the witness has learned from personal experience. . . . ‘The requisite knowledge can be based on either knowledge, training or experience.’” Rosenberg v. Tavorath, 352 N.J. Super. 385 (App. Div. 2002) (citation omitted).

Here, Dr. Bendesky did not examine the patient and did not provide particular studies with regard to the medical properties of injuries. However, he established that, as an emergency-room expert, he has examined multitudes of traumatic injuries, including at least a dozen involving slaps to the torso, and that he has been called upon to analyze photographs with regard to what caused particular injuries. Common sense suggests that an understanding of what causes an injury would be helpful in first-responder determinations on how to treat them. He explained how the physiological properties of the body are triggered when injury occurs, beginning with red marks and rising to bruises and tears. He analyzed the appearance of the mark in the picture, which is a cookie-cutter-type outline of fingers, in comparison to the appearance of marks on people struck by wire hangers or tail fins—an outline of a hanger, or the punctures from the fin points, with white space where there was no trauma. Therefore, he has provided the “why and wherefore” of his opinion, based upon substantial personal experience, and I **CONCLUDE** that his opinion is admissible.

I am not convinced that Forman slapped T.E. hard enough to leave that mark through a t-shirt. It seems unlikely that a group of high school seniors who clearly liked each other would describe that kind of behavior as “joking around.” Moreover, none of them reported hearing the kind of sound that would accompany such a blow. Further, one girl refused to get involved in taking the picture. Additionally, most had limited memories of the incident, suggesting that the strength of their recollections was related to how harsh the contact actually was. And finally, as the doctor testified, the marks are not a handprint; they are a hand outline, inconsistent with the physical realities of injury

creation and appearance. Therefore, I **FIND** as **FACT** that the contact was, as one student put it, a “light slap.”

I am persuaded there was some discussion of grades in relation to Facebook, and that the students were chattering about T.E. complaining to the school principal. I **FIND** that respondent’s version of the events—he heard talk about some kind of picture, he told T.E. to delete the picture because of the school’s phone policy, he did not even know for sure there was a picture, T.E. asked him for a score of 100 if he did not tell anybody—accurately reflects his memory of events. But I also **FIND** that it dances around the central problem, which is that he knew or should have known that students were discussing inappropriate behavior on his part, that this conduct left him open to student threats and jokes about a form of blackmail, and that he did not put a firm end to such discussions.

With regard to overall background, Thomas Jones, assistant principal, testified that an incident during the week prior to May 11 had caused him some concern. He was called to the gym because respondent had been injured when a student, in a joking manner, jumped on his back. The student received a one-day suspension as a result of the incident. Jones’s concern was that the student said that when he jumped the teacher, the teacher had taken his leg, back-kicked him, and later tapped him on the head with a clipboard. (Tr. 1 at 175.) He spoke to Forman about the child’s allegations, and they “had a discussion about how we need to make sure . . . that we can’t put our hands on the students at any time.” (*Id.* at 176.) Asked about the incident, Forman testified that he had sustained an on-the-job back injury on May 5, when, without provocation, a student jumped on his back as he was taking attendance during physical education class. He testified, “my hands went backwards . . . I don’t know if I hit the—if I made contact with the student or not or what part of the body I made contact [with]. My first reaction is—was to get them off my back.” (Tr. 2 at 242.) Forman stated, “If a five-six 200-pound person jumps on your back, your initial—and you go forward your initial reaction is to get that person off your back” (*Ibid.*) He essentially conceded that he acted first, then spoke, once the child was off him. He denied that Jones told him that physical contact with students was not appropriate.

Forman himself acknowledged that at the time he was hired at Clearview, he disclosed that he had accepted a football coach position at another high school, but had been forced to withdraw when the school discovered that he had lied on his résumé by stating that he had played football in college, when, in fact, he had done volunteer work with the team. (*Id.* at 214–15.) In February 2009 he received a letter from the director of Special Services for failing to attend a required meeting. (P-9.)

There was other credible documentation and testimony to establish that Forman had worked hard to create a stimulating math class that used the stock market to engage student interest in mathematics and consumer issues. His formal evaluations had been positive since his arrival in September 2002. He had undertaken an array of other paid tasks, including summer custodian work, the summer reading program, security services for games, detention monitoring, paid lunch duty, and working at the alternative night school. Two fellow coaches testified to his effectiveness in working with both boys and girls in spring track.

LEGAL ANALYSIS

The purpose of teacher tenure laws is “to aid in the establishment of a competent and efficient school system by affording teaching staff members ‘a measure of security in the ranks they hold after years of service.’” Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528–29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)). A tenured teacher may not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct or other just cause. N.J.S.A. 18A:28-5; N.J.S.A. 18A:6-10. Here, petitioner Clearview Regional High School District Board of Education has charged respondent with three counts of conduct unbecoming. The first is related to the allegation that he “intentionally and forcefully pushed” student T.E. into the trophy case; the second to the allegation that he slapped T.E. so hard that the blow resulted in a large red handprint on the student’s stomach; and the third to an alleged promise to give T.E. scores of 100 for the rest of the year if he deleted the cell-phone photograph of the handprint. The District bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21;

N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958).

While the education laws do not provide a definition of unbecoming conduct, the courts have considered unbecoming conduct on a case-by-case basis and determined that it can embrace a wide range of conduct that touches upon a teacher's fitness to discharge the duties and the functions of the position. See In re Watkins, 2003 N.J. AGEN LEXIS 14 (citing Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1957); In re Grossman, 127 N.J. Super. 13, 28–29 (App. Div.), certif. denied, 65 N.J. 292 (1974)).

Although corporal punishment has been held to include “unnecessary and inappropriate physical contact” with a student, In re Quinones, 96 N.J.A.R.2d (EDU) 649, 652, such contact is more often treated as conduct unbecoming where there is no intent to harm. In the current instance, the Board has not proved by a preponderance of the evidence that respondent had any malicious intent, or even a present intention to discipline the student. Respondent did, however, twice lay hands on a student.

Physically wrestling with a student in a hallway was unbecoming conduct. Students should not be stomping each other's feet, or grabbing each other's arms in a hallway between classes, and a teacher that signals that such engagement is appropriate by wrestling himself, or by allowing a passing student to stamp on his feet, is neglecting his duty. Laughing and joking about the fact that a student went tumbling into a trophy case was inappropriate, and invading that young man's physical person a second time, minutes later, now in a classroom, was misconduct. Finally, the joking references to “100s” in an atmosphere where the students easily could have linked it to a form of blackmail were completely inappropriate, also constituting conduct unbecoming.

The remaining issue is whether termination is warranted. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967), involved an instance where a teacher had twice used corporal punishment on students, although there was no indication in the record that the teacher's acts were premeditated, cruel or vicious, or done with intent to punish or to

inflict corporal punishment. The court held that the resulting penalty "should be based upon the Commissioner's findings as to the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system." 93 N.J. Super. at 422.

As was noted recently in a footnote to the Commissioner's determination in In re Tenure Hearing of Craft, EDU 1751-11, modified, Acting Comm'r, (September 1, 2011), <<http://www.nj.gov/education/legal/>>:

There are a series of cases which are routinely cited by litigants involving incidents of physical contact between a teacher and a student. Although the penalties given in those cases can offer some insight into appropriate penalties to be imposed in future matters, it is important to recognize that cases involving physical force are extremely fact sensitive and require a case-by-case analysis. Moreover, conduct on the part of teaching staff members that occurred several decades ago may not be consistent with the type of behavior that will be tolerated in this day and age. The adherence to precedents in administrative proceedings is "subject to the basic notion that experience is a teacher and not a jailer. In re Masiello, 25 N.J. 590, 598-599 (1958) (citations omitted).

Craft was given a four-month suspension after she slapped an eight-year-old special education student who had been hitting her.

In re Alvarez, EDU 10067-09, Initial Decision (March 5, 2010), modified, Comm'r (June 3, 2010), <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>, involved a teacher who pushed a desk into a student on one occasion, used physical force to push a student out of a room on another, and utilized profane language in other frustrating situations. The Commissioner distinguished Alvarez's situation from the situation in In re Tenure Hearing of Mierzwa, EDU 8220-07, Initial Decision (May 6, 2008), modified in part, Comm'r (June 23, 2008), <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>. While Mierzwa was recognized as having a mindset that focused on a lack of administrative support and/or proper protocols as the primary

factors triggering his temper flare-ups, Alvarez's outbursts were directed at students and left both staff members and students in fear. Thus, while the penalty exacted from Mierzwa was the forfeiture of 120 days' pay withheld upon initial suspension, and an additional suspension of four months while he obtained training in anger management, conflict resolution and handling difficult and disruptive students, with termination of his employment if he did not successfully complete the program, the Commissioner dismissed Alvarez from his tenured position.

An examination of the facts of the current situation, the mitigating factors, the effect on the school district, and the precedents indicates the following. T.E.'s behavior could be viewed as a form of provocation. He stepped on the respondent, pulled on the respondent, and then later, in a classroom, suggested that the two go at it. However, as the incident of the prior week and the video showed, this sort of student-teacher interaction had become a pattern. Respondent's responses to it were wholly inappropriate, and in fact encouraged other students to misbehave, as demonstrated by the unidentified student who felt free to stomp on a teacher. There are some threads in the case law that suggest that behavior in gym class is necessarily more physical than is the case elsewhere in school, but these incidents did not happen in gym. The actual class was over; the first T.E. incident happened in the hall, the second in math class.

Testimony by Robyn Gray also suggested that male teachers had less formal relationships with students than did their female counterparts. Whether this was a polite way of alluding to tolerance of horseplay and greater levels of physical contact is uncertain. But in a time when schools are focusing on how to comply with the new anti-bullying laws, this sort of physical behavior is out of step with current requirements for school districts.

The inappropriate joking about "100s" in and of itself is not so offensive as to implicate tenure, but taken with the other behavior underlines the problem with properly modeling behavior.

As his counsel notes, respondent testified compellingly as to his remorse about the conduct, and to his understanding that the joking was inappropriate, and that what

he intended as a means of building a spirit of camaraderie instead blurred the student-teacher relationship unacceptably. It should also be noted that Forman did demonstrate that he has worked hard at elements of the position, trying to build an intellectually engaging program, supporting student athletes, and supporting the school by taking paid duty in a variety of areas. Further, it was clear that respondent did care deeply about his students and had no malicious intent, but for some reason, simply failed in the time in question to appreciate the inappropriateness of the horseplay.

Nonetheless, given the current precedents and the ongoing efforts through the anti-bullying laws to change how students conduct themselves in relation to each other, I **CONCLUDE** that the loss of tenure from this position is appropriate.

ORDER

The respondent is hereby dismissed from his tenured teaching position in the Clearview Regional High School District.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

4/12/12
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency:

April 12, 2012

Date Mailed to Parties:

April 12, 2012

/caa

List of Witnesses

For Petitioner

T.E.

Michael Lerch

Robyn Gray

For Respondent

C.T.

M.C.

J.M.

Brad Bendesky, M.D.

Cory Forman

List of Exhibits

For Petitioner

- P-1 Surveillance video of Pioneer Hallway in Clearview Regional High School—
May 11, 2011
- P-2 Investigation Report of Patrolman David Marro, dated May 24, 2011
- P-3 Photograph of T.E.
- P-4 Written statement of T.E.
- P-5 Superintendent's chronological log and notes of investigation—May 12,
2011, to June 16, 2011
- P-6 Superintendent's Report to Board, dated June 16, 2011
- P-7 Letter to respondent from Tammy McHale, Supervisor of Special Education,
dated December 23, 2006
- P-9 Letter to respondent from Jeff Chierici, dated February 3, 2009
- P-10 Evaluation/Supervision Summary, dated June 2009

For Respondent

- R-1 Transcript of municipal court proceeding
- R-2 Harrison Township Municipal Court disposition
- R-3 Clearview Regional School District Regulation R 5600.1, Pupil Discipline/Code of Conduct
- R-4 Curriculum Vitae for Brad Bendesky, M.D.
- R-5 Medical expert report by Brad Bendesky, dated November 12, 2011
- R-13 Rebuttal letter to lateness issue
- R-14 Email communication re: Attendance at Department Meetings
- R-15 Superintendent Toscano letter to Acting County Superintendent dated September 3, 2002
- R-16 Evaluation by Tom Jones—2010–2011
- R-17 Evaluation by Michael Vicente—June 2, 2010
- R-18 Evaluation by Jeff Chierici—June–2009
- R-19 Evaluation by Jeff Chierici—2008–2009
- R-20 Evaluation by Jeff Chierici—June–2008
- R-21 Evaluation by Jeff Chierici—2006–2007
- R-22 Evaluation by Jeff Chierici—2005–2006
- R-23 Letter of praise from Jeff Chierici, dated December 28, 2005
- R-24 Evaluation by Jeff Chierici—2005
- R-25 Record of Class Visitation by Theresa Triola, dated December 2, 2004
- R-25(a) Classroom Visitation—November 12, 2004
- R-26 Letter of praise from Carol Smith, dated November 17, 2004
- R-27 Record of Class Visitation by Michael Vicente, dated October 11, 2004
- R-28 Evaluation by Jeff Chierici—2003–2004
- R-29 Record of Class Visitation by Pat Carroll, dated December 12, 2003
- R-30 Record of Class Visitation by Michael Vicente, dated December 1, 2003
- R-31 Evaluation by Jeff Chierici, dated June 14, 2003
- R-32 Record of Class Visitation by Michael Vicente, dated April 3, 2003
- R-33 Record of Class Visitation by Theresa Triola, dated February 10, 2003
- R-34 Record of Class Visitation by Pat Carroll, dated January 21, 2003
- R-35 Record of Class Visitation by Theresa Triola, dated January 2, 2003

- R-36 Letter of praise from Jeff Chierici, dated November 18, 2002
- R-37 Letter of praise from Michael Toscano, dated November 18, 2002
- R-38 Record of Class Visitation by Bob Bennette, dated October 25, 2002
- R-39 Work injury records, dated May 5, 2011
- R-40 Letters of praise
- R-41 Interview of Jennifer Ballinger—October 6, 2011
- R-42 Interview of Molly Cormetz—October 7, 2011
- R-43 Interview of A.J. Roberts—October 7, 2011
- R-44 Interview of Christopher Thompson—October 7, 2011
- R-45 Coaching Evaluations: 2005–2006, 2006–2007, 2007–2008, 2009–2010
- R-46 Video of hallway incident

OAL DKT. NO. EDU 11437-10
AGENCY DKT. NO. 550-8/10

SHARON BEAGAN and CYNTHIA
YACOVELLI,

PETITIONERS,

V.

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE
TOWNSHIP OF HOLMDEL,
MONMOUTH COUNTY,

DECISION

RESPONDENT.

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Deputy Commissioner – to whom this matter was delegated pursuant to *N.J.S.A. 18A:4-33* – approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/09/12

Date of Mailing: 8/10/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11437-10

AGENCY DKT. NO. 550-8/10

**SHARON BEAGAN AND
CYNTHIA YACOVELLI,**

Petitioner,

v.

**BOARD OF EDUCATION OF HOLMDEL
TOWNSHIP PUBLIC SCHOOLS,
MONMOUTH COUNTY,**

Respondent.

Kathleen A. Naprstek, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum
& Friedman, attorneys)

Danielle H. Bohlen, Esq., for respondent (Pucell, Mulcahy, O'Neill & Hawkins,
LLC, attorneys)

Record Closed: June 28, 2012

Decided: June 29, 2012

BEFORE **EDWARD J. DELANOY, JR., ALJ:**

This matter was transmitted to the Office of Administrative Law on October 14, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement and Board Resolution indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

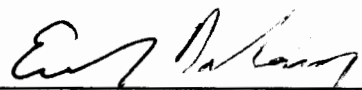
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

6-28-12
DATE


EDWARD J. DELANOY, JR., ALJ

Date Received at Agency:

7/11/12

Date Mailed to Parties:

7/10/12

OAL DKT. NO. EDU 11437-10

/bal

PURCELL, MULCAHY, O'NEILL & HAWKINS, LLC

One Pluckemin Way

P.O. Box 754

Bedminster, NJ 07921

(908) 658-3800

**Attorneys for Respondent, Board of Education of Holmdel Township Public Schools,
Monmouth County**

Our File: 304-20408-RFB

2012 JUN - 1 7 11:33

SHARON BEAGAN and CYNTHIA
YACOVELLI,

Petitioners,

v.

BOARD OF EDUCATION OF HOLMDEL
TOWNSHIP PUBLIC SCHOOLS,
MONMOUTH COUNTY

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL Docket No. EDU 11437-10
Agency Ref. No. 550-8/10

STIPULATION OF SETTLEMENT

THIS STIPULATION OF SETTLEMENT is made by and between Petitioners, Sharon Beagan and Cynthia Yacovelli ("Petitioner Beagan" and "Petitioner Yacovelli") and the Respondent Board of Education of Holmdel Township Public Schools, Monmouth County ("District"), hereinafter jointly referred to as the "Parties".

WHEREAS Petitioner Beagan was employed by the Holmdel Township Board of Education in a full-time secretarial/clerical position from on or about August 24, 2000 through June 30, 2010; and

WHEREAS Petitioner Yacovelli was employed by the Holmdel Township Board of Education in a full-time secretarial/clerical position from on or about January 2, 2002 through June 30, 2010; and

WHEREAS Petitioners acquired tenure under N.J.S.A. 18A:17-2 as full-time secretarial/clerical employees; and

WHEREAS during the 2009-10 school year Petitioner Beagan was assigned to the full-time secretarial/clerical position in the library at Village Elementary School; and

WHEREAS during the 2009-10 school year Petitioner Yacovelli was assigned to the full-time secretarial/clerical position in the library at Holmdel High School; and

WHEREAS Respondent determined, at a meeting held on May 26, 2010, to abolish two (2) secretarial/clerical positions in the District's libraries, pursuant to a Reduction in Force ("RIF"); and

WHEREAS at the time of the RIF, the four (4) employees assigned to secretarial/clerical positions in the District's libraries, including Petitioners, were all tenured secretarial/clerical employees; and

WHEREAS, pursuant to Article 19D of the Collective Bargaining Agreement between the Holmdel Township Board of Education and the Holmdel Township Education Association (the Association") for the period from July 1, 2009 to June 30, 2013, dismissals of tenured office services personnel, in the event of a reduction in force, shall be accomplished on the basis of seniority of personnel currently assigned within the job classification affected by the RIF; and

WHEREAS Petitioners had the least seniority in the job classification of library secretary, and, thus, they were notified by Respondent that their employment would be terminated, effective July 1, 2010; and

WHEREAS, as tenured secretarial/clerical employees, Petitioners are entitled, following the termination of their employment pursuant to a reduction in force, to remain on a preferred eligibility list for recall to employment in the District when comparable secretarial/clerical positions become

available; and

WHEREAS the Association asserted a claim, on behalf of Petitioners to the secretarial/clerical positions of Secretary to Technology and Facilities and Administrative Assistant to the Superintendent, as those positions were held at the time of the RIF by non-tenured secretarial/clerical employees; and

WHEREAS the written job descriptions for the secretarial/clerical positions of Secretary to Technology and Facilities and Administrative Assistant to the Superintendent were significantly different from the written job description for the secretarial/clerical positions held by Petitioners during their employment in the District; and

WHEREAS the Petitioners were administered a computerized test by the District to assess their qualifications and skills for the positions of Secretary to Technology and Facilities and Administrative Assistant to the Superintendent; and

WHEREAS, following the administration of the computerized test, the Petitioners were not offered the positions of Secretary to Technology and Facilities and Administrative Assistant to the Superintendent; and

WHEREAS, Petitioner Beagan and Petitioner Yacovelli commenced an administrative proceeding, bearing the above caption, which is presently pending before the Commissioner of Education and the Office of Administrative Law, the allegations of which are detailed more fully in the Petition of Appeal which initiated this litigation; and

WHEREAS the Parties have, in good faith, negotiated concerning this matter and have a desire to settle this matter in an amicable manner, in the best interest of the Parties and to avoid the time and expense associated with continued litigation;

NOW THEREFORE, in consideration of the mutual covenants and promises contained herein, the Parties agree as follows:

1. Respondent Holmdel Township Board of Education shall remove the results of the aforementioned computerized tests from the personnel files of Petitioner Beagan and Petitioner Yacovelli, and shall not utilize same, in any fashion, as the basis for denying the Petitioners future employment in secretarial/clerical positions with the District.

2. Petitioner Beagan and Petitioner Yacovelli, hereby agree to a dismissal, with prejudice, of the Petition of Appeal against Respondent in this matter. Said dismissal shall have no effect on the rights that Petitioner Beagan and/or Petitioner Yacovelli may have to future employment in the District.

3. In consideration of the Respondent's obligations set forth in this agreement, Petitioners specifically release the Respondent from any and all claims or causes of action of any kind based upon any State or Federal law, statute, rule or regulation, regardless of the forum for the claim including, but not limited to, claims for damages including back pay, front pay, benefits, pension benefits or other emoluments, and/or pre and post judgment interest. Petitioners expressly waive any right available to them to seek reimbursement for attorney's fees and expenses.

4. This Agreement represents the entire understanding between the parties and shall not be modified in whole or in part except as a mutual subsequent written and signed Agreement. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion, and with the opportunity for the parties to consult with legal counsel of their own choosing and option. The parties acknowledge that they did consult with said legal counsel and acknowledge that they were represented by competent legal counsel, and that they all understand,

consent and agree with all of the contents of this Agreement. It is also agreed that neither party is a "prevailing party" for any purpose. Each party shall be fully responsible for the payment of its own attorneys' fees and related costs in this case.

5. This Agreement is not an admission by either party of any liability, or the violation of any law, statute, or regulation, nor shall it be cited as precedent in any future judicial or administrative proceedings, except as needed for enforcement or interpretation of its specific terms.

6. All parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, are also bound. This Agreement is made for the benefit of all the parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors or assigns.

7. This Agreement shall be construed fairly according to the plain language of its terms and not for or against any party hereto.

8. This Agreement shall not constitute, be interpreted, construed or used as evidence of any admission of fact, law, responsibility, wrongdoing or liability and shall not be referred to in any subsequent proceeding by any party other than to enforce the express terms of this Agreement. In the event that this Agreement is not fully executed and approved by all parties hereto, it shall become null and void and shall neither constitute an admission of any party, nor be referred to by any party in any subsequent legal proceeding for any purpose whatsoever.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates set forth below:

FOR THE RESPONDENT:

By: Barbara Dancer

Dated: 5-17-12

WITNESS:

By: Mandy Peet

Dated: 5-17-12

THE PETITIONERS:

By: Sharon Beagan
SHARON BEAGAN

Dated: 5-4-12

WITNESS:

By: Roseanne Petrone

Dated: 5-4-12

By: _____
CYNTHIA YACOVELLI

Dated: _____

By: _____

Dated: _____

FOR THE RESPONDENT:

By: Barbara Duran

Dated: 5-21-12

WITNESS:

By: Mandi Plant

Dated: 5/21/12

THE PETITIONERS:

By: _____
SHARON BEAGAN

Dated: _____

By: Cynthia Yacovelli
CYNTHIA YACOVELLI

Dated: 5/8/2012

WITNESS:

By: _____

Dated: _____

By: Sharon W. Kunkel Sr

Dated: 5/8/2012

AGENDA
REGULAR BUSINESS MEETING
HOLMDEL HIGH SCHOOL COMMONS
JUNE 13, 2012 7:00 PM

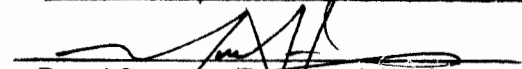
7b. Approval of a Non-Monetary Agreement

Resolved: That the Board approve a Non-Monetary Agreement with ID. #4355 and ID. #4130 in settlement of litigation.

MOTION: Mrs. Wetmore SECOND: Mr. Pavlik VOTE: 8-0
Absent: Mr. Sockol

I do hereby certify that the foregoing is a
true and exact copy of a resolution adopted
by the Holmdel Board of Education

on 6/13/12


Board Secretary/Business Administrator

2012 JUN 28 A 8:50

ANITRA MARTIN,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF JERSEY CITY,	:	DECISION
HUDSON COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – an early childhood education teacher employed in respondent’s school district since 1990 – appealed the determination of the respondent Board to withhold her 2010-2011 salary increment, alleging that the Board’s actions were arbitrary, capricious and unreasonable. The Board contended that the increment withholding was justified based upon deficiencies in petitioner’s teaching performance as documented in all of her evaluations throughout the previous school year.

The ALJ found, *inter alia*, that: petitioner was observed and evaluated three times during the 2009-2010 school year; all three evaluations concluded that petitioner’s performance was below standard, unsatisfactory, and needed improvement; petitioner never submitted a written rebuttal stating why she should not have received an unsatisfactory evaluation, and never asked for or accepted assistance from staff or colleagues, although it was offered; and that the Board acted reasonably in withholding the petitioner’s increment due to unsatisfactory performance during the 2009-2012 school year. The ALJ concluded that the petitioner failed to show that the increment withholding was unreasonable and accordingly affirmed the Board’s decision to withhold petitioner’s increment; the petition was dismissed.

Upon independent review and consideration, the Commissioner concurred with the ALJ that the petitioner failed to sustain her burden of establishing that the Board’s action was arbitrary, capricious unreasonable, or an abuse of its discretion. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 9, 2012

OAL DKT. NO. EDU 10893-10
 AGENCY DKT. NO. 557-9/10

ANITRA MARTIN,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF JERSEY CITY,	:	DECISION
HUDSON COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon careful consideration, the Commissioner¹ determines to adopt the ALJ's recommended decision as he finds that the Board's action in withholding the petitioner's 2010-2011 increment was a valid exercise of its discretionary authority. In so determining, the Commissioner was mindful that it is well-established that the scope of the Commissioner's review in increment withholding matters is not to substitute his judgment for that of those who made the evaluation, but to determine whether they had a reasonable basis for their conclusions. (*Kopera v. West Orange Bd. of Ed.*, 60 N.J. Super. 288 (App. Div. 1960). As such, there are *only two* determinations to be made when reviewing the Board's decision to withhold the increment of a teaching staff member, *i.e.*, 1) whether the underlying facts were as those who made the evaluation claimed, and 2) whether it was unreasonable for them to conclude as they did based

¹ This matter has been delegated to the Deputy Commissioner pursuant to N.J.S.A. 18A:4-33.

on those facts. Moreover, it is likewise well-established that the burden of proving unreasonableness lies with the petitioner. (*Kopera* at 296-297)

With this applicable legal standard in mind, the Commissioner's review persuades him that the record here amply establishes that the Board's action in withholding petitioner's increment was based on validly perceived deficiencies in her performance during the 2009-2010 school year. Consequently, the Commissioner agrees with the ALJ that petitioner has failed to sustain her burden of establishing, by a preponderance of the credible evidence, that the Board's action was arbitrary, capricious, unreasonable, or an abuse of its discretion.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.²


DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/09/12

Date of Mailing: 8/10/12

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10893-10

AGENCY DKT. NO. 557-9/10

ANITRA MARTIN,

Petitioner,

v.

JERSEY CITY BOARD OF EDUCATION,

HUDSON COUNTY,

Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich & Feintuck, attorneys)

Paula Mercado Hak, Esq., for respondent (Jersey City Public Schools, Law
Department)

BEFORE CARIDAD F. RIGO, ALJ:

Record Closed: July 19, 2012

Decided: July 19, 2012

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter Anita Martin, the petitioner, appeals the Jersey City Board of Education's (hereinafter District) decision to withhold her salary increment for the 2010-2011 school year. Petitioner contends that respondent's actions were arbitrary, capricious and unreasonable.

On September 20, 2010, petitioner filed a Verified Petition appealing respondent's decision. On September 28, 2010, respondent filed an Answer and Affirmative Defenses. The matter was transmitted by the Department of Education Bureau of Controversies and Disputes to the Office of Administrative Law (OAL) as a contested case on October 6, 2010. The case was heard on September 21, 2011, December 5, 2011, and on December 9, 2011. Closing briefs were received on January 10, 2012, at which time the record closed.

ISSUE

Did respondent school District have a reasonable basis to withhold petitioner's increment?

THE FACTS

Anitra Martin began teaching in Jersey City on September 1, 1990. She has a Bachelor of Science degree in education from Trenton State College and is certified in early childhood education. She has taught three-year-olds and the pre-k programs for Jersey City for approximately twenty-two years. Petitioner is a tenured teacher.

By letter dated August 24, 2010, petitioner was advised that the District Superintendent directed that her salary increment for the school year 2010-2011 be withheld because of her unsatisfactory performance. (See Exhibit R-20.)

Summary of Testimony

Lauren Bernero

Lauren Bernero is the supervisor of the early childhood education department of the Jersey City Public Schools. She has been employed by the District for thirteen years. She has a Bachelor of Arts degree from the University of Scranton in elementary

education and a Master of Arts degree from Jersey City University. She has certifications in pre-school, elementary education, and a supervisor's education. She oversees ten childcare centers in Jersey City plus twelve public schools. She further oversees a staff of twenty. She said the majority of her work entails evaluating pre-school teachers. She conducts about sixty-five evaluations a year. She is also responsible for coordinating the professional-development programs for the teachers.

Bernero testified that she observed Ms. Martin for purposes of evaluating on March 30, 2010. (Exhibit R-15.) Bernero observed Ms. Martin at Public School #9 (PS 9) in the pre-kindergarten class. Bernero observed Martin in four domains of teaching; "Planning and Preparation," "Students and Learning," "Instruction" and "Classroom Environment." On Planning and Preparation Bernero concluded that Martin's performance needed improvement. According to Bernero there was little if any effective planning methods. Bernero gave Martin an unsatisfactory score on Domain 1. For Domain 2, Students and Learning, Bernero said Martin's skills needed improvement. On Domain 3, Instruction, Bernero felt that Martin needed to improve. And, on Domain 4, Classroom Environment, Bernero evaluated Martin as unsatisfactory.

Bernero stated that she offered Martin support services for curriculum, program social workers, psychologist, teacher consultants, and the pre-school nurse.

Under cross-examination Bernero stated that Martin's classroom was not set up as it should have been. She said the space in Martin's classroom was not well defined although it was divided. She said Martin had things all mixed up; she had adult things with children's toys. She said traffic flow in the classroom was a problem. Children's names were not on their cubbies or hooks.

Bernero observed that some children were fighting and Martin did nothing about it. The children's challenging behaviors were not addressed by Martin. Bernero said she did not observe a lot of adult-child interaction. That, Martin did not spend a lot of time interacting with the children, Martin just moved around the class. Martin did not

engage with the children while they were playing—thereby extending their play. Bernero stated Martin was not engaged and was generic. She observed Martin in her classroom for forty-five minutes. She concluded that learning was limited because of the limited child-teacher interaction. She observed that Martin used the same lesson plans and the same small-group activity.

Bernero testified that Martin was not aware of her students. Further, she had not managed her class well, so much so, that a student left the room and Martin did not notice. The children with misbehaviors were not redirected. She saw children acting out in disruptive behaviors and at one point Martin walked out of the class leaving the students unsupervised.

Bernero had a post-evaluation conference with Martin on March 31 and they discussed the results. Bernero said that petitioner acknowledged that on the day of the observation she had a bad day.

Wendy Perez

Wendy Perez has been employed by the Jersey City Board of Education for over thirty-four years. She has a Master's degree in early childhood and certificates in supervisor, principal, and bi-lingual education. She is principal at PS 5 and previously the principal of PS 9. She has nineteen-years experience as a school principal. She evaluates about sixty teachers a year teaching in grades pre-k through 8.

Perez observed and evaluated Martin twice. Perez had a pre-observation conference with Martin on September 23, 2009. (See Exhibit R-9.) At that pre-observation conference the areas to be observed and evaluated were discussed and the date of the observation was confirmed. The first observation took place on November 9, 2009.

On November 9, 2009, Perez said Martin was not organized and she was minimally engaged with the students. Perez observed that Martin was not walking

around and talking with the children. Perez noted that Martin's plan book lacked detail in planning. Martin's plan book did not follow the district guidelines. Perez observed that Martin did not record anecdotal records for the students and Martin did not use the appropriate documentation forms required by the district.

Perez noted that children were sleeping even though the scheduled nap time was over. It took over ten minutes to wake some of the children up and at times Martin had to kick the children's sleeping mats to wake them. The children were motivating and stimulating themselves to learn and interacting amongst themselves, while Martin just stood by and watched. Perez noted that the classroom was barren of displays and did not have grade-appropriate visual stimulation. The classroom's labeling was minimal. The work and play centers did not contain sufficient materials to meet the students' needs and interests. Perez also noted that Martin's class notes were incomplete.

As a result of the November 9, 2009, observation and evaluation Perez gave Martin the following ratings: Domain 1 - Planning and Preparation, needs improvement; Domain 2 - Students and Learning, needs improvement; Domain 3 - Instruction, unsatisfactory; and Domain 4 - Classroom Environment, needs improvement. (See Exhibit R-10.)

The second evaluation by Perez took place on May 11, 2010. Perez stated that on that day when she came into the classroom appellant was not in the class, only the teacher's assistant was in the classroom, and again the children were still sleeping from their nap. Perez noted that the children were all doing "their own thing." As a result of her observations, Perez concluded that Martin was not doing her job in a satisfactory manner. Perez also stated that Martin had not demonstrated any progress from her previous reviews. Perez said she offered to provide Martin assistance but Martin never came to her. Perez told the lead teacher to provide support services to Martin. Perez told Martin that her increment was in danger.

As a result of the May 11, 2010, observation and evaluation Perez gave Martin the following ratings: Domain 1 - Planning and Preparation, unsatisfactory; Domain 2 - Students and Learning, needs improvement; Domain 3 - Instruction, unsatisfactory; and Domain 4 - Classroom Environment, unsatisfactory. (See Exhibit R-18.)

Perez said she frequently observed petitioner by informally walking in to her class.

Anitra Martin

Anitra Martin testified that she started teaching at Jersey City on September 1, 1990, prior to that she taught at a daycare center in Newark, N.J. She has a Bachelor of Science degree in education from Trenton State College and is certified in Early childhood education. She has taught pre-k to three-year-olds at PS 9 and at the Kennedy School. Martin has been at PS 9 for seventeen years. In the school year 2009-2010 she had pre-k class at PS 9 that had thirteen to fifteen students, in which she had one assistant who worked cooperatively with her.

Martin stated she was teaching to the children's interest. Martin explained that in interest learning the teacher is more of a facilitator. Martin said the children choose work or play center, for example, home center, library center, family center, etc. She had a schedule that she prepared and she taught according to that time schedule. (See Exhibit P-1.) The majority of the equipment/crafts/displays were provided by the district. All of the centers are guided by the district's curriculum. The displays in her class were the children's work.

According to Martin, Perez generally did not review her lesson plans. And, her teaching methods did not change in 2009-2010 from the previous years. Martin said she used the High Scope Preschool Curriculum on a daily basis. (See Exhibit P-2.) Martin said that the entire class is together during large-group time and reading time. She said she has a plan book of her own that follows the district's curriculum. Her lesson plans are done on a daily basis.

Martin denied ever kicking a child's cot to wake them up. She actively engaged herself with the children. Martin denied ever leaving the classroom with the children unsupervised. And, that no child ever walked out of her class and she did not know it.

Martin furthered that her classroom was small so it was difficult to keep organized, as she did not have much space to put things.

Martin testified that she was not in agreement with the May 14, 2010, evaluation.

Under cross-examination Martin stressed that she taught based on the child's interest. The child's interest is what she uses to drive her daily plans. For example, if the child wants to listen to music every day you let it happen and take the opportunity to introduce different instruments. She said the High Scope Curriculum is driven by the child's interest.

Martin explained that the purpose of anecdotal records is for the teacher to see what the child has accomplished. Therefore, the teacher can see the child's development over the school year. In her case, she kept anecdotal records but not on a regular basis because much of the information she gets from the child is the same from day to day. She only kept anecdotal records if it changed.

Martin further stated that she disagreed with the evaluation results from Perez. That Perez's conclusions were inaccurate representations of her teaching but that she never submitted a response. She did not sign the evaluations because she did not agree with the contents.

Martin said that Perez never offered to help her improve with her performance.

She said no parent ever complained.

FINDINGS OF FACT

Based upon the testimonial and documentary evidence presented and having had the opportunity to observe the demeanor of the witnesses and assess their credibility , I **FIND** the following to be **FACT**:

1. Petitioner is a tenured pre-k teacher for the respondent district. She has taught pre-k to three-year-olds at Public School #9 for at least seventeen years. She has taught in the district nineteen years.
2. Petitioner was observed and evaluated three times during the 2009-2010 school year: twice by her Principal Wendy Perez, and once by Supervisor of Early Childhood Education Lauren Bernero for the district.
3. Petitioner was observed and evaluated on November 9, 2009, March 30, 2010, and May 11, 2010. All three evaluations concluded that petitioner's performance was below standard, unsatisfactory, and needed improvement.
4. Petitioner disagreed with the conclusions and the ratings her superiors gave her but never submitted a written rebuttal stating why she should not have received an unsatisfactory evaluation.
5. Petitioner never asked or accepted assistance from staff or colleagues.

In this case, petitioner tries to defend her position by arguing that she instructs according to her interpretation of the required curriculum. Petitioner asserts that her classes are child-interest driven. Petitioner responds by saying that the lesson plans may be repeated on a daily basis because it is the child that drives the instruction. Petitioner stated that no child ever walked out of her classroom without her knowing it. And, that she never kicked the cots to wake the children up. I **FIND** that other than these assertions, petitioner does not address the heart of the deficiencies found in her performance evaluations.

Therefore, based on the above findings of **FACTS** I further **FIND** that the district acted reasonably in withholding petitioner's increment due to unsatisfactory performance during the 2009-2010 school year.

LEGAL DISCUSSION AND CONCLUSION

N.J.S.A. 18A:29-14, allows a board of education to withhold any member's employment increase for inefficiency or other good cause. The purpose of the statute is to "reward only those who have contributed to the educational process thereby encouraging high standards of performance." Bd. of Educ. of the Twp. of Bernards v. Bernards Twp. Educ. Ass'n, 79 N.J. 311, 321, (1979). "The decision to withhold an increment is therefore a manner of essential managerial prerogative which has been delegated by the Legislature to the board." Ibid.

In matters such as this, petitioner has the burden of proof to demonstrate that the district's decision was arbitrary and capricious. Gnatt v. Bd. of Educ. of the Manalapan-Englishtown Reg'l Sch. Dist., 92 N.J.A.R.2d (EDU) 89. When reviewing a board's determination to withhold a teaching increment, the scope of the Commissioner's review is to determine (1) whether the underlying facts were as those who made the evaluations claimed, and (2) whether it was reasonable for them to conclude as they did based upon their findings and facts. The Commissioner is not to substitute his judgment for that of those who made the observations and evaluations. Id. at 94. I **CONCLUDE** that petitioner failed to prove her burden; therefore, the increment withholding by the District should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that petitioner's petition of appeal is hereby **DISMISSED**. And, I **AFFIRM** Respondent's decision to withhold petitioner's increment for the 2010-2011 academic year.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 19, 2012

DATE



CARIDAD F. RIGO, ALJ

Date Received at Agency:

July 19, 2012

Date Mailed to Parties:

JUL 19 2012



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

WITNESSES

For Petitioner:

Anitra Martin

For Respondent:

Wendy Perez

Lauren Bernero

EXHIBITS

For Petitioner:

P-1 Daily Schedule

P-2 High Scope Preschool Curriculum

For Respondent:

R-1 Contract between Jersey City Public Schools and Teachers Association
September 1, 2005-August 31, 2006

R-2 Excerpt from Contract September 1, 2001-August 31, 2005, in R-1 pages 19-20,
91-92

R-3 Excerpt from Contract dated September 1, 1998-August 31, 2001, pages 19-20,
87-88

R-4 Lead Teacher Monthly Activity Log dated September 7, 2009, to June 30, 2010

R-5 Weekly Schedules

R-6 Weekly Observation Evaluation, Activity Log and Instructional Evaluation

R-9 Pre-Observation Conference From dated September 23, 2009, and October 19,
2009

R-10 Formative Observation Form signed November 20, 2009

- R-11 High Scope Preschool Daily Planning Form November 9, 2009, November 10, 2009, November 12, 2009
- R-12 Informal Observation of Anitra Martin dated November 19, 2009
- R-13 High Scope Preschool Daily Planning Form of Anitra Martin February 1, 2010-March 30, 2010
- R-14 Pre Observation Conference Form dated March 4, 2010
- R-15 Observation Form for Anitra Martin March 30, 2010
- R-16 Pre-Observation Conference Form dated April 23, 2010
- R-17 High Scope Preschool Daily Planning Form of Anitra Martin April 26-May 13, 2010
- R-18 Formative Observation Form for Anitra Martin dated May 11, 2010
- R-19 Summative Evaluation and Professional Improvement Plan for Anitra Martin
- R-20 Letter from Superintendent to Anitra Martin dated August 24, 2010
- R-21 Excerpts from Early Childhood Curriculum Handbook

#325-12

DEBRA BRUNO,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
WESTWOOD REGIONAL SCHOOL DISTRICT,	:	
BERGEN COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured school psychologist – challenged the Board’s decision to transfer her from the position of school psychologist assigned to the child study team to a newly created elementary school psychologist position. Petitioner alleged that under the new position she has been assigned teaching duties that are inconsistent with her school psychologist certification, and that she is now effectively employed as an elementary school teacher. The Board contended that petitioner failed to file the petition in a timely manner, and filed a motion to dismiss.

The ALJ found that: petitioner was notified on June 22, 2011 that she would be reassigned to the newly created position of school psychologist for the 2011-2012 school year; on the same day, petitioner met with the director of elementary education and the principal of the George Elementary School, and was told about the new position and how she would implement the “second-step” curriculum; petitioner acknowledged in an email after the June 22, 2011 meeting that her new position would be of a teaching nature; although petitioner knew of her reassignment in June 2011, she did not submit her appeal until November 10, 2011, which is beyond the 90 day limitation period set forth in *N.J.A.C. 6A:3-1.3(i)*. Accordingly, the ALJ concluded that petitioner’s appeal was untimely filed, and granted the Board’s motion to dismiss the petition.

The Deputy Commissioner – to whom this matter was delegated pursuant to *N.J.S.A. 18A:4-33* – concurred with the ALJ that this matter must be dismissed as untimely. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 9, 2012

OAL DKT. NO. EDU 14447-11
AGENCY DKT. NO. 335-11/11

DEBRA BRUNO,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
WESTWOOD REGIONAL SCHOOL DISTRICT,	:	
BERGEN COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto – filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner¹ in reaching his determination herein.

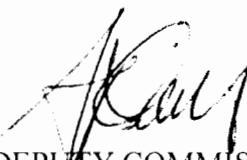
Petitioner's exceptions replicate her arguments advanced in her letter memorandum in opposition to the Board's Motion for Summary Decision filed below. As it is determined that such arguments were fully considered and addressed by the Administrative Law Judge (ALJ) in his Initial Decision, they will not be revisited here.

Upon full consideration, the Commissioner concurs with the ALJ that summary decision is appropriately granted to the Board as the instant petition of appeal was filed well outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i) and the record provides no reason whatsoever for relaxation of this rule.

¹ This matter has been delegated to the Deputy Commissioner pursuant to *N.J.S.A.* 18A:4-33.

Accordingly, the recommended decision of the OAL is adopted for the reasons clearly presented therein and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.²


DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/09/12

Date of Mailing: 8/10/12

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 14447-11

AGENCY DKT. NO. 335-11/11

DEBRA BRUNO,

Petitioner,

v.

WESTWOOD REGIONAL

BOARD OF EDUCATION,

Respondent.

Randi Doner April, Esq., for petitioner (Oxfeld Cohen, attorneys)

Rodney T. Hara, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: June 4, 2012

Decided: July 19, 2012

BEFORE **MICHAEL ANTONIEWICZ, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education for Westwood (Board) seeks dismissal of a petition, filed with the Commissioner of Education, in which Debra Bruno (Bruno) seeks to challenge the Board's decision to transfer her from a school psychologist position to an

elementary school psychologist position. The Board contends that she failed to file the petition in a timely fashion, more specifically: within ninety days of the date of the Board action from which she appeals as required by N.J.A.C. 6A:1.3(i). Bruno responds that she effectively complied with the regulation, citing that she was unaware that the new position was a teaching position and that it was not until the first week of school for the 2011–2012 school year that it became clear that her transfer was not a new assignment requiring her educational services certificate with the school psychologist's endorsement. Bruno thus avers that the ninety days began to run in September 2011, when she acquired notice of her actual job duties. Respondent filed a Motion for Summary Decision on April 30, 2012; the petitioner filed a brief in opposition to the motion on May 24, 2012; and the Board filed a reply to the petitioner's brief on June 4, 2012, on which day the record closed.

FACTS

Based upon a review of the evidence presented and the submissions by both parties, I **FIND as FACT** the following:

1. Bruno was employed by the Westwood Regional School District as a school psychologist since 1988 and was assigned as such for the child study team through the 2010–2011 school year.
2. Bruno possesses an educational services certificate with a school psychologist endorsement.
3. Bruno's primary responsibilities as the school psychologist on the child study team were to administer, score, and interpret psychological assessments of the District's students with special needs.
4. During the 2010–2011 school year, the Board determined that there was a need in the elementary schools to provide systemic-learning experiences for students in the third, fourth, and fifth grades.

5. At the Board's meeting held on June 9, 2011, the Board approved the creation of a new elementary school psychologist position at George Elementary School and approved the job description for same.
6. On June 22, 2011, Superintendent of Schools Dr. Geoffrey Zoeller informed Bruno that he would be recommending to the Board that she would be assigned to this newly created position for the 2011–2012 school year.
7. In addition, on June 22, 2011, Bruno met with Rory McCourt (Mccourt), director of elementary education and district technology, and Mary Ferreri (Ferreri), principal of the George Elementary School, and was told about the elementary school psychologist position and how she would implement the second-step curriculum.
8. Furthermore, on June 22, 2011, Bruno e-mailed McCourt and Ferreri and confirmed that she would be recommended for a transfer to the elementary psychologist position.
9. Petitioner sent an e-mail to McCourt and Ferreri after the June 22, 2011 meeting acknowledging that his new position would be of a teaching nature.
10. On November 10, 2011, Bruno filed a petition with the Commissioner, alleging that the Board assigned her to a job with teaching duties that are inconsistent with her school psychologist's endorsement.

LEGAL DISCUSSION

A summary decision may be rendered in an administrative proceeding if the pleadings, discovery and affidavits "show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The standard to be applied in deciding a motion pursuant to

N.J.A.C. 1:1-12.5(b) is essentially the same as that governing a motion under R. 4:46-2 for summary judgment in civil litigation. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

The standard for evaluating a motion for summary judgment was modified in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995). Under this standard, a determination as to whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

The Board disputes the petitioner’s argument that she had no notice of the change of position and responsibilities by stating that there exists documentation that Bruno was aware in June 2011, that she was transferred to a newly created position entitled elementary school psychologist with new and different professional responsibilities, including providing services in the classroom and contending that any action challenging its decision must be timely filed with the Commissioner with the time period beginning on June 22, 2011.

The ninety-day filing requirement is codified at N.J.A.C. 6A:3-1.3(i)

(i) The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

Clearly, the petition contemplated by this rule is a petition to the Commissioner of Education, who is empowered to decide disputes arising under the education laws of this State and whose jurisdiction is generally primary in such matters. The ninety-day rule is applied strictly and substantial case law supports that practice. There are limited

instances where exceptions to the rule have been allowed. The purpose of the rule has been described as:

The limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements.

[Kaprow v. Berkeley Twp. Bd. of Educ., 131 N.J. 572, 582 (1993).]

The rule has been waived where the issue(s) presented by a petition filed out-of-time involve important and novel constitutional questions or matters of important public rather than private interests which are in need of adjudication or where there are informal or ex parte determinations of legal questions by administrative officials. However, in general, the rule has been strictly enforced. Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975); Raymond v. Bd. of Educ. of River Edge, 94 N.J.A.R.2d (EDU) 203; see also Dreher v. Jersey City Bd. of Educ., 1987 S.L.D. 1706, aff'd, 1988 S.L.D. 2439 (State Bd. 1988), rev'd on other grounds, A-6120-82 (App. Div. February 28, 1985) (where a petition which was filed only two days after the timeline expired was dismissed as untimely).

In some matters involving a controversy regarding the school laws, a party first seeks to institute another type of challenge to the action in some other arena, or in some other fashion has given a board of education some degree of notice that the party is not satisfied with the board's action. Generally, these efforts do not satisfy the requirement to file a petition with the Commissioner within the allotted ninety days. The case law has long recognized that the fact that other proceedings

may have been initiated elsewhere does not effect the 90-day time period to file with the Commissioner. In Medeiros v. Jersey City School District, 97 N.J.A.R.2d (EDU) 276, the

petitioner had a claim before the worker's compensation court for an alleged work-related injury. The ALJ held that the petitioner should not have waited for his worker's compensation claim to be determined before filing a petition with the Commissioner for a violation of the school laws. Citing the opinion in Verneret v. Elizabeth Bd. of Educ., 92 N.J.A.R.2d (EDU) 191, modified in part and aff'd in part, 95 N.J.A.R.2d (EDU) 134, the ALJ held that "even if an alleged work-related injury also is the subject of a worker's compensation petition, a school law claim . . . still must be filed within 90 days." Medeiros, supra, 97 N.J.A.R.2d (EDU) at 277; see also Riely v. Hunterdon Cent. High Sch. Bd. of Educ., 173 N.J. Super. 109, 113 (App. Div. 1980) (stating that the respondent "gambled" on a favorable arbitration award and after losing in arbitration tried to seek relief with the Commissioner in an untimely manner); Bernards Township Bd. of Educ. v. Bernards Township Educ. Ass'n, 79 N.J. 311, 326 (1979) (holding that a teacher who proceeds to arbitration is not thereby relieved from compliance with the 90-day requirements of N.J.A.C. 6A:3-1.3); Hoffman v. Hillsborough Township Bd. of Educ., 96 N.J.A.R.2d (EDU) 943, 946 (stating, "[t]here is no reason why [the petitioner] could not have timely filed a petition of appeal with the Commissioner of Education even while pursuing other avenues" of relief).

[Z.G. on behalf of minor child, V.G. v. Bd. of Educ. of the Twp. of Livingston, Essex County, EDU 5459-04, Initial Decision, (September 20, 2004), <http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>.]

In this case, the petitioner did not take any action in another forum. Rather, Bruno's defense for not filing within the ninety-day period from June 22, 2011, is that the ninety-day period did not begin until September, 2011. Bruno alleges that the time limitation began in September 2011, when it became clear to her that her transfer was not a new assignment requiring the educational services certificate with the school psychologist's endorsement.

I agree with the Board that there is ample evidence that Bruno was fully aware in June 2011 that her transfer was to a newly created position entitled "Elementary School Psychologist," with its new and different professional responsibilities, including providing services in the classroom. Such evidence includes the fact that: 1) Bruno admits that

she was informed by McCourt and Ferreri on June 22, 2011, that Bruno was being transferred to the elementary schools to serve as the elementary school psychologist; 2) Bruno stated that she was informed by McCourt and Ferreri that the transfer resulted from being moved from the Department of Special Services and that she would no longer serve as a child study team member; 3) McCourt e-mailed the Board-approved job description for the elementary school psychologist position to Bruno on June 22, 2011; 4) Bruno sent an e-mail to McCourt and Ferreri after their meeting on June 22, 2011, acknowledging that “primarily my position was expected to be of a teaching nature”; 5) McCourt informed Bruno that, as an elementary school psychologist, Bruno’s role would be teaching lessons regarding anti-bullying, social skills and life skills, and that she would also assist the District with implementing New Jersey’s new harassment, intimidation, and bullying program; and 6) McCourt sent a responding email to Bruno, dated June 22, 2011, which states that he would develop a schedule for the ensuing year for Bruno and that he would email to her over the summer the social-skills curriculum that she would be using.

Bruno’s claim, at this point, that she had no knowledge of her new role simply cannot stand up to the weight of the evidence set forth above and has no credibility. It is clear that Bruno had notice of and acknowledged her changed responsibilities on June 22, 2011, and yet did not file her petition until November 10, 2011, when the ninety-day requirement for filing had expired. A Verified Petition was filed with the Commissioner on November 10, 2011.

Indeed, as the Kaprow court itself said, the purpose of the ninety-day rule is both to “stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims” and “to prevent dilatoriness and serve as a measure of repose by giving security and stability to human affairs.” Kaprow, supra, 131 N.J. at 587.

For the reasons stated, I **CONCLUDE** that Bruno’s petition was not filed with the Commissioner within ninety days of the time when she knew that such filing was required by the facts known to her. I **CONCLUDE** that the delay of at least 141 days in

filing the petition with the Commissioner is precisely that sort of delay that undermines the interest in certainty and repose that lies at the foundation of the ninety-day rule. As such, I **CONCLUDE** that the petition is untimely.

ORDER

The Motion to Dismiss the Petition is therefore **GRANTED**. It is so **ORDERED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

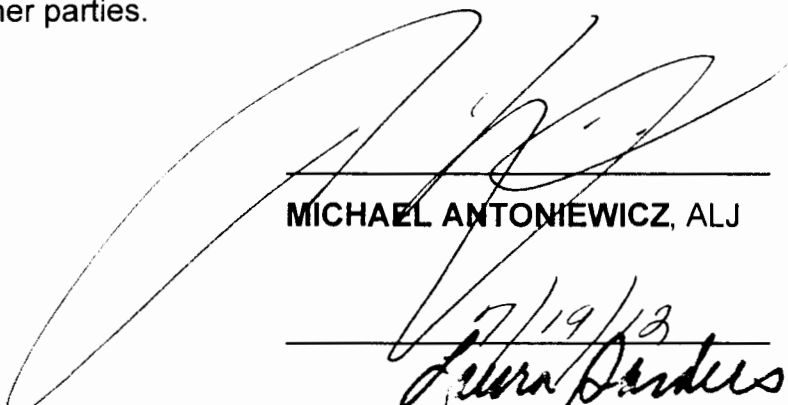
Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/19/12
DATE

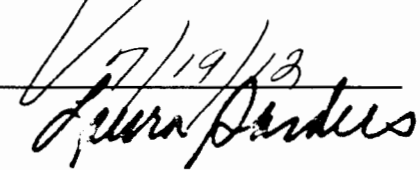
Date Received at Agency:

Date Mailed to Parties:

jb



MICHAEL ANTONIEWICZ, ALJ

7/19/12


FELICIA SANDERS
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 20 2012

SUBMISSIONS

For Petitioner:

- P-1 Affidavit of Debra Bruno (with Exhibits A-J)
- P-A Job description for school psychologist
- P-B E-mails from Bruno to McCourt, dated June 22, 2011
- P-C E-mails from Bruno to McCourt and Ferreri, dated June 23, 2011
- P-D E-mails from Susan Ross to Bruno, dated June 22, 2011
- P-E Job description for elementary school psychologist
- P-F E-mails between Bruno and McCourt
- P-G Letter from Zoeller to Bruno, dated July 1, 2011
- P-H Schedule for Bruno for the 2011–2012 school year
- P-I Summary of principal meeting, dated September 7, 2011
- P-J E-mails from Bruno to Ferreri, dated September 26, 2011

For Respondent:

- R-A Job description for elementary school psychologist
- R-B Memorandum from Geoffrey Zoeller, Ed.D. to Bruno, dated June 22, 2011
- R-C E-mail from Bruno to Rory McCourt and Mary Ferreri, dated June 22, 2011
- R-D E-mail from Bruno to McCourt and Ferreri, dated June 23, 2011
- R-E E-mail from McCourt to Bruno and Ferreri, dated June 22, 2011, with job description for elementary school psychologist
- R-F Letter from Oxfeld Cohen to Geoffrey Zoeller, Jr., Ed.D., superintendent of schools, dated June 24, 2011
- R-G Letter from Zoeller to Spivack, Esq., from Oxfeld Cohen, dated June 28, 2011
- R-H Letter from Zoeller to Bruno, dated July 1, 2011

#326-12

J.M.H., on behalf of minor child, J.M.H., III, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
VILLAGE OF RIDGEWOOD,
BERGEN COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner appealed the determination of the respondent Board that his child is not eligible for a free public education in the Ridgewood school district. Petitioner contended that the house he owns in Ridgewood was for sale during the 2011-2012 school year because he and his wife have separated. Petitioner stated that his wife – who has custody of J.M.J., III – intends to move back to Ridgewood after their house sells; however, petitioner admitted that neither he nor his wife resided in Ridgewood during the 2011-2012 school year. The Board sought tuition reimbursement in the amount of \$12,600 for the full school year.

The ALJ found, *inter alia*, that: petitioner did not appear at the hearing on June 18, 2012; the Board did appear, and represented that petitioner had admitted that neither he nor his wife has been domiciled in Ridgewood since before September 2011; J.M.H., III, attended school in Ridgewood without interruption during the 2011-2012 school year; the respondent Board is entitled to tuition from petitioner for this time period; and the out-of-district tuition rate for the 2011-2012 school year is \$70 per day, or a total of \$12,600 for the whole year. The ALJ concluded that J.M.H., III, attended school but was not domiciled in Ridgewood during the 2011-2012 school year; accordingly, the ALJ ordered the petitioner to pay the Board \$12,600 in tuition for his period of ineligible attendance.

Upon a full and independent review, the Deputy Commissioner – to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-33 – concurred with the findings and conclusion of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this case, and the petitioner was ordered to pay tuition in the amount of \$12,600 for the period of J.M.H.'s ineligible attendance in the district's schools.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
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August 10, 2012

OAL DKT. NO. EDU 4726-12
AGENCY DKT. NO. 88-4/12

J.M.H., on behalf of minor child, J.M.H., III, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
VILLAGE OF RIDGEWOOD,
BERGEN COUNTY, :
RESPONDENT. :

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A. 18A:4-33* – adopts the Initial Decision as the final decision for the reasons set forth therein. Accordingly, the petitioner shall pay the Board \$12,600 in tuition costs for the 2011-2012 school year.

IT IS SO ORDERED.*



DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/10/12
Date of Mailing: 8/13/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 04726-12

AGENCY DKT. NO. 88-4/12

J.M.H., JR ON BEHALF OF MINOR CHILD J.M.H.,III

Petitioner,

v.

**BOARD OF EDUCATION OF THE VILLAGE OF
RIDGEWOOD, BERGEN COUNTY,**

Respondent.

J.M.H., petitioner, pro se

Jeffrey R. Merlino, Esq, for respondent

Record Closed: June 18, 2012

Decided: July 11, 2012

BEFORE **WALTER M. BRASWELL,** ALJ:

STATEMENT OF THE CASE

Petitioner, J.M.H. is challenging the non-residency determination of his son J.M.H.III, who is a student currently enrolled in the Ridgewood Public School District. J.M.H. contends that his wife has custody of his son and that he is entitled to continue his

schooling under the auspices of the Ridgewood School District. Ridgewood Board of Education (Board) contends that neither the son nor the parents live in Ridgewood.

On March 15, 2012, the Board determined that J.M.H.III is ineligible to attend school in the district. By letter of March 15, 2012, the Board notified petitioner of its determination. The Board seeks tuition reimbursement for the 2011-2012 school year. On April 11, 2012, the Bureau of Controversies and Disputes transmitted the contested case to the Office of Administrative Law. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A telephone pre-hearing was scheduled for May 3, 2012, and notices were mailed to the parties and to the attorney for the Board. A hearing was conducted on June 18, 2012, on which date the record closed. Petitioner did not appear for the hearing.

TESTIMONY AND FINDING OF FACTS

During the hearing Jeffrey R. Merlino, Esq. on behalf of the Board represented that:

1. On or about March 14, 2012 petitioner admitted to Dr. Daniel Fishbein, Superintendent of Schools, (hereinafter referred to as "Dr. Fishbein") and the Respondent Ridgewood Board of Education that neither parent of J.M.H., III, is domiciled in Ridgewood, New Jersey.
2. At the aforementioned time, petitioner also admitted that neither parent of J.M.H., III has been domiciled in Ridgewood since before September 2011.
3. J.M.H., III, has been attending Ridgewood Public Schools without interruption since before September 2011.
4. The out-of-district tuition rate to attend Ridgewood Public Schools for the 2011-12 school year is \$12,600 per year, or \$70.00 per day.
5. J.M.H., III continues to be educated by Ridgewood Public Schools.

6. J.M.H., III unlawfully attended Respondent's schools during the 2011-2012 school year.
7. Respondent is entitled to tuition from petitioner for this time period.

THE LAW

The general rule concerning attendance at school free of charge is that public schools are free for anyone over five and under 20 years of age who is domiciled within the district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home, and principle establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). For purposes of (Subsection A), the domicile of an unemancipated child is the domicile of the parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001). Thus, a child would routinely attend school in the district where his or her parents live.

Based upon the facts adduced, I **CONCLUDE** that J.M.H., III attended school but was not domiciled in Ridgewood during the 2011-2012 school year.

The Board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(b)(2). "Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance" Ibid. Jeffrey R. Merlino, Esq represented that the total annual per pupil cost for the 2011-2012 school-year was \$12,600.00. The per diem rate for the 2011-2012 school-year is \$70.00. J.M.H. was ineligible to attend Ridgewood High School during the 2011-2012 school-year and he has accumulated 180 days of ineligible attendance. Accordingly, I **CONCLUDE** that the total due the Board for the 2011-2012 school year is \$12,600.

ORDER

I hereby **ORDER** that the Board's decision to remove J.M.H., III. from its school district is **AFFIRMED**. I further **ORDER** that the Board's application for tuition reimbursement is hereby **GRANTED** in the amount of \$12,600.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 11, 2012
DATE

Walter M. Braswell
WALTER M. BRASWELL, ALJ

Date Received at Agency:

Date Mailed to Parties:
ljb

JUL 12 2012

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

#327-12

OAL DKT. NO. EDU 2135-12
 AGENCY DKT. NO. 11-1/12

WALTER FISHER,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF ELIZABETH, UNION COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

The record of this matter, the parties' proposed Settlement Agreement and General Release, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A. 18A:4-33* – approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/10/12

Date of Mailing: 8/13/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 02135-12N

AGENCY DOCKET NO. 11-1/12

WALTER FISHER.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF

ELIZABETH, UNION COUNTY,

Respondent.

Adam M. Epstein, Esq. appearing on behalf of petitioner (Caruso, Smith, Edell, Picini)

Karen A. Murray, Esq., for respondent (Elizabeth Public Schools)

Record Closed: July 24, 2012

Decided: July 25, 2012

BEFORE **WALTER M. BRASWELL, ALJ:**

This matter was transmitted to the Office of Administrative Law (OAL) on February 17, 2012, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted on March 13, 2012. A status conference was held on May 2, 2012 during which time the hearing was scheduled for June 20, 2012. On the date of the hearing the parties advised that this matter is settled and the terms of the agreement were put on the record. On July 24,

the OAL received the fully executed Settlement Agreement and Board Resolution, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement meets the requirements of N.J.A.C. 1:1-19.1 and that the stipulation should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 26, 2012
DATE

Walter M. Braswell
WALTER M. BRASWELL, ALJ

Date Received at Agency:

7-30-12
Laura Sanders

Date Mailed to Parties:
ljb

JUL 30 2012

**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

CARUSO SMITH EDELL PICINI, P.C.
60 Route 46 East
Fairfield, NJ 07004
(973) 667-6000
Attorneys for: Petitioner, Walter Fisher

FILED
JUL 25 P 3:05
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Walter Fisher,

Petitioner,

v.

Elizabeth Board of Education,

Respondent

Before the Commissioner of Education
OAL Docket No.: EDU 02135-2012-N

**SETTLEMENT AGREEMENT AND
GENERAL RELEASE**

This Settlement Agreement and General Release is made by and between the Elizabeth Board of Education (the "Board") whose administrative offices are located at 500 North Broad Street, Elizabeth, New Jersey 07207 and Walter Fisher ("Fisher"), whose address is 612 Ziegler Ave., Apt. 16, Linden, New Jersey 07036. In consideration of mutual promises and undertakings contained in this Settlement Agreement and General Release and for good and valuable consideration the receipt of which is hereby acknowledge, the undersigned parties state:

WHEREAS, on December 1, 2010, Fisher was employed as a security guard by the Board; and

WHEREAS, on December 3, 2010, a criminal Complaint was issued against Fisher for allegedly assaulting a student during the course of Fisher's employment by the Board; and

WHEREAS, on January 6, 2011, the Elizabeth Municipal Court dismissed the above-referenced criminal Complaint against Fisher;

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Fisher's defense counsel forwarded a demand letter to the Board, on or about February 25, 2011, seeking reimbursement from the Board for Fisher's

attorney's fees and costs associated with Fisher's legal defense relative to Elizabeth Municipal Court Complaint, Summons No. G 2010-052450;

WHEREAS, Fisher subsequently filed the Petition at issue demanding reimbursement from the Board in the amount of \$7,440.87;

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Settlement Agreement and General Release in order to avoid the need for further litigation; and

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Three Thousand Dollars (**\$3,000.00**) as full and complete indemnification of the attorney's fees and costs incurred by Fisher in relation to the Elizabeth Municipal Court Complaint, Summons No. G 2010-052450. The Board shall make this payment payable to Caruso Smith Edell Picini P.C., and shall send it directly to Fisher's legal counsel, Caruso Smith Edell Picini P.C. whose offices are located at 60 Route 46 East Fairfield, NJ 07004.
2. For and in consideration of the Indemnification set forth in Paragraph One (1) above, Fisher and his heirs, executors, administrators, successors and assigns, hereby forever release and discharge the Elizabeth Board of Education, its members, successors and assigns and all of its or their past or future members, officers, agents, employees, administrators, attorneys, fiduciaries, successors and assigns (whether acting as agents for the Board, its affiliates or its related entities or in their individual capacities) from any and all claims, demands, causes of action, fees and liabilities of any kind whatsoever (upon any legal or equitable theory, whether contractual, common-law, statutory, federal, state, local, or otherwise), whether known or unknown, which Fisher ever had, now has or hereafter may have against the Board by reason of any actual or alleged act, omission, transaction, practice, conduct, occurrence or other matter relating to any and all allegations contained in the Petition entitled Walter Fisher v. Elizabeth Board of Education, and bearing OAL Docket No.: EDU 02135-2012-N.

3. The parties agree that if any of the provisions, terms, clauses, waivers and releases of claims and rights contained in this Settlement Agreement and General Release are declared illegal, unenforceable, or ineffective in a legal forum of competent jurisdiction, such provisions, terms, clauses, waivers and releases of claims or rights shall be modified, if possible, in order to achieve, to the extent possible, the intentions of the parties. If any such provisions, terms, clauses, waivers and releases of claims and rights contained in this Settlement Agreement and General Release cannot be modified, the remaining provisions, terms, clauses, waivers and releases of claims and rights contained in this Agreement shall remain in full force and effect.

4. This Settlement Agreement and General Release set forth the entire terms between the parties, and fully supersedes any and all prior Agreements or understanding between them pertaining to the subject matter thereof.

5. Nothing contained in this Settlement Agreement and General Release constitutes an admission of any wrongdoing by either party and neither party shall be considered to be a prevailing party in this matter.

6. All terms of this Settlement Agreement and General Release are deemed material. The parties agree that this Settlement Agreement and General Release may not be altered, amended, modified, superseded, canceled or terminated except by an express written Agreement duly executed by all the parties or their attorneys on their behalf, which makes specific reference to this Settlement Agreement and General Release.

7. Fisher agrees that he has been fully and fairly represented by legal counsel throughout this proceeding.

8. This Settlement Agreement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

9. This Settlement Agreement and General Release is an agreement that shall be construed in accordance with the laws of the State of New Jersey.

10. All parties hereby agree that the terms of this Settlement Agreement and General Release are binding upon all parties, their heirs and their assigns.

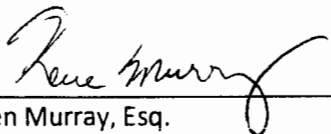


Walter Fisher

Dated:

6/25/12

Harold E. Kennedy, Jr.
Business Administrator/Board Secretary
ELIZABETH BOARD OF EDUCATION
Dated:



Karen Murray, Esq.
Board Counsel/Director for H.R.
ELIZABETH BOARD OF EDUCATION
Dated:

BOARD OF EDUCATION

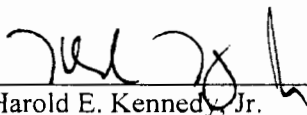
RESOLUTION

WHEREAS, the Elizabeth Board of Education and Walter Fisher have discussed a resolution of OAL Docket No. EDU 02135-2012N; and

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreement on file in the Office of the School Business Administrator/Board Secretary.

TRUE COPY APPROVED AND ADOPTED AT
THE ELIZABETH BOARD OF EDUCATION MEETING
HELD ON **June 28, 2012**



Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

OAL DKT. NO. EDU 14494-11
 (EDU 13213-10 on remand)
 AGENCY DKT. NO. 626-11/10

T.H. on behalf of minor children S.K.,
 S.H. and S.H.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE
 CITY OF BURLINGTON,
 BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the proposed settlement agreement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon such review, the Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A. 18A:4-33* – approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 8/10/12

Date of Mailing: 8/13/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 14494-10¹¹

AGENCY DKT. NO. 626-11/10

(ON REMAND OAL DKT. NO.
EDU 13213-10)

T.H. on behalf of S.K., S.H. AND S.H.,

Petitioners,

v.

**BURLINGTON CITY BOARD
OF EDUCATION,**

Respondent.

T.H., on behalf of S.K., S.H. and S.H, petitioners, pro se

Frank P. Cavallo, Esq., for respondent (Parker McCay, attorneys)

Record Closed: June 27, 2012

Decided: July 5, 2012

BEFORE **DENNIS P. BLAKE, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

My Initial Decision in this matter was signed on September 15, 2011. That Initial Decision stated that the parties had agreed to settle this matter. The Settlement Agreement was signed on July 21, 2011, by petitioner and the respondent's business

administrator. The matter was remanded on October 31, 2011. The Department of Education demanded that the Settlement Agreement be supplemented by respondent's execution of same either by a resolution of the Board of Education or by the signature of counsel for the Board. The remanded matter was transferred to the Office of Administrative Law on December 5, 2011. Conferences were conducted on April 18, 2012, June 13, 2012, and June 26, 2012. On June 26, 2012, respondent transmitted to the Office of Administrative Law the original Settlement Agreement with the addition of the signature of the Board attorney.

ORDER

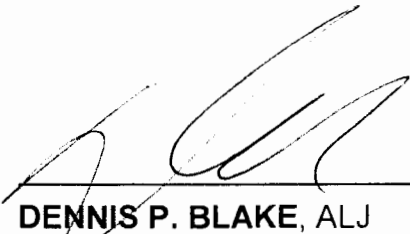
Based on the receipt of the Settlement Agreement, now bearing the signature of the counsel for the respondent Board of Education, I **CONCLUDE** that the issue which required the remand in this matter has been appropriately addressed. Thus, I hereby **ORDER** that the properly executed agreement be forwarded to the Department of Education.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 5, 2012
DATE


DENNIS P. BLAKE, ALJ

Date Received at Agency:

7/11/12

Date Mailed to Parties:

7/10/12

/bal

1 of 3

R-1
in EVIN
7.21.11

T.H. o/b/o S.K, SH & SH,
Petitioner, 2012 JUN 27

P 2:48

Office of Administrative Law
CAL Docket No. EDU13213-20
Agency Ref. No. 020-11/10

v.

Burlington City Bd. of Educ.
Respondent

Civil Action

Settlement Agreement

The Petitioner, Trennace I. Hams, residing at 619 Cooper St., Beverly, New Jersey 08010, and the Respondent, Burlington City Board of Education, with principal offices located at 518 Locust Avenue, Burlington, New Jersey, 08016, hereby enter into the following settlement of the above referenced matter.

WHEREFORE, the Petitioner filed the present Petition of appeal, challenging the District's determination that the Petitioner and her child did not reside within the Burlington City School District during the 2009-2010 and 2010-2011 school years.

WHEREFORE, the Petitioner has acknowledged, during the hearing before the Honorable Dennis Blake, ALJ, that she currently resides in Beverly and has, at all relevant times, resided in Beverly.

WHEREFORE, Petitioner further acknowledges that her children were ineligible to attend the Burlington City School District during the 2009-2010 and 2010-2011 school years;

WHEREFORE, an order has been entered by the Honorable Dennis Blake, ALJ, dismissing the Petitioner's appeal and assessing tuition in the amount of \$131,922.00 against the Petitioner, pursuant to N.J.S.A. 18A:38-1b(2) and N.J.A.C. 6A:22-4.1 and -4.2.

It is hereby agreed as follows:

1. The Burlington City Board of Education will drop the Petitioner's children from its rolls effective immediately.
2. The Petitioner will ^{immediately} enroll her children in the Beverly City School District, their district of residence.
3. The Burlington City ~~Board~~ Board of Education will not seek to enforce the order entered by the Honorable Dennis Blake, ALJ, on July 21, 2011, unless the Petitioner seeks to reenroll her children in the Burlington City School District.

10/3

Trennae I. Harris - 7-21-2011
Trennae I. Harris Date

Cathy Wilkie - 7-21-11
Cathy Wilkie Date
School Business Administrator

Frank P. Cavalli, Jr.
Frank P. Cavalli, Jr., Esq.
Attorney for Burlington City
Board of Education

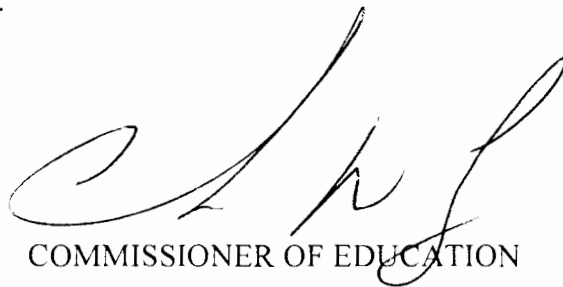
OAL DKT. NO. EDU 1202-12
AGENCY DKT. NO. 359-12/11

ARTIE WILLIAMS, :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE :
CITY OF JERSEY CITY, :
HUDSON COUNTY, :
RESPONDENT. :

The record of this matter, the proposed "Stipulation of Settlement Agreement," and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C. 1:1-19.1* have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 8/17/12

Date of Mailing: 8/17/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01202-12N

AGENCY DKT. NO. 359- 12/11

ARTIE WILLIAMS,

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY
OF JERSEY CITY, HUDSON COUNTY,**

Respondent.

Wayne J. Oppito, Esq., for petitioner Artie Williams (N.J. Principals & Supervisors Association)

Lester E. Taylor, Esq., for respondent Board of Education of the City of Jersey City, Hudson County (Florio Perrucci Steinhardt & Fader, attorneys)

Record Closed: July 16, 2012

Decided: July 20, 2012

BEFORE **EVELYN J. MAROSE, ALJ:**

Petitioner, who claims tenure status, asserted that the Board reduced his salary from \$120,893.28 to \$100,795.44 in violation of the tenure laws. On January 26, 2012, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for

hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A prehearing was conducted on February 28, 2011. Prior to the commencement of a hearing, in May 2012 a Stipulation of Settlement Agreement was prepared and executed on behalf of the Jersey City Public School District on May 30, 2012, and by Artie Williams on June 14, 2012. The Settlement Agreement meets the standards expressly established by the State Board of Education in In re Cardonick, 1990 S.L.D. 842, 846. A Board Resolution approving the settlement was made on June 28, 2012.

The record was left open pending receipt of the executed Stipulation of Settlement Agreement and a certified copy of the Board Resolution. The documents were received July 10, 2012, at which time the record closed. A copy of the Settlement Agreement and Release is attached hereto and made part hereof. Thereafter, by letter dated July 16, 2012, in accordance with Paragraph 10 of the Stipulation of Settlement Agreement, the petition was withdrawn by counsel for petitioner. A copy of the letter withdrawing the petition is also attached hereto and made a part hereof.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the Signatures of the parties or their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

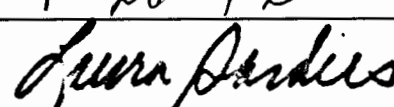
July 20, 2012

DATE



EVELYN J. MAROSE, ALJ

Date Received at Agency:

7-26-12


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:

JUL 26 2012

kep

LESTER E. TAYLOR, III, ESQ.
FLORIO PERRUCCI STEINHARDT & FADER, L.L.C.
218 Route 17 North
Rochelle Park, New Jersey 07662
(201) 843-5858
ltaylor@florioperrucci.com
Attorneys for Respondent

Artie Williams,

Petitioner,

v.

State Operated School District of the
City of Jersey City, Hudson County,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Dkt. No.: EDU 01202-2012 N
Agency Ref. No.: 359-12/11

**STIPULATION OF SETTLEMENT
AGREEMENT**

This Stipulation of Settlement Agreement (hereinafter "Agreement") is made and entered into on this 14 th day of June 2012, by and between the Jersey City Public School District, (hereinafter referred to as "Respondent") and Artie Williams (hereinafter "Petitioner"). Petitioner and Respondent may be collectively referred to herein as the "Parties."

The Parties to this Agreement mutually understand and agree to the following:

WHEREAS, on or about December 12, 2011, a petition of appeal was filed by Petitioner with the Commissioner of the New Jersey Department of Education ("Commissioner"), challenging the reduction in his salary following his transfer from Athletic Supervisor of Dickinson High School to Crisis Intervention Teacher at M.S.

40.

WHEREAS, on or about January 26, 2012, Respondent filed an Answer in response to the above-referenced petition of appeal with the Commissioner.

WHEREAS, the Parties to this Agreement have engaged in pre-trial discovery and desire to resolve this matter in lieu of potentially protracted and costly litigation.

WHEREAS, the Parties to this Agreement have engaged in good faith negotiations and hereby agree to resolve the instant matter in dispute according to the following terms:

1. Respondent, Jersey City Public School District, shall restore Petitioner's salary to level before he was transferred from Athletic Supervisor of ~~Dickinson~~ ^{Lincoln} High School to Crisis Intervention Teacher at M.S. 40, retroactive to September 1, 2011.

2. Respondent, Jersey City Public Schools District, shall freeze Petitioner's salary at the restored level until the salary guide for the position of Crisis Intervention Teacher reaches the amount of Petitioner's restored salary. Thereafter, Petitioner will progress on the salary guide for the position of Crisis Intervention Teacher.

3. Petitioner shall withdraw and/or otherwise consent to the settlement of the instant matter subject to the provisions of Paragraph 1 and Paragraph 2.

4. After voluntary settlement negotiations, the parties believe it is fair and reasonable to resolve the instant dispute in the manner described in Paragraph 1 and Paragraph 2.

5. Both Parties have had sufficient time to review the instant Agreement and accordingly, both Parties enter the instant Agreement freely and voluntarily and fully understand and consent to the terms and conditions referenced herein.

6. Petitioner, Artie Williams, has had sufficient time to consult with his attorney, Wayne Oppito, Esq., fully understands his rights in the instant matter, and voluntarily waives his right to a hearing and/or to otherwise set forth a defense in the instant matter.

7. The instant Agreement is in the public interest as it will avoid the time and expense of potentially protracted and costly litigation.

8. Petitioner, in consideration of the instant Agreement, hereby waives and releases Respondent, and its officers, employees, agents, and assigns, from any and all causes of action, known or unknown, from the beginning of time up to and including the effective date of this Agreement concerning the herein petition.

9. The Parties in this Agreement specifically understand and agree that, pursuant to N.J.A.C. 6A:3-1.13(d), the instant Agreement is subject to ratification and approval by the Jersey City Board of Education.

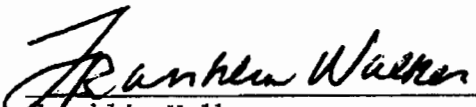
10. Upon the approval of this Agreement by the Jersey City School District, the instant petition of appeal is hereby withdrawn with prejudice and will be memorialized in writing by Wayne J. Oppito, Esq., attorney for petitioner, to the Honorable Evelyn J. Marose, ALJ. Petitioner acknowledges and fully agrees with the withdrawal of the petition.

11. To the extent allowed by law, the Parties to this Agreement shall keep the terms of the instant Agreement confidential.

12. Petitioner and Respondent acknowledge that this Agreement is not an admission on either party's part of any wrong-doing or liability. Accordingly, this Agreement may not be admissible in any forum as an admission, but only in an action to enforce this Agreement.

In consideration of the terms stated herein, both Parties hereby enter the instant Agreement freely and voluntarily.

For Respondent
Jersey City Public Schools District:


Franklin Walker
Interim Superintendent

Date: 5/30/12

For Petitioner
Artie Williams:


Wayne Oppito, Esq.

Date: 6/14/2012

#337-12A

STATE BOARD OF EXAMINERS DKT. NO. 0910-146;
COMMISSIONER APPEAL DKT. NO. 3-8/11A

IN THE MATTER OF THE :
REVOCATION OF THE CERTIFICATES : COMMISSIONER OF EDUCATION
OF BRIAN TAYLOR BY THE : DECISION
STATE BOARD OF EXAMINERS. :

Order of Revocation Decision by the State Board of Examiners, August 1, 2011

For the Respondent-Appellant, Michael T. Barrett, Esq.

For the Petitioner-Respondent State Board of Examiners, Farha Ahmed, Deputy Attorney
General (Jeffrey S. Chiesa, Attorney General of New Jersey)

Appellant challenges the determination of the New Jersey State Board of Examiners (Board of Examiners) that his actions warranted the revocation of his teaching certificates. The Commissioner has thoroughly reviewed the record of the proceedings before the Board of Examiners and the parties' appellate papers, and concurs with the Board of Examiners' holdings.

The facts have been amply set forth in the various adjudications of the tenure charges – including a Commissioner Decision and an affirmance of same by the Superior Court, Appellate Division – which underlay the Board of Examiners' action against appellant's certificates. Those facts reveal that appellant was found guilty of insubordination towards his administrative superiors and inappropriate behavior towards students, parents and colleagues – the latter behavior having included a physical altercation with a fellow teaching staff member. The Commissioner's and Appellate Division's findings of unbecoming conduct constitute the

law of the case and will not be relitigated here. Under *N.J.A.C.* 6A:9-17.5, such findings may serve as the basis for revocation of teaching certification.

The Board of Examiners provided appellant with the opportunity to present information which might mitigate against action on his certificates. In response, appellant invoked the New Jersey Law Against Discrimination (NJLAD) *N.J.S.A.* 10:5-1 *et seq.*, arguing that his behavior had been caused by depression – for which he should not be punished. For this proposition, appellant relied on a letter report by James R. Cowan, M.D., in which Cowan concluded that appellant was suffering from depression “associated with the present experience at the school where he teaches.” (Letter Report dated January 23, 2008 from James R. Cowan, M.D. to Florence B. Eatman, M.D., attached to Item #10 of respondent’s statement of items comprising the record.)

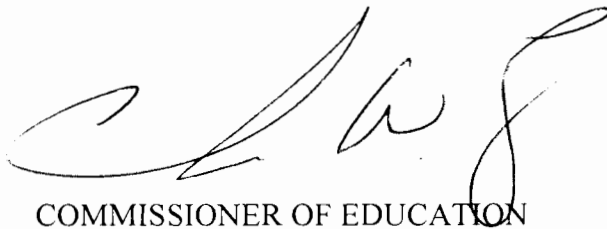
Cowan’s report did not, however, contain any determination that depression had caused appellant’s unbecoming behavior; nor would that have been appropriate insofar as Cowan had met with appellant on one occasion only – after the offending behavior had occurred – had administered no testing, and had based his assessment of appellant exclusively upon appellant’s own account of his background and situation. Thus, appellant’s contention that his aggressive behavior was caused by depression lacks factual support.

Further, even if appellant had proven that his behavior had been the result of a depressive disorder, the Board of Examiners would not have been precluded from revoking his teaching certificates. To establish the elements of a *prima facie* discriminatory discharge, the plaintiff employee must prove (1) that he or she was handicapped, (2) that he or she was performing the job at a level acceptable to the employer, (3) that he or she was fired, and (4) that the employer sought to fill the job after he or she left. *Jansen v. Food Circus Supermarkets, Inc.*,

110 N.J. 363, 382 (1988) (emphasis added). Since it has been determined that appellant had not been performing his job acceptably, appellant cannot prove one of the four necessary elements of a claim under the NJLAD. Moreover, the Appellate Division has addressed the issue and has determined that it concurs “with the federal authority that laws protecting the handicapped from employment discrimination are not intended to protect against crime or egregious conduct which, if committed by any other employee, would [warrant an] adverse employment decision. *Barbera v. Di Martino*, 305 N.J. Super. 617, 640 (App. Div. 1997).

In summary, the Commissioner is not persuaded that there is any basis to disturb the decision of the Board of Examiners to revoke appellant’s certificates.¹ Accordingly, said decision is affirmed and the appeal is dismissed.

IT IS SO ORDERED.²



COMMISSIONER OF EDUCATION

Date of Decision: 8/17/12

Date of Mailing: 8/17/12

¹ Pursuant to N.J.A.C. 6A:9-17.10, appellant may file an application for a new certificate upon the satisfaction of the criteria in N.J.A.C. 6A:9-17.10(b). Those criteria include the provision of evidence of rehabilitation for the unbecoming conduct. N.J.A.C. 6A:9-17.10(b)(3). It is solely the responsibility of appellant to seek and realize that rehabilitation.

² Pursuant to P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.

IN THE MATTER OF NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF STATE BOARD OF EXAMINERS
BRIAN TAYLOR ORDER OF REVOCATION

DOCKET NO: 0910-146

At its meeting of December 2, 2009, the State Board of Examiners (Board) reviewed a decision forwarded by the Commissioner of Education that had dismissed Brian Taylor from his tenured position with the East Orange School District (East Orange) for charges of unbecoming conduct. *In the Matter of the Tenure Hearing of Brian Taylor*, Docket No. 307-09 (Commissioner's Decision, September 21, 2009). Taylor currently holds a Teacher of Elementary School Certificate of Eligibility, issued in July 1998 and a Teacher of Elementary School certificate, issued in September 1999. At its meeting of January 7, 2010, the Board voted to issue Taylor an Order to Show Cause as to why his certificates should not be revoked.

This case originated in September 2008 when East Orange certified tenure charges against Taylor alleging unbecoming conduct and/or other just cause. East Orange alleged that Taylor had engaged in inappropriate behavior toward students, inappropriate treatment of colleagues, insubordination to administrators and inappropriate treatment of parents.

After receiving Taylor's response to the tenure charges, the Commissioner of Education transmitted the case to the Office of Administrative Law (OAL). Administrative Law Judge (ALJ) Irene Jones heard testimony on several days during March and April, 2009. After receiving post-hearing submissions, the record closed and the ALJ issued an Initial Decision on August 4, 2009. *In the Matter of the Tenure Hearing of Brian Taylor*, Dkt. No. EDU 11914-08 (Initial Decision, August 4, 2009).

In that decision, ALJ Jones found that Taylor had engaged in a verbal altercation with a female special education student in which he became abusive and called her an "untamed beast."

Id. at 4-5. The ALJ also found that Taylor was insubordinate toward his supervisor by attempting to block his entry into Taylor's classroom when he came to evaluate Taylor and by directly disobeying his supervisor's directive not to take a class to the school book fair so that Taylor might be evaluated on his lesson plan. *Id.* at 5. ALJ Jones also determined that Taylor was insubordinate when he stormed out of an administrative meeting on two occasions, inappropriately slamming the door, and inappropriate when he made disparaging remarks about his supervisor in front of other teachers and students. *Id.* at 6-7. The ALJ found that Taylor left his class unattended and, upon returning and finding his supervisor in the doorway, attempted to push him aside. *Id.* at 7-8. Taylor was also found to have engaged in unbecoming conduct when he called another student "stupid and retarded" and then refused to acknowledge or address the student's parent in a conference arranged to address the issue. *Id.* at 8-9. ALJ Jones also found that, on other occasions, Taylor approached his principal in a hostile and threatening manner, violated district policy by distributing a flier at a Superintendent's convocation, exhibited aggressive and inappropriate behavior toward another staff member in the presence of students, and initiated a physical altercation with a fellow faculty member. *Id.* at 9-14.

Based on the totality of the charges, ALJ Jones concluded that Taylor was guilty of unbecoming conduct. *Id.* at 14. The ALJ determined that Taylor "failed to control his temper, exercised poor judgment, made disparaging remarks about students and allowed his feelings of frustration and anger to overwhelm his professional demeanor." *Ibid.* The ALJ was not persuaded that Taylor deserved a second chance even though his behavior might possibly have been caused by depression. *Ibid.* Rather, ALJ Jones stated that Taylor's "single act of physical assault against a fellow teaching staff member, in the presence of students and staff, rises to the level of an act significantly alarming as to warrant dismissal." *Id.* at 14-15. That act, coupled

with Taylor's other behaviors caused other staff members to feel physically threatened. *Id.* at 15. ALJ Jones therefore concluded that East Orange's determination "to remove respondent was reasonable and necessary in order to insure the safety and well being of the students and staff." *Ibid.* Accordingly, the ALJ affirmed Taylor's dismissal from his tenured position. *Ibid.*

In a decision dated September 21, 2009, the Commissioner of Education concurred with the ALJ's factual findings in the case: "Upon a reasoned review of the record..., the Commissioner is satisfied that the ALJ's recitation of testimony is both accurate and thorough, and that she carefully measured its relevance to the charges, conflicts, inconsistencies, potential biases, and the plausibility of its content in deciding which testimony to credit in reaching her findings of fact." Commissioner's Decision, slip op. at 7. The Commissioner further concurred with the ALJ that East Orange had sustained its burden of proving 12 out of the 13 charges of unbecoming conduct against Taylor by a preponderance of "the competent, relevant and credible evidence." *Ibid.* In assessing the appropriate penalty, the Commissioner considered Taylor's service in East Orange, as well as "the stresses and strained relationships that may exist in any employment relationship whether in the public or private sectors." *Id.* at 10. Those factors, however, were outweighed by Taylor's demonstrated "pattern of improper conduct toward students, staff and parents alike." *Ibid.* The Commissioner stated that, "based on this record, it cannot be said that respondent's behavior is an aberration; nor can it be said that it is more likely than not that such conduct would not be repeated in the future." *Id.* at 11. Under those circumstances, the Commissioner could not "entertain the prospect of respondent's return to the District and the resultant potential for the perpetration of an unhealthy educational environment." *Ibid.* Accordingly, the Commissioner sustained the tenure charges of unbecoming conduct and affirmed Taylor's removal from his tenured employment. *Id.* at 12. The Commissioner

transmitted the matter to the State Board of Examiners for appropriate action regarding Taylor's certificates.¹ *Ibid.*

Thereafter, on January 7, 2010, the State Board of Examiners issued Taylor an Order to Show Cause as to why his certificates should not be revoked. The Order was predicated on the charges of unbecoming conduct that had been proven in the tenure hearing.

The Board sent Taylor the Order to Show Cause by regular and certified mail on January 13, 2010. The Order provided that Taylor's Answer was due within 30 days. Taylor responded on January 26, 2010. In that response, Taylor stated that the tenure allegations and the Commissioner's tenure decision were "self-explanatory." (Answer, ¶¶ 3-4.) He added that there was no basis to revoke his certificates. (Answer, ¶ 6.)

Thereafter, pursuant to *N.J.A.C. 6A:9-17.7(e)*, on February 5, 2010, the Board sent Taylor a hearing notice by regular and certified mail. The notice explained that it appeared that no material facts were in dispute. Thus, Taylor was offered an opportunity to submit written arguments on the issue of whether the conduct addressed in the Order to Show Cause constituted conduct unbecoming a certificate holder as well as arguments with regard to the appropriate sanction in the event that the Board determined to take action against his certificates. It also explained that upon review of the charges against him and the legal arguments tendered in his defense, the Board would determine if the charges proven in the tenure matter warranted action against his certificates. Thereupon, the Board would also determine the appropriate sanction, if any. Taylor was also provided the opportunity to appear before the Board to testify on the sanction issue. After granting Taylor's request to hold the matter in abeyance pending the

¹ Taylor appealed from the Commissioner's decision to the Appellate Division. In a decision issued on November 1, 2010, the Appellate Division affirmed the Commissioner's decision. *In the Matter of the Tenure Hearing of Brian Taylor*, Dkt. No. A-1082-09T2 (App. Div. November 1, 2010) (Unpublished Opinion).

resolution of his appeal, the Board received Taylor's response to the Hearing Notice on February 8, 2011.

In his response, Taylor denied that any "relationship difficulties with parents of students were the result of his actions." (Hearing Response, p. 2). He also included with his response, a report from a psychiatrist, Dr. James Cowan, who indicated that Taylor was suffering from Depression Disorder. (Hearing Response, p. 2). Taylor claimed that "[d]espite Dr. Cowan's recommendation for further psychological testing and counseling, the [district] failed to take any steps at all in follow up." (Hearing Response, p. 2). Taylor stated that since the district took no steps to address his condition, it shared some of the responsibility "in the events that occurred." (Hearing Response, p. 3). Taylor reiterated his claim that if he was given training in anger management, conflict resolution and handling difficult and disruptive students, he could again satisfactorily handle his teaching responsibilities. (Hearing Response, p. 3). Finally, Taylor argued that suspending or revoking his certificates was premature since he could still be given the opportunity to address his psychological and behavioral issues. (Hearing Response, p. 3).

The threshold issue before the Board in this matter is whether Taylor's conduct and his subsequent loss of tenure constitute conduct unbecoming a certificate holder. At its meeting of June 16, 2011, the Board considered the Order to Show Cause, Taylor's Answer and his response to the Hearing Notice. The Board determined that no material facts related to Taylor's offense were in dispute since he did not deny that he had lost his tenured position as a result of the tenure proceedings brought against him. Thus, the Board determined that summary decision was appropriate in this matter. *N.J.A.C. 6A:9-17.7(h)*. It is therefore ORDERED that the charges in the Order to Show Cause are deemed admitted for the purpose of this proceeding.

The Board must now determine whether Taylor's conduct, as set forth in the Order to Show Cause, represents just cause to act against his certificates pursuant to *N.J.A.C.* 6A:9-17.5. The Board finds that it does.

The Board may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. *N.J.A.C.* 6A:9-17.5. "Teachers ... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. There can be no dispute that Taylor's ongoing conduct in verbally abusing students and embarrassing them in front of their classmates, being disruptive at meetings, acting rude and disrespectfully to parents and administrators, engaging in threatening and aggressive behavior towards colleagues and in one instance, initiating a physical altercation, amply demonstrates his inability to be a role model for students. Moreover, his continued insistence that his actions were instigated by others' behavior and his refusal to accept responsibility for his own conduct speaks volumes about his unfitness to be a teacher. Psychological counseling and treatment may well be warranted in this case, but the Board does not owe Taylor the right to re-enter the classroom, especially given the pattern of egregious behavior in this matter. The Board therefore concludes that the only appropriate response to Taylor's breach is the revocation of his teaching certificates.

Accordingly, on June 16th, 2011, the Board voted to revoke Brian Taylor's Teacher of Elementary School Certificate of Eligibility and his Teacher of Elementary School certificate. On this 28th day of July 2011 the Board voted to adopt its formal written decision and it is therefore ORDERED that the revocation of Taylor's certificates be effective immediately. It is

further ORDERED that Taylor return his certificates to the Secretary of the State Board of Examiners, Office of Licensure, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Robert R. Higgins, Secretary
State Board of Examiners

Date of Mailing: April 1, 2011

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.

CARIDAD RODRIGUEZ,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF	:	DECISION
JERSEY CITY, HUDSON COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioner – a world language teacher employed in respondent’s school district since 2004 – appealed the determination of the respondent Board to withhold her 2010-2011 salary increment based on performance, alleging that the Board’s actions were arbitrary, capricious and unreasonable. The Board contended that the increment withholding was justified based upon deficiencies in petitioner’s teaching performance as documented in her evaluations from the previous school year.

The ALJ found, *inter alia*, that: petitioner was evaluated three times during the 2009-2010 school year – two formative reviews and a summative review; these evaluations concluded that petitioner’s performance was unsatisfactory and in need of improvement; petitioner’s second and third evaluations reflected no improvement in targeted performance areas; petitioner’s evaluations reflect genuine professional observations of her performance rather than retaliatory action, as suggested by petitioner; and, pursuant to *N.J.S.A. 18A:29-14*, petitioner received a letter dated August 24, 2010 which clearly advised that her increment was being withheld due to performance concerns. The ALJ concluded that petitioner did not meet her burden of demonstrating that the Board’s actions were arbitrary, capricious or unreasonable. Accordingly, the ALJ ordered the petition dismissed.

Upon independent review and consideration, the Commissioner concurred with the ALJ findings and conclusions in this matter; accordingly the Initial Decision of the OAL was adopted as the final decision and the petition was dismissed.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 17, 2012

OAL DKT. NO. EDU 5470-12
AGENCY DKT. NO. 551-9/10

CARIDAD RODRIGUEZ,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF	:	DECISION
JERSEY CITY, HUDSON COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner agrees with the Administrative Law Judge – for the reasons comprehensively detailed in her decision – that petitioner has failed to sustain her burden of establishing that the District’s withholding of her increment for the 2010-2011 school year was arbitrary, capricious or unreasonable.

Accordingly, the recommended decision of the OAL is adopted and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 8/17/12

Date of Mailing: 8/17/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 05470-12

AGENCY DKT. NO. 551-9/10

CARIDAD RODRIGUEZ,

Petitioner,

v.

BOARD OF EDUCATION OF THE

CITY OF JERSEY CITY,

Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich and Feintuch, attorneys)

Lester Taylor, Esq., for respondent (Florio, Perrucci, Steinhardt and Fader,
attorneys)

Record Closed: June 29, 2012

Decided: July 23, 2012

BEFORE **ELLEN S. BASS, ALJ:**

STATEMENT OF THE CASE

Petitioner, Caridad Rodriguez, a tenured teacher employed by the Jersey City Board of Education (the Board), appeals the Board's action to withhold her salary increment, in accordance with N.J.S.A. 18A:29-14.

PROCEDURAL HISTORY

Rodriguez filed her appeal with the Commissioner of Education (the Commissioner) on September 17, 2010. An answer was filed on behalf of the Board, and the contested case was transmitted to the Office of Administrative Law (OAL), on October 4, 2010. A hearing was conducted on June 29, 2012, at which time the record closed.¹

FINDINGS OF FACT

Background Facts

The parties stipulated to the pertinent background facts, and I **FIND**:

Rodriguez is a ten-month tenured world language teacher, who has taught at P.S. 37 since March 22, 2004. Her principal and primary evaluator is Marvin Strynar. Rodriguez was twice evaluated during the 2009-2010 school year using the school district Formative Evaluation Form, which rates teachers across four domains, including "Planning and Preparation"; "Students and Learning"; "Instruction"; and "Classroom Environment." In five sub-categories under each domain, teachers are rated as satisfactory, needs improvement, or unsatisfactory.

On or about March 1, 2010, Rodriguez received a Formative Evaluation report dated February 22, 2010, in which Strynar gave her an overall rating of "needs improvement" in the domain, "Classroom Environment." (J-3.) Rodriguez also received several "needs improvement" ratings across the remaining evaluative domains, and in such critical areas as "designing coherent instruction"; "linking assessment to instructional objective"; "employing effective questioning and discussion techniques"; and "properly providing feedback to students."

¹ The case was assigned to me on April 20, 2012, after the judge originally assigned to the matter recused herself due to a conflict of interest.

On or about June 2, 2010, Rodriquez received a Formative Evaluation dated May 24, 2010, in which Strynar gave her an overall rating of “needs improvement” in the “Planning and Preparation,” and “Students and Learning” domains. (J-4.) Strynar rated Rodriquez as “unsatisfactory” overall in the “Instruction” and “Classroom Environment” domains. A June 8, 2010, Summative Evaluation, prepared by Assistant Principal Sergio Cabrera, again rated Rodriquez as needing improvement in planning and preparation, and rated her as unsatisfactory in the domains of “Instruction,” “Classroom Environment,” and “Students and Learning.”

Strynar recommended an increment withholding in a June 8, 2010, memorandum to the district Executive Assistant of Human Resources. Via letter dated August 24, 2010, Rodriguez received written notice that her increment was being withheld for the 2010-2011 school year based on performance.

The Testimony

The testimony shed light on the learning environment in Rodriquez’s seventh-grade world language classroom. Rodriguez stated that her February 22, 2010, lesson was intended to support Black History Month by focusing on the achievements of well-known black Hispanics. The activity Strynar observed that day was not part of the course curriculum and was conducted in English. Rodriguez gave the students background information on a celebrity that she had selected, and they were required to answers a series of questions. Rodriguez urged that it was a well-planned, coherent lesson, with a clear objective. She admitted that the classroom was loud and that the children were talking among themselves, but she asserted that it was a group activity that required that the students interact. Rodriguez stressed that the children were having fun, noting that in her view learning can and should be enjoyable.

Strynar has served as principal of P.S. 37 for forty-five years. He explained that the evaluation process includes pre-observation and post-observation meetings between staff and administration, and an opportunity for the staff member to rebut in writing any unfavorable aspects of the evaluation. It is thus open and collaborative. Relative to his February 22, 2010, observation of Rodriquez, Strynar stated that the

“purpose of the lesson” was not clearly stated at the start of class; it likewise was not included in Rodriguez’s planning book. Strynar felt that the classroom environment was disorganized and lacked discipline. Rodriguez did not make a real effort to interact with her students.² Strynar did not disagree that learning should and could be enjoyable; he simply felt that that the clamor in Rodriguez’s classroom was tomfoolery, without any real instruction taking place. Interestingly, when asked if Strynar had fairly evaluated her performance that February day, Rodriguez did not reply with a resounding no. Rather, she explained that this was a middle school class; that the children are at a difficult age; that they like to fool around, but that most importantly they enjoyed the lesson.

The lesson observed by Strynar on May 24, 2010, reflected no improvement in the targeted performance areas. His evaluation was increasingly critical of Rodriguez’s teaching efforts. Instruction centered on telling time in Spanish. Strynar again found few positive interactions took place with the children; that Rodriguez did not clearly state the objective of the lesson; and that the lesson was conducted without appropriate follow through. Strynar renewed serious concerns about classroom decorum and discipline. He noted that Rodriguez did not establish a culture for learning, and he stated that “the lesson ended as it started with lack of order.” (J-4.) Strynar felt that the lesson was not meaningful for the children. He noted that clocks were used as tools for instruction, but felt that they were ineffective, and that the children were confused by them. Strynar emphasized that Rodriguez referred to the class as “Room 406,” which did not aid in establishing control or give the children the impression that she wished to get to know them personally.

Rodriguez again urged that her lesson was undeserving of criticism, explaining that the students were all actively engaged in learning. Although Strynar’s evaluation noted that no visuals were used, Rodriguez pointed to the clocks that were provided to each child. Strynar criticized Rodriguez for not assessing the children’s performance; but she urged that she did use an activity sheet to assess learning. She testified that the decorum of the class Strynar observed was appropriate.

² Strynar pointed out that typically children are on best behavior when he enters a room, making the lack of discipline he observed all the more troublesome.

Rodriguez argued, unsuccessfully, that a dispute with Strynar prior to the May 2010 observation was the true reason for his poor evaluation of her performance. Her testimony lacked credibility. Indeed, initially, when asked if she ever had a difference of opinion with Strynar, Rodriguez replied that she did not, and that she always got along well with him. She needed to be prompted by her attorney to recall an incident where she sustained an eye injury after a child hit her with a pencil. Although the nurse examined and released her, Rodriguez continued to feel discomfort. She asked to see the school doctor; Strynar did not grant her permission to do so. After seeking the intervention of her union representative, Rodriguez went to the doctor over Strynar's objection. Rodriguez contended that thereafter their relationship soured. Nonetheless, on cross-examination, she reiterated that she got along well with Strynar, and specifically denied that she felt that Strynar "was out to get her," was biased against her, or disliked her.

It seemed unlikely that Rodriguez's cordial relationship with Strynar would change so dramatically over so small a disagreement. Indeed, Strynar testified with credibility that he did not even recall the eye-injury incident until it came up at the hearing; his bemused tone was utterly believable. Moreover, it was uncontroverted that Rodriguez was never disciplined in any way for her visit to the doctor; she stated that she did not even receive as much as a verbal reprimand. Her perception that she was the victim of retaliation was nowhere mentioned in her rebuttal to the evaluation. Accordingly, I **FIND** that the evaluation of May 2010 reflected Strynar's genuine professional observations of Rodriguez's performance, and was not retaliation for her decision to visit a doctor during school hours over his objection.

Rodriguez contends that she was blindsided by the withholding of her increment. But a letter to her dated August 24, 2010, clearly advised that her increment was being withheld due to performance concerns. (J-7.) All of her evaluations during the 2009-2010 school year fell far short of professional expectations and put her on clear notice that administration was dissatisfied with her performance. Rodriguez's May 24, 2010, lesson evidenced no responsiveness to earlier administrative concerns.

However, it should be noted that Strynar testified that Rodríguez tended to call for the assistance of building security guards too frequently and that he heard noise and disruption in her classroom often when he walked through the building. While the evaluations clearly put Rodríguez on notice that classroom management was of concern, I **FIND** that these latter criticisms and observations were nowhere expressed in writing.

ANALYSIS AND CONCLUSIONS OF LAW

Rodríguez's increment was withheld pursuant to N.J.S.A. 18A:29-14, which provides that, "[a]ny board of education may withhold for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board." It is well-established that an increment is not a statutory right but "a reward for meritorious service to the school district." N. Plainfield Educ. Ass'n v. N. Plainfield Bd. of Educ., 96 N.J. 587, 593-94 (1984).

Rodríguez has the burden of demonstrating that the withholding of her increment was arbitrary, capricious or unreasonable. Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). The Kopera court confirmed that in reviewing the local board's decision, the Commissioner must engage in a two-part inquiry. He must determine "whether the underlying facts were as those who made the evaluation claimed, and . . . whether it was unreasonable for [the evaluators] to conclude as they did upon those facts" Id. at 296-97. As the Kopera court stated, "the scope of the Commissioner's review is . . . not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." Id. at 296. I **CONCLUDE** that Rodríguez has not met her burden of demonstrating arbitrary, capricious or unreasonable action by this Board.

Rodríguez did not convince me that her classroom environment was any different than as described by Strynar in his evaluations and in his testimony. Strynar was a credible witness, and I heard nothing that would suggest that his evaluations contained other than honest descriptions of the instruction he observed. That instruction was

sorely lacking in several respects, including an inability by Rodriquez to keep her students attentive to learning and a lack of focus to her lessons. She admitted that she found classroom management challenging, testifying that her class could be loud, and that the adolescents in her charge could be hard to control. Having determined that Strynar accurately portrayed the educational environment in Rodriquez's classroom, and it appearing that she was non-responsive to the concerns raised in her first evaluation, it was plainly reasonable for Strynar to withhold Rodriquez's salary increment. This record offers no basis upon which to overturn the action of the Board and its administration.

Rodriquez's contention that she did not receive proper notice of her increment withholding is unavailing. She is entitled by statute "to written notice of [the increment withholding], together with the reasons therefor" N.J.S.A. 18A:29-14. Strynar's testimonial accounts of informal observations, and his assertion that Rodriquez too frequently called security, were not documented by the Board in writing. But the August letter notifying Rodriquez of her increment withholding plainly cited performance concerns, and many such concerns were thoroughly documented in her written evaluations. Accordingly, I **CONCLUDE** that Rodriquez received the written notice required by the statute.

ORDER

Based on the foregoing, it is **ORDERED** that the relief sought by Rodriquez is **DENIED** and that the petition is **DISMISSED**.

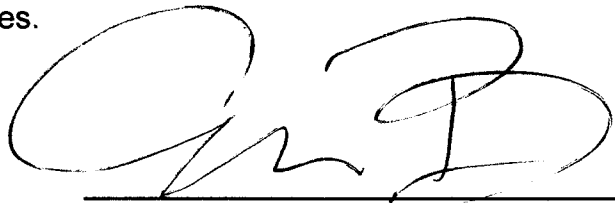
I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 23, 2012

DATE



ELLEN S. BASS, ALJ

Date Received at Agency:

Date Mailed to Parties:

JUL 23 2012



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Petitioner:

Caridad Rodriquez

For Respondent:

Marvin Strynar

EXHIBITS

For Petitioner:

None

For Respondent:

None

Joint Exhibits:

- J-1 Joint Stipulation of Facts
- J-2 Employee "Look-up"
- J-3 Formative Evaluation Form, dated February 22, 2010
- J-4 Formative Evaluation Form, dated May 24, 2010
- J-5 Summative Evaluation Form, dated May 27, 2010
- J-6 Memorandum, dated June 8, 2010
- J-7 Letter, dated August 24, 2010



State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHRISTOPHER D. CERF
Commissioner

August 16, 2012

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Morristown, NJ 07962

Edward Cridge, Esq.
Wills, O'Neill & Mellk
10 Nassau Street
P.O. Box 614
Princeton, NJ 08542

Dear Counsel:

I have reviewed the file in the matter captioned *In the Matter of the Tenure Hearing of Erin M. Markakis, School District of the Township of Bedminster, Somerset County*, Agency Dkt. No. 111-5/11, which has been held in abeyance pending Ms. Markakis' appeal of the State Board of Examiners' Order of May 12, 2011 revoking her teaching certificates.

In light of my decision of September 19, 2011 affirming such revocation, there is no basis upon which I can order this matter to proceed and it is, therefore, dismissed as moot.

Sincerely,

A handwritten signature in black ink, appearing to read "C. D. Cerf", written over the word "Sincerely,".

Christopher D. Cerf
Commissioner

CDC/MKD/MH
c: Executive County Superintendent

Mailed 8/17/12



State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHRISTOPHER D. CERF
Commissioner

August 22, 2012

T. [REDACTED] & L. [REDACTED] Flaherty, *Pro Se*
518 [REDACTED] Road
Pt. Pleasant, NJ 08742

David G. Lucas, Jr., Esq.
Wolff, Helies, Duggan, Spaeth & Lucas
Valley Park Professional Center
2517 Highway 35
Building K, Suites 201 & 202
Manasquan, NJ 08736-1994

Dear Parties:

I have reviewed the Board's Motion to Dismiss in the matter captioned *T.F. and L.F., on behalf of minor children, M.M. and K.F. v. Board of Education of the Borough of Manasquan, Monmouth County, Ron Kornegay and Rick Coppola*, Agency Dkt. No. 192-7/12. Therein the Board argues that as petitioners Thomas & Lynn Flaherty are neither the parent or legal guardian of minor child M.M., they have no legal standing to file this petition on this child's behalf. Petitioner's were provided an opportunity to file a response to the Board's motion but did not file any response.

Accordingly, as there is no authority for individuals to file a petition of appeal on behalf of a child for whom they have no legal responsibility, minor child M.M. is being removed from petitioner's petition of appeal.

Sincerely,

A handwritten signature in black ink, appearing to be "C. D. Cerf", written over a horizontal line.

Christopher D. Cerf
Commissioner

CDC/MJD/MH

MAILED 8/23/12

OAL DKT. NO. EDU 8598-12
 (EDU 10853-11 ON REMAND)
 AGENCY DKT. NO. 256-9/11

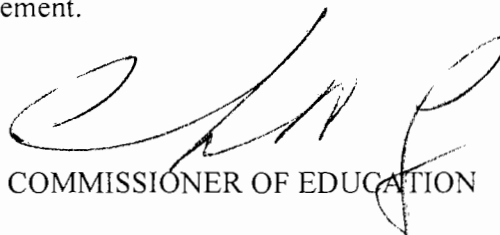
IN THE MATTER OF THE TENURE :
 HEARING OF FELICIA MORALES, : COMMISSIONER OF EDUCATION
 SCHOOL DISTRICT OF THE CITY OF : DECISION
 PLEASANTVILLE, ATLANTIC COUNTY. :

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision on Remand of the Office of Administrative Law (OAL), have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. On June 27, 2012, the Commissioner remanded this matter to the OAL based upon a determination that the settlement agreement recommended for adoption by the Administrative Law Judge ("ALJ") contained several deficiencies and the Initial Decision did not include the analysis required by *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Upon review of the revised agreement and the record on remand, the Commissioner finds that the deficiencies identified in the prior agreement have been corrected. The Commissioner also concurs with the ALJ that the proposed settlement is consistent with the established standards governing the settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

Date of Decision: 8/29/12
 Date of Mailing: 8/29/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. No. EDU 8598-12
(On Remand from EDU 10853-11)
AGENCY DKT. NO. 256-9/11

**IN THE MATTER OF THE TENURE
HEARING OF FELICIA MORALES,
SCHOOL DISTRICT OF THE CITY
OF PLEASANTVILLE, ATLANTIC
COUNTY.**

Raymond L. Hamlin, Esq., for petitioner (Hunt, Hamlin & Ridley, attorneys)

Keith Waldman, Esq., for respondent (Selikoff & Cohen, attorneys)

Record Closed: July 19, 2012

Decided: July 24, 2012

BEFORE **BRUCE M. GORMAN, ALJ**:

This matter was transmitted to the Office of Administrative Law on June 28, 2012, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures, and as placed on the record on March 29, 2012.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.
3. A copy of the disciplinary charges are attached hereto.

I **CONCLUDE** that this settlement is in accord with the requirements of N.J.A.C. 1:1-19.1 and of In Re Cardonick, 1990 S.L.D. 842, 846, and that it should be approved. In reaching this conclusion, I rely heavily on the testimony adduced during that portion of the board's case that was tried prior to the parties reaching this settlement. The evidence to that point showed that respondent served as executive secretary to the board's prior superintendent, Gloria Grantham. Upon succeeding Grantham, the new superintendent, Gail Bailey, immediately removed respondent from her position and brought in her own executive secretary, a person whom she perceived to be loyal to herself. By all appearances, Bailey's action was an attempt to dispose of an employee who she believed to be loyal to her predecessor. The balance of the board's case centered around certain computer records that demonstrated someone was surfing the internet during work hours and may have been utilizing respondent's assigned computer. The board was attempting to show that such activity occurred on dates when respondent sought overtime compensation. The board contended that such a claim for overtime constituted "theft." Even had the board been able to prove that respondent had surfed the internet during work hours, the board would have had great difficulty establishing that such conduct amounted to "theft." Further, the board maintained a policy regarding internet use that specified such activity was permitted with permission. At the point in time that the case settled, the prior superintendent Grantham was scheduled to testify for respondent. While the nature of Grantham's testimony remains unknown, had she testified she granted respondent permission to surf the internet during work hours because she was regularly kept late at work, then the board's case would have collapsed.

Given the dubious nature of the board's proofs, the board's decision to resolve this matter appears to be a wise one. For that reason, I am satisfied that the requirements of N.J.A.C. 1:1-19.1 and of In Re Cardonick, 1990 S.L.D. 842, 846 have been satisfied. I therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

7-24-12
DATE


BRUCE M. GORMAN, ALJ

Date Received at Agency:

7/27/12

Date Mailed to Parties:

7/27/12

/sd

DISCIPLINARY CHARGES

Person Bringing Charges:

Dr. Garnell Bailey, Superintendent

Address:

Pleasantville Board of Education
Administration Building
601 Mill Road
Pleasantville, New Jersey 08232

Charges Brought Against:

Felicia Morales, Secretary

The Respondent, Felicia Morales, a Secretary assigned to the transportation department at Pleasantville High School has been charged with Conduct Unbecoming. Said charges have been demonstrated by the Respondent as follows:

1. Respondent submitted false and misleading information in an effort to derive a financial benefit from the Pleasantville Board of Education with full knowledge that she was not entitled to said benefit
2. Respondent improperly utilized Board of Education property and computer equipment for non Board of Education work without any approval to do so by the Administration or the Board of Education.
3. Respondent's use of Board of Education property by way of its computer equipment for personal non-Board of Education business is a violation of Board of Education policy and expectations of its employees.
4. Respondent submission of false and misleading information was designed to enable her to collect overtime compensation in excess of \$8,000.00 for work which was allegedly performed on behalf of the Board of Education when said time was spent surfing the internet for non-Board of Education related information which included entertainment

sites, social networking sites and other unauthorized and unapproved sites.

5. Respondent defrauded the Pleasantville Board of Education by submitting documents which implied that the overtime compensation for which she was seeking authorization was due to her working beyond normal working hours in order to complete assignments which were requested and/or required which same could not be completed during the normal course of the work day.
6. Respondent created a false impression when she submitted a certification seeking payment for work which she performed notwithstanding the fact that Respondent was engaged in non-Board of Education business.
7. Respondent prepared a document certifying that the time which she was seeking payment for was time which she actually worked on Board of Education business.
8. By affixing a signature to the document, the Respondent appears to have committed an act of "false swearing" pursuant to *N.J.S.A. 2C:28-2*, in that Respondent made false statements under oath about overtime compensation that she believed she was entitled to with full knowledge that the amount of compensation which she claimed an entitlement to actually included time when she was not actively working on Board of Education business.
9. Respondent's conduct in submitting false and misleading timesheets is also in violation *N.J.S.A. 2C:20-4*, in that the Respondent submitted time sheets to the Board of Education with the intent to deceive that she in fact performed certain work when in reality she was engaged in non-Board of Education business .
10. Respondent's conduct in receiving compensation for alleged overtime work with full knowledge that she was not entitled to same amounts to conduct unbecoming a public

school employee and must result in her termination.

STATEMENT OF EVIDENCE IN SUPPORT OF CHARGE

1. Respondent is an employee with the Pleasantville Board of Education having worked in the district since in or about September 6, 1989, the capacity of secretary.
2. On May 6, 2011, Respondent submitted a request for payment of overtime for hours Respondent claimed to have spent working on Pleasantville Board of Education assignments during the summer months of July 2010 through September 2010.

Respondent submitted this request to the State Monitor assigned to the Pleasantville Board of Education.
3. Respondent thereafter forwarded timesheets for the periods which she claimed to have worked said overtime.
4. At the bottom of each timesheet is a signature line which requires employees to certify as to the hours claimed for payment.
5. In total, the Respondent submitted payment for overtime from July 27, 2010 to September 28, 2010.
6. Respondent claimed in the aforementioned documents that she was owed a total of \$8,543.52 from Petitioner.
7. To ensure Respondent completed the work that she claimed in the aforementioned timesheets, Petitioner, through its employees, agents and/or servants, reviewed the "user activity details" for the work station(s) utilized by Respondent during the relative time at issue.
8. The "user activity details" is a log of webpages visited by Respondent during the hours she claims to have been working on Board related assignments.

9. A review of this report for the periods provided by the Respondent revealed that

Respondent visited the following non-Board of Education related webpages, during times that she is alleged to have been working on Board of Education business:

a. Respondent visited PNCBank.com and GCU.com (Grand Canyon University) during the period of 09/06/10 to 09/18/10; **(The Respondent has no duties and responsibilities which involve said sites)**

b. Respondent visited "Black Rock Retreat," a Christian retreat center that hosts programs for Christian-centered organizations; **(The Respondent has no duties and responsibilities which involve said site)**

c. Respondent visited BFMAZEO.com, a shopping website during the period of 08/23/10 to 09/02/10; **(The Respondent has no duties and responsibilities which involve said site)**

d. Respondent again visited GCU.edu; **(The Respondent has no duties and responsibilities which involve said site)**

e. Respondent photius.com, a blog/forum partially centered around Christian/religious themes, **(The Respondent has no duties and responsibilities which involve said site)**

f. Respondent visited CAPEMAYLEWESFERRY.com, a travel website, **(The Respondent has no duties and responsibilities which involve said site)**

g. Respondent utilized web based mail services such as AOL and COMCAST, among others during the period of 08/09/10 to 08/21/10; **(The Respondent has no duties and responsibilities which involve said site)**

h. Respondent also attempted login to Facebook, Twitter and other chat logins during the times at issue; **(The Respondent has no duties and responsibilities which involve said site)**

i. Respondent visited sports fantasy websites such as MLB.FANHOUSE.com and FANTASYFOOTBALL.FANHOUSE.com; **(The Respondent has no duties and responsibilities which involve said site)**

j. Respondent also visited PRESSOFATLANTICCITY.com;

SHORENEWTODAY; READOZ.com;
TRACKER.FLIGHTVIEW.com; UNITED and
TRAVEL.UNITED.com; LUFTHANSA.com; ONETRAVEL.com;
CHEAPOAIR.com; SEATGURU.com; TRIPADVISER.com;
PAPERDIRECT.com; GCU.com; BRIEF THERAPY.org; and
BLACKCELEBRITYKIDS.WORDPRESS.com, among other
websites and search engines during the period of 07/27/10 to
08/07/10. **(The Respondent has no duties and responsibilities
which involve said sites)**

10. During the above stated work periods for which Respondent submitted certified time sheets, Respondent spent hours conducting her personal affairs.
11. Respondent thereafter billed the Board of Education for the services she certified to performing knowing full well the extent of her deception upon Petitioner.
12. The Respondent was compensated for hours of time she did not work notwithstanding the fact that she was not entitled to said compensation.
13. Such conduct on the part of Respondent was fraudulent and misleading and amounts to conduct unbecoming a public employee.
14. Respondent is responsible for the theft of public school funds, same being limited and necessary to the operation of the district and the payment of vendors and for services actually performed.
15. Respondent's conduct represents just cause to terminate Respondent by way of tenure charges.
16. Petitioner shall rely on the following: testimony of employees/agents familiar with Respondent's work station(s), duties, responsibilities and the breach of same; documents demonstrating Respondent's on-line activities during the work periods claimed by Respondent; and testimony and/or documents regarding pay received by Respondent during this period.

17. Petitioner reserves the right to use additional information relative to the allegations contained herein should same become available after completion of this document.



THE LAW FIRM OF
HUNT, HAMLIN & RIDLEY
COUNSELLORS AT LAW



FOUNDING PARTNERS
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RAYMOND L. HAMLIN
TERRY RIDLEY

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PATERSON OFFICE
418 GRAND STREET
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VIELKA VELAZQUEZ

KENYATTA K. STEWART†
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ALL REPLIES TO THE NEWARK OFFICE

†ALSO ADMITTED IN NY

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2012 JUL 17 P 2:30
JUL 17 2012

VIA REGULAR MAIL AND FACSIMILE (609) 441-3824

The Honorable Bruce M. Gorman, ALJ
Office of Administrative Law
1601 Atlantic Avenue, Suite 601
Atlantic City, New Jersey 08401

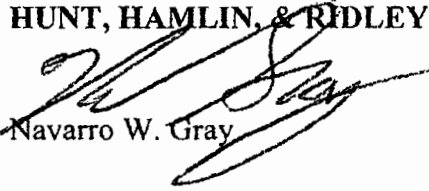
Re: **IN THE MATTER OF THE TENURE HEARING OF FELICIA MORALES, SCHOOL DISTRICT OF THE CITY OF PLEASANTVILLE, ATLANTIC CITY, AGENCY DKT NO. 256-9/11, OAL DKT NO. EDU 10853-11, COMMISSIONER DECISION NO. 270-12**

Dear Judge Gorman:

This office represents the Pleasantville Board of Education in the above-captioned matter. This letter is in response to the Commissioner of Education's Decision that concluded that the sufficient basis to approve the proposed settlement is lacking. Enclosed please find a copy of the resolution evidencing petitioner's ratification of the agreement, and a letter from the State Monitor setting forth his approval of the settlement. In addition, the Commissioner's finding that the settlement was not signed by the petitioner's attorney is inaccurate. My signature appears on the settlement agreement. Kindly advise if the enclosed submissions are acceptable.

Respectfully Submitted,

HUNT, HAMLIN, & RIDLEY


Navarro W. Gray

NG/eu
Enclosures
cc: file

PLEASANTVILLE SCHOOL DISTRICT

Administrative Offices
801 Mill Road, 3rd Floor
Pleasantville, New Jersey 08232-0960

James L. Riehman
State Fiscal Monitor
609-383-6800 x2543

The Honorable Bruce M. Gorman, A.L.J.
Office of Administrative Law
1601 Atlantic Avenue, Suite 601
New Jersey 08401 Atlantic City

Re: Felicia Morales v. Pleasantville Board of Education

Dear Judge Gorman:

I have reviewed the proposed Settlement between Felicia Morales and the Pleasantville Board of Education. Based on the evidence presented and the relative limited financial impact on the school district, I as the State Fiscal Monitor, assigned to the Pleasantville School District and with the authority of my position agree with the terms and conditions of the settlement reached by the parties to this litigation.

Very truly yours,


James L. Riehman
State Fiscal Monitor
Pleasantville School District

Pleasantville Public Schools

Mr. Dennis Mulvihill
Business Administrator/Board Secretary
E-mail: mulvihill.dennis@pps-nj.us

(609) 383-6800 – Ext. 2527
Fax: (609) 677-8118
Cell: (609) 517-4722

Page 1 of 2

J. J. Initial

April 25, 2012

I Certify, that during the Pleasantville Board of Education Regular Work/Action Meeting of April 24, 2012 the Board approved the following resolution with motion and vote reflected below:

RESOLUTION APPROVING THE SETTLEMENT OF THE CASES ENTITLED "IN THE MATTER OF THE TENURE HEARING OF FELICIA MORALES, SCHOOL DISTRICT OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY" AND "FELICIA MORALES V. CITY OF PLEASANTVILLE BOARD OF EDUCATION"

WHEREAS, the Board of Education and Felicia Morales have decided to resolve the matters currently pending before the Commissioner of Education under Agency Ref. No.: 256-9/11, and OAL Docket Number: EDU 10853-11, hereinafter the "Tenure Case," and Agency Ref. No.: 297-10/11, and OAL Docket Number: EDU 13390-11, hereinafter the "Petition for Overtime Case"; and

WHEREAS, the Board has had a full opportunity to investigate these matters, and based upon those investigations, has determined that this Stipulation of Settlement is fair and just, and causes the least disruption to the School District in that witnesses will not be taken away from their normal responsibilities and that given the voluminous amount of records, the settlement avoids the uncertainty of litigation and a more lengthy and expensive hearing process for both matters and possible appeals, and that Felicia Morales has raised defenses and objections to the manner in which the Board proffered the charges which may be meritorious and that there is good cause which warrants this settlement; and

WHEREAS, the Board of Education has determined that it is in the best interests of the Pleasantville School District, and the public at large to resolve the dispute existing between the Board of Education and Felicia Morales in that the long term costs to the District may far exceed the costs of settling the matter in the near term, and a settlement ensures the most efficient way in which to resolve this matter;

NOW THEREFORE BE IT RESOLVED, that the Pleasantville Board of Education approves the aforementioned settlement which will be on file with the Board Secretary's Office upon final approval by the Commissioner of Education. The material terms of the settlement are as follows:

1. Felicia Morales will return to work as a tenured secretary, upon Board approval in a secretary position, not within the executive offices. There will be no reduction in compensation, benefits or emoluments of employment in that regard;

Pleasantville Public Schools

Mr. Dennis Mulvihill
Business Administrator/Board Secretary
E-mail: mulvihill.dennis@pps-nj.us

(609) 383-6800 – Ext. 2527
Fax: (609) 677-8118
Cell: (609) 517-4722

Page 2 of 2

2. Ms. Morales shall forfeit ninety (90) days of salary which shall be deemed as an administrative leave without pay;
3. Ms. Morales shall receive thirty (30) days back-pay; and
4. Ms. Morales will withdraw the Petition seeking overtime compensation in the amount of \$8,543.52.

Motion by: Ms. Melanie Griffin Seconded by: Mr. Paul Moore, Jr. Yea: X

ROLL CALL:

Ms. Connie Graham	No
Mrs. Bey-Blocker	Yes
Ms. Famularo	Yes
Mr. McClellan	Absent
Mr. Moore	Yes
Ms. Griffin	Yes
Ms. Ketsy Alicea	Yes
Mrs. Seymore	Yes
Mrs. Graves	Yes

SEVEN YES; MOTION PASSED.

Thank you,


Dennis J. Mulvihill
Business Administrator/Board Secretary

DJM/gg

2012 JUL 19 A 9:18

GENERAL RELEASE AND WAIVER

In consideration for the promises and undertakings described in the Settlement Agreement dated March 29, 2012 and subject to the approval of the settlement in this matter by the State Fiscal Monitor, the Office of Administrative Law and the Commissioner of Education, without modification, I hereby release, waive and discharge the City of Pleasantville Board of Education, its successors and assigns, and all affiliated and related entities and their present and former board members, officers, employees and representatives, and their estates and/or heirs thereof from any and all claims which I, my estate and/or heirs may have against any of them. This releases and waives all claims, known and unknown, resulting from anything which has happened up to now, including claims for attorneys' fees.

Without limiting the scope of the foregoing provision in any way, subject to the approval of the settlement in this matter by the State Fiscal Monitor, the Office of Administrative Law and the Commissioner of Education, without modification, I specifically release all claims which were or could have been asserted by me in the action entitled *I/M/O Tenure Hearing of Felicia Morales*, Pleasantville Board of Education, Atlantic County, OAL Dkt. No. EDU 10853-11, Agency Dkt. No. 256-9/11, *Felicia Morales v. City of Pleasantville Board of Education*, Atlantic County, OAL Dkt. No. EDU-13390-2011S, Agency Ref. No. 297-10/11. I also release and waive all claims relating to or arising out of any aspect of my employment with the City of Pleasantville Board of Education, including but not limited to, all claims under Title VII of The Civil Rights Act, The Civil Rights Act of 1991 and the laws amended thereby; Sections 1981 through 1988 of Title 42 of the United States Code; the Employee Retirement Income Security Act of 1974; the Immigration Reform Control Act; the Fair Labor Standards Act; the Occupational Safety and Health Act; the Age Discrimination in Employment Act of 1967, the Older Workers Benefit

Protection Act of 1990, the Americans with Disabilities Act; the Family and Medical Leave Act of 1993; the New Jersey Family Leave Act, the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Wage and Hour Act, any related federal, state or local law claims, and any claims of discrimination based on race, age, sex, religion, color, creed, handicap or disability, citizenship, national origin and any other factor prohibited by any federal, state or local law, rule, regulation or guideline; any claim for wrongful discharge; any contract of employment, express or implied; any provision of the Constitution of the United States or the State of New Jersey; and any other law, common or statutory, of the United States, the State of New Jersey or any other state; any claims for the negligent and/or intentional infliction of emotional distress or specific intent to harm; any claims for attorneys' fees, costs and/or expenses; any claims for unpaid or withheld wages, severance pay, benefits, bonuses, deferred compensation, stock option awards, restricted stock awards, commissions and/or other compensation of any kind; and/or any other federal, state or local human rights, civil rights, wage and hour, wage payment, pension or labor laws, rules and/or regulations, and all claims growing out of any legal restrictions on City of Pleasantville Board of Education right to hire and/or terminate its employees, including all claims that were asserted and/or that could have been asserted by the me in this cause of action.

Subject to the approval of the settlement in this matter by the State Fiscal Monitor, the Office of Administrative Law and the Commissioner of Education, without modification, I also promise not to sue and I waive all claims against the City of Pleasantville Board of Education its successors and assigns, or any related und/or affiliated entities, based upon my claims covered by the Settlement Agreement and this General Release and Waiver.

Notwithstanding the foregoing, This release specifically excludes claims, if any: (a) arising under

any pension, earnings or tax sheltered annuity plan in which Releasor is a participant; (b) arising under the New Jersey Workers' Compensation Act or (c) arising from the breach of the settlement agreement giving rise to this release. Releasor is unaware of any factual basis for such claims.

I acknowledge that I was advised to consult with attorneys and have, in fact, consulted with my attorney, Keith Waldman, Esq., regarding this General Release and Waiver; that the terms of this General Release and Waiver have been explained to me by my attorneys; and that I have represented to my attorneys that I have read this General Release and Waiver and fully understands it and agree to be bound by it. I also acknowledge that I have been given a reasonable period of time within which to consider this settlement and the terms of this General Release and Waiver prior to executing it.

ACKNOWLEDGMENT

I HAVE CAREFULLY READ AND FULLY UNDERSTAND THE TERMS AND CONDITIONS OF THIS RELEASE AND WAIVER. I ACKNOWLEDGE THAT I HAD THE OPPORTUNITY TO REVIEW THIS RELEASE AND WAIVER WITH MY ATTORNEY, KEITH WALDMAN, ESQ, AND/OR ANYONE ELSE OF MY CHOOSING, AND TO DISCUSS WITH SUCH PERSONS THE TERMS AND CONDITIONS OF THIS RELEASE AND WAIVER AND MY RIGHTS UPON EXECUTION. I AGREE AND ACKNOWLEDGE THAT NO REPRESENTATIONS CONCERNING THE TERMS OR EFFECT OF THIS RELEASE WERE MADE BY CITY OF PLEASANTVILLE BOARD OF EDUCATION OR THEIR ATTORNEYS OTHER THAN AS SET FORTH IN THE DOCUMENT AND THAT I HAVE VOLUNTARILY SIGNED THIS RELEASE AND WAIVER AS MY OWN FREE ACT WITH FULL KNOWLEDGE OF ITS TERMS AND CONDITIONS. WHICH ARE FINAL AND BINDING UPON ME.



FELICIA MORALES

Dated: 7-18-12

STATE OF NEW JERSEY :
: S.S.
COUNTY OF ATLANTIC :

I CERTIFY that on July 18, 2012, Felicia Morales, personally came before me and acknowledged under oath, to my satisfaction, that she is named in and personally signed this document and that she voluntarily executed same.



ELVA THOMAS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 7, 2014

OAL DKT. NO. EDU 10856-11
AGENCY DKT. NO. 246-8/11

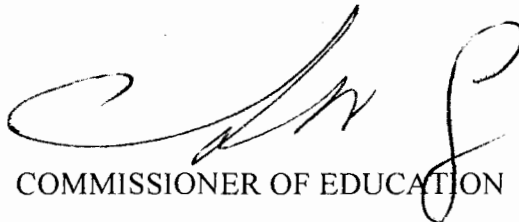
IN THE MATTER OF THE TENURE HEARING :
OF JOHN COOK, SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF PEMBERTON, : DECISION
BURLINGTON COUNTY. :

The record of this matter, the parties' proposed Settlement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon careful review of the record, the Commissioner concurs with the Administrative Law Judge that, under the circumstances of this matter, the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 8/29/12
Date of Mailing: 8/29/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10856-2011

AGENCY DKT. NO. 246-8/11

**IN THE MATTER OF THE TENURE
OF JOHN R. COOK, TOWNSHIP
OF PEMBERTON, BURLINGTON COUNTY.**

Alan R. Schmoll, Esq., for petitioner, Township of Pemberton (Capehart & Scatchard, attorneys)

Steven R. Cohen, Esq., for respondent, John Cook (Selikoff & Cohen, attorneys)

Record Closed: July 19, 2012

Decided: July 20, 2012

BEFORE LAURA SANDERS, Acting Director and Chief ALJ:

On August 25, 2011, the Board of Education of the School District of the Township of Pemberton, Burlington County ("the Board") certified tenure charges against the respondent, Major John Cook, a member of the tenured teaching staff employed by the district. Major Cook filed an answer denying the charges, and the Commissioner, having deemed the charges sufficient, if true, to warrant dismissal or reduction in salary, transmitted the contested case to the Office of Administrative (OAL), pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. It was filed at the OAL on September 13, 2011.

The Board charged Major Cook with conduct unbecoming a teaching staff member and other just cause, in relation to the allegation that he "physically initiated and forcibly accosted" a student walking in the hallway, in violation of the policy prohibiting either physical force or threat thereof to maintain discipline.

After a prehearing conference on September 28, 2011, the matter was scheduled for an in-person conference to view a DVD of the incident of the issue. Following several telephone status conferences to allow the parties to pursue settlement, an in-person settlement conference was held on January 31, 2012. At that conference, the parties agreed to the outline of a settlement, and the hearing scheduled for February 16, 2012, was adjourned to afford the parties time to finalize and execute settlement documents. A fully executed stipulation of settlement and certified copy of a Board resolution approving the settlement were received by me on July 19, 2012, at which time the record closed.

Based upon a review of the attached settlement agreement, together with Borgess's testimony on the record, I **FIND** as follows:

1. The nature of the charges has been documented by the submission of a Statement of Charges and Certificate of Determination to the Commissioner. John Cook (Major, retired) has been employed by the Board since September 1, 1997. Among his duties, he has served as senior Army instructor of the Pemberton High School JROTC.
2. Under the terms of the settlement agreement, the tenure charges against Major Cook shall be withdrawn and dismissed with prejudice. The Board agrees to reinstate Major Cook to all teaching, coaching/extracurricular assignments and army-related activities forthwith.
3. With regard to compensation, the following shall occur. A one-time fine of the loss of two and one-day days of vacation time from the 2011-2012 school year, which is equivalent to the sum of \$1,250, will be imposed on Major Cook.

Major Cook will be paid for the salary previously withheld for the period August 25, 2011, through December 24, 2011, at the 2011-2012 negotiated pay rate. Additionally, he will receive one JROTC stipend for the 2011-2012 year, equaling \$2,673, due and payable in June 2012. He will not receive a stipend for seventh period instruction in either the 2010-2011 or 2011-2012 school years; however, he will receive one in the 2012-2013 school year if he is scheduled for seventh period instruction.

4. During the transition of students through hallways, Major Cook will remain in his classroom; however, in the event that he happens to observe student conduct he believes to be in violation of school rules, he will report it to an assistant principal, and will not interact directly with students regarding violation of school rules. Inside the classroom, he will comply with the school handbook's regular rules and procedures governing student discipline.

5. As part of the settlement, Major Cook has agreed to withdraw his November 18, 2011, Notice of Tort Claim against the Board, and has tendered a general release, to be effective upon approval by the Commissioner of the Settlement.

6. If proven, the charges associated with the incident would have been serious; however, the evidence reviewed during the settlement discussion fell far short of the types of conduct that the Commissioner has deemed worthy of such penalties as increment withholding, loss of months of salary, or dismissal.

7. The proposed settlement agreement is with the consent of all parties. It has been approved by the Board of Education, as confirmed by the attached Board resolution.

8. By the terms of the proposed settlement agreement, Major Cook has entered into this agreement with a full understanding of his rights. He further

confirmed on the record that he was represented by counsel, counsel fully explained his rights, and he was satisfied with that representation.

9. The Board's resolution indicates the settlement is prudent and fulfills the public interest with regard to these matters, and I so **FIND**. Further, by entering into this agreement, the Board has avoided costly and uncertain litigation involving taxpayer funds.

10. As the tenure charge would be dismissed with prejudice, if the Commissioner of Education approves the settlement, the Commissioner's obligation to refer matters of sufficient magnitude to affect general tenure rights would not be implicated.

I therefore **CONCLUDE** that this settlement agreement meets the requirements of N.J.A.C. 6A:3-5.6 and that approval of this settlement is in the public interest.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 20, 2012
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency:

Date Mailed to Parties:

July 20, 2012

/caa

**SELIKOFF
& COHEN, P.A.**

A Labor and Employment Law Firm for more than 30 years

*Keith Waldman**

*Steven R. Cohen**

*Michael C. Damm**

*Stacey A. Cutler**

Kathleen L. Kirvan

*Joel S. Selikoff**

Of Counsel

members NJ bar

members DC bar

members PA bar

July 18, 2012

RECEIVED

Via UPS Ground

Honorable Laura Sanders, Chief A.L.J.

State of New Jersey

Office of Administrative Law

9 Quakerbridge Plaza

P.O. Box 049

Trenton, NJ 08625-0049

2012 JUL 19 P 2:47

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

700 East Gate Drive

Suite 502

Mount Laurel, New Jersey

08054-3823

t 856-778-6055

f 856-778-6056

selikoff.cohen@verizon.net

Re: I/M/O Tenure Hearing of John R. Cook,
School District of the Township of Pemberton, Burlington County
OAL Dkt. No. EDU-10856-2011S
Agency Ref. No. 246-8/11

Dear Judge Sanders:

I have enclosed an original of Joint Request for Approval of Settlement Including Withdrawal of Tenure Charges ("Joint Request") for your review and approval. You will note that the Joint Request has been executed by both parties and, as to the Board, please note that Exhibit 2 confirms that the Board has taken official action to approve same.

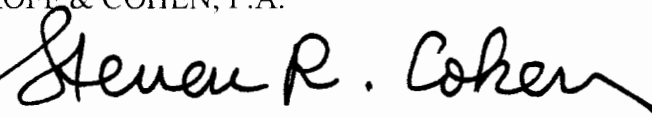
With regard to the Board's resolution (Exhibit "2"), you will note that it does not refer to Major Cook by name for privacy reasons; rather it refers to the Board "approv[ing] a settlement with the employee in position number BJY." Accordingly, I am also enclosing a copy of Mr. Schmoll's email to me of July 17, 2012 1:27 PM, which contains an email string between School Business Administrator Pat Austin and him, confirming that the resolution pertains to Major Cook.

We will await Your Honor's determination and, hopefully, your submission of the Joint Request to the Commissioner of Education for his review and approval.

Please contact Mr. Schmoll or me should you require any additional information in connection with the Joint Request.

Respectfully yours,
SELIKOFF & COHEN, P.A.

BY:


STEVEN R. COHEN

scohen@selikoffcohen.com

SRC:jlm

Enclosure – Joint Request

c: Alan R. Schmoll, Esq. (via UPS Ground)(w/ encl.)
Major John R. Cook (via email only)(w/out encl.)
Sherry Scull, President, PTEA (via email only)(w/out encl.)
Debbie Syer, NJEA UniServ Rep., Reg. #5 (via email only)(w/out encl.)

Alan R. Schmoll, Esquire
CAPEHART & SCATCHARD
Suite 300S
8000 Midlantic Drive
Mount Laurel, NJ 08054-1526
(856) 914-2072
Counsel for Petitioner, Pemberton Township
Board of Education

Steven R. Cohen, Esquire
SELIKOFF & COHEN, P.A.
700 East Gate Drive
Mt. Laurel, NJ 08054
(856) 778-6055
Counsel for Respondent,
John R. Cook

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2012 JUL 19 P 2:47

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE TENURE
HEARING OF JOHN R. COOK,
SCHOOL DISTRICT OF THE
TOWNSHIP OF PEMBERTON,
BURLINGTON COUNTY

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 10856-2011 S
AGENCY REF. NO. 246-8/11

*JOINT REQUEST FOR APPROVAL OF
SETTLEMENT, INCLUDING
WITHDRAWAL OF TENURE CHARGES*

INTRODUCTION

Counsel for the Board of Education of the School District of Pemberton Township ("BOARD") and counsel for its tenured employee MAJOR JOHN R. COOK ("COOK"), join in moving for an order declaring that the Settlement Agreement between the Parties, attached hereto as Exhibit A, meets the requirements of *N.J.A.C. 1:1-19.1*, recommending that the Settlement Agreement be approved by the Office of Administrative Law ("OAL") and the Commissioner of Education ("Commissioner"), and on condition that the Administrative Law Judge ("ALJ") and the Commissioner approve without modification the Settlement Agreement attached hereto as Exhibit A, ordering that the Settlement Agreement be implemented, and that the tenure charges filed by the BOARD be withdrawn and this matter dismissed with prejudice.

JRC

PROCEDURAL STATEMENT

This matter arises out of charges certified by the BOARD to the Commissioner on August 25, 2011, against a tenured teaching staff member on grounds of conduct unbecoming. The tenure charges were transmitted to the OAL as a contested case on September 13, 2011. A settlement conference concerning the BOARD's tenure charges was scheduled before the Honorable Laura Sanders, ALJ, for January 31, 2012. Following the January 31, 2012 settlement conference, the Parties reached a tentative settlement agreement conditioned upon the drafting of mutually satisfactory settlement documents to be submitted for approval by the ALJ and the Commissioner in accordance with which the tenure charges might be withdrawn.

The Parties have agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that COOK will be reinstated to all positions he held prior to his suspension, consistent with his certification as a teacher.

The Parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that conditioned upon the ALJ's and the Commissioner's approval of the Settlement Agreement without modification, the tenure charges against COOK shall be withdrawn and dismissed with prejudice. Furthermore, should the ALJ and the Commissioner fail to approve the Settlement Agreement attached hereto as Exhibit A without modification, the Parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet any objections and to provide the Parties with the full benefit of the intended settlement.

THE JUSTIFICATION FOR WITHDRAWAL OF TENURE CHARGES

Removing the hat from the young man's head does not rise to corporal punishment as generally defined in the case law. However, it did fall outside the BOARD's view of appropriate implementation of behavior modification

CONCLUSION

The Settlement Agreement was negotiated between counsel after certain facts became known during the course of discovery; in particular, a DVD which recorded the interaction between COOK and the student, which DVD was reviewed by the ALJ. Counsel, as well as COOK and the BOARD, are satisfied with the Settlement Agreement and believe that it fulfills the public interest with respect to these matters. For the reasons outlined above, and for good cause shown, this tribunal should conclude that the Settlement Agreement meets the requirements of *N.J.A.C. 1:1-19.1*, recommend that the Settlement Agreement be adopted without modification by the Commissioner, order that the Settlement Agreement be implemented on condition that it is so approved, and therefore upon such approval dismiss with prejudice the tenure charges in this matter.

Respectfully submitted,

CAPEHART & SCATCHARD
Attorneys for Board of
Education of Pemberton Township
School District

BY: _____

ALAN R. SCHMOLL

DATED:

SELIKOFF & COHEN, P.A.
Attorneys for Major John R. Cook

BY: _____

STEVEN R. COHEN

DATED:

06.25.12

JRC

EXHIBIT A
SETTLEMENT AGREEMENT REGARDING ACTIONS PENDING
BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the BOARD OF EDUCATION OF PEMBERTON TOWNSHIP, BURLINGTON COUNTY ("BOARD") and its tenured employee MAJOR JOHN R. COOK ("COOK")(the BOARD and COOK are sometimes referred to in this agreement severally as a "Party" and jointly as the "Parties").

WHEREAS, COOK has been continuously employed by the BOARD as a teacher since September 1, 1997; and

WHEREAS, on August 25, 2011, the BOARD certified tenure charges against COOK to the Commissioner of Education under the Tenure Employees Hearing Law, which charges were captioned:

*IN THE MATTER OF THE TENURE HEARING OF JOHN R.
COOK, SCHOOL DISTRICT OF PEMBERTON TOWNSHIP,
BURLINGTON COUNTY*

OAL DKT. NO. EDU 10856-2011 S
AGENCY REF. NO. 246-8/11

WHEREAS, COOK filed an answer contesting the tenure charges;

WHEREAS, the Parties exchanged reciprocal discovery, in particular, a DVD which recorded the interaction between COOK and the student, which DVD was reviewed by the Honorable Laura Sanders, ALJ;

WHEREAS, ALJ Sanders conducted a settlement conference with the parties on January 31, 2012; and

WHEREAS, the BOARD has reviewed the defenses and evidence and decided to withdraw the charges with prejudice subject to this settlement;

JRC

NOW THEREFORE, the matters in dispute having been amicably adjusted by and between the Parties, it is hereby stipulated and agreed as follows:

1. The parties consent to the imposition of a one-time fine to be imposed upon COOK amounting to the loss of school year 2011-2012 vacation time (2 and ½ days), which is equivalent to the sum of one thousand two hundred fifty dollars and no cents (\$1,250.00).

2. The BOARD will restore the following amounts of compensation and pay them to COOK, subject to usual and customary payroll deductions:

a. Payment of salary previously withheld for the period August 25, 2011 through December 24, 2011 at the 2011-2012 negotiated pay rate;

b. Payment of one of the two JROTC stipends for the 2011-2012 school year (either Color Guard/Raider Team or Drill/Rifle Team Advisor (they are always divided between COOK and First Sergeant Gaskin) for the sum of two thousand six hundred seventy three dollars and no cents (\$2,673.00) to be paid in June 2012.

3. COOK will not receive a stipend for seventh period instruction for either the 2010-2011 or 2011-12 school years. In the event COOK is scheduled for seventh period instruction for the 2012-2013 school year, the stipend will be paid to him.

4. The BOARD agrees to reinstate COOK to all teaching, coaching/extra-curricular assignments and army-related activities forthwith;

5. The Parties further agree:

a. During the transition of students at any time through the hallways, COOK is to remain in his classroom and to not stand in the hallway to monitor the student hallway activity. Notwithstanding this, in the event that COOK nevertheless observes student conduct which he believes violates school rules, he will report it to an assistant principal. Subject to paragraph 5.b. below, COOK is not to interact with students directly regarding their violation of school rules.

b. Insofar as violations of school rules by students who are in COOK's classroom are concerned, COOK will comply with the procedures and rules set forth in the school handbook dealing with student discipline.

c. Subject to the approval of this Settlement Agreement by the ALJ and the Commissioner without modification, COOK hereby withdraws his November 18, 2011 Notice of Tort Claim and tenders the General Release attached to this Settlement Agreement as Exhibit 1. Provided, however, in the event that the settlement giving rise to this Settlement Agreement is voided, the withdrawal of the Notice of Tort Claim and the tender of the General Release shall both be void.

6. The Parties understand and agree that this matter is now concluded. Going forward, hereafter, neither Party shall disparage the other relating to this particular matter and neither shall take any reprisal against the other.

7. The Parties will seek the ALJ's and the Commissioner's approval for this Settlement Agreement, and if the ALJ and the Commissioner approve the Settlement Agreement without modification, ask the ALJ and Commissioner to allow the tenure charges against COOK to be withdrawn and dismissed with prejudice.

8. Should the ALJ and the Commissioner fail to approve the Settlement Agreement without modification, the Parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet any objections and to provide themselves with the fully-negotiated benefit of the settlement memorialized by this Settlement Agreement.

9. The Parties agree in consideration of this Settlement Agreement that if it is not approved by the ALJ and Commissioner without modification and if reformation proves impossible, the Joint Request for Approval (including the Justification for Withdrawal of the Charges) and this draft Settlement Agreement will not be admissible in any judicial or administrative proceeding, nor shall any statements by the BOARD through its attorney

JRC

concerning the reasons it believes this settlement is not inconsistent with the public's interest.

10. True copies of the BOARD'S minutes demonstrating that the Board authorized the BOARD's signatory to execute this Settlement Agreement are attached to this Settlement Agreement as Exhibit 2.

BOARD OF EDUCATION OF PEMBERTON
TOWNSHIP SCHOOL DISTRICT

BY: Perry J. Doyle Sr.
PERRY J. DOYLE, PRESIDENT

John R. Cook
MAYOR JOHN R. COOK

DATED:

DATED: 29 JUNE 2012

WITNESS:

Pat Doyle 6/14/12

WITNESS:

Steven R. Cohen

EXHIBIT 1 – GENERAL RELEASE

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Major John R. Cook ("COOK") **RELEASES AND DISCHARGES**, with prejudice, the Pemberton Township Board of Education, its current or past members, officers, directors, trustees, employees, agents, insurers, attorneys, representatives, predecessors, successors and assigns, and all persons acting in such capacities (jointly "BOARD"), of and from all claims, issues, demands, actions, causes of action, suits, damages, grievances, arbitration demands, claims for discovery, losses and expenses, of any and every nature whatsoever, including but not limited to any claim for attorney fees, whether known or not known, in law or in equity, arising out of, resulting from or touching upon the employment of COOK by the BOARD up to and including the date the Settlement Agreement in this matter is duly ratified and signed by the BOARD, including but not limited to:

a) any acts and/or omissions that have been or could have been alleged in an action detailed in the Notice of Tort Claim dated November 18, 2011 ("Action");

b) any acts and/or omissions regarding a violation of COOK's common law, federal or state constitutional rights and any past and present law, ordinance or regulation governing the rights of employees, including, but not limited to, those based upon political affiliation, free speech, free association, conspiracy, employment discrimination, discharge without cause or right to due process;

c) any claim or right arising out of or under any policy, employment manual/handbook or process promulgated by the BOARD;

d) any collective bargaining agreement entered into by and between the BOARD and the Pemberton Township Education Association;

e) any alleged unlawful harassment, retaliation or discrimination based upon any unlawful consideration including but not limited to political affiliation or belief, race, color,

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religion, creed, sex, age, national origin, marital or family status or disability, sexual orientation or affiliation, retaliation for filing, attempting to file or testifying with regard to a worker's compensation or discrimination claim charge or complaint or in connection with the exercise of any right protected by federal or state constitution or laws;

f) Title VII of the Civil Rights Act of 1964, as amended, any claim or right for which redress could be sought or obtained under 42 U.S.C. §1981 through and including §1988, the Americans with Disabilities Act of 1990, the Family Medical Leave Act; the Employment Retirement Income Security Act, 29 U.S.C. §1001 *et. seq.*, the Fair Labor Standards Act, the Age Discrimination in Employment Act, federal and state equal pay laws, Executive Orders 11246 and 11141, the National Labor Relations Act, New Jersey health and safety laws, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, the New Jersey Minimum Wage and Overtime Law, the New Jersey Wage Payment Law, and any amendments to such acts;

g) claims for intentional or negligent infliction of emotional distress, stress, humiliation or embarrassment, mental anguish, pain and suffering, defamation, tortious interference, retaliation, negligence, breach of public policy, breach of express or implied contract; claims for aiding, abetting, inciting, conspiring, compelling and/or coercing another in violation of her rights; and

h) and/or any common law claims under tort, contract or any other theories now or hereafter recognized, any type of damages cognizable under any of the laws or causes of action referenced herein, including, but not limited to, any and all claims for compensatory damages and punitive damages.

HOWEVER, specifically excluded from this release are any claims arising under the Teachers' Pension and Annuity Fund, the New Jersey Workers' Compensation Act and any claims arising from any breach of the Settlement Agreement. COOK specifically represents that

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as of the Effective Date, there are no such claims pending or presently contemplated and he is unaware of any basis for any such claims.

THIS RELEASE arises from and is pursuant to the Settlement Agreement between the BOARD and COOK to which this Release is attached. This Release is specifically contingent upon the approval by the Office of Administrative Law and the Commissioner of Education of the Settlement Agreement and upon the BOARD's compliance with the terms of the Settlement Agreement.


JOHN R. COOK

STATE OF NEW JERSEY :
: SS
COUNTY OF BURLINGTON :

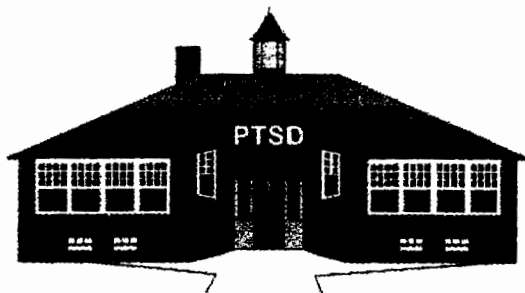
I certify that on the 29th day of June, 2012, JOHN R. COOK personally came before me and acknowledged under oath, to my satisfaction, that this person:

1. is named in and personally signed this document; and
2. signed, sealed and delivered this document as his or her act and deed.

SWORN and SUBSCRIBED to before me this 29th day of June, 2012

NOTARY PUBLIC
My Commission Expires 2/11/16


JO-ANNA LYNN MARTIN
A Notary Public of New Jersey
My Commission Expires February 11, 2016



PAT AUSTIN, Business Administrator, Board Secretary
JAMES J. FLANAGAN, CPA, Assistant Business Administrator

PEMBERTON TOWNSHIP SCHOOL DISTRICT

P.O. BOX 228, ONE EGBERT STREET
PEMBERTON, NEW JERSEY 08068-0228
PHONE: 609-893-8141

MICHAEL R. GORMAN, Ed.D., Superintendent

This is a certified true copy of a resolution approved by the Pemberton Township Board of Education at its meeting held on May 24, 2012.

Pat Austin, Board Secretary

Report of the Superintendent of Schools

Mission Statement: Pemberton Learning Community: Pursuing Excellence One Child at a Time

4. Recommend the Board approve a settlement with the employee in position number BJY.

Approved on motion by Mr. Bauer, seconded by Mrs. Glawson

Roll Call

Mr. Bauer	<u>yes</u>	Mr. Jerome	<u>yes</u>	Mr. Ulrich	<u>abstain</u>
Mrs. Glawson	<u>yes</u>	Mr. Pinto	<u>absent</u>	Mr. Wells	<u>yes</u>
Mr. Haines	<u>yes</u>	Mrs. Prickett	<u>yes</u>	Mr. Doyle	<u>absent</u>



State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHRISTOPHER D. CERF
Commissioner

August 29, 2012

Edward A. Cridge, Esq.
Mellk O'Neill
10 Nassau Street
P.O. Box 614
Princeton, NJ 08542

Stephen M. Bacigalupo, II, Esq.
Schartz, Simon, Edelstein & Celso
100 South Jefferson Road, Suite 200
Whippany, NJ 07981

Dear Counsel:

I have reviewed the submissions filed in connection with the request of Respondent Lang for Interlocutory Review of the appended August 8, 2012 Order of Administrative Law Judge (ALJ) Tiffany M. Williams, denying his motion to compel discovery in the matter entitled *In the Matter of the Tenure Hearing of James Lang, School District of the Township of Woodbridge, Middlesex County*, OAL Dkt. No. 5463-12, Agency Dkt. No. 108-4/12. Upon my review of the Order and the filings in connection with this interlocutory review request, I have determined to set aside the ALJ's blanket denial of respondent's request for discovery.

On April 23, 2012, the Board certified tenure charges against respondent based – in large measure – upon inappropriate comments which he allegedly made to students in his classroom during the 2010-11 and 2011-12 school years. Respondent charges that the Board has refused to provide him with certain information pertaining to the students who made allegations against him, and the other students who were in his classes when he allegedly made inappropriate comments. The Commissioner is in full accord with the Board that respondent has not demonstrated a genuine need for the broad discovery he requested which would serve to outweigh the involved students' privacy interests – for example: copies of reports, records, or other documents memorializing any disciplinary reports, referrals, or other disciplinary action during the 2003-04, 2010-11 and 2011-12 school years, and any Individualized Education Plan for each student who provided a statement included in the evidence supporting the tenure charges.

However, respondent's submission here identifies four particularized pieces of information which he sought and was denied, specifically: 1) the names of the students who were in the classes where the comments were allegedly made; 2) the dates of attendance of the students in the classes where the comments were allegedly made; 3) the grades which the students accusing respondent of making such inappropriate comments received in his classes; and 4) any records of disciplinary action taken against the accusing students by respondent. In justification of his request in this regard respondent offered:

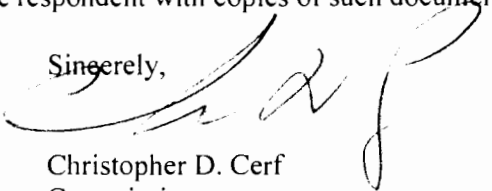
In preparing the tenure charges, [t]he Board solicited statements from students in Mr. Lang's classes. It used those statements, and provided the names of those students, to Mr. Lang with the tenure charges. Though the names of his accusers have been disclosed, [respondent] has been denied discovery as to the names of the other students who were in his classes, who could either confirm or deny his alleged comments. Likewise, attendance records would allow Mr. Lang to determine who was, or was not, in this classroom when any alleged comment was made.

The grades which the students in question received from Mr. Lang are relevant since a poor or failing grade may create a bias on the part of the student against him, rendering such information relevant for purposes of impeaching the witness....The same is true with respect to any disciplinary action taken against the students which was initiated by Mr. Lang.

The nature of the controversy here and the dictates of fundamental fairness require that respondent be accorded reasonable due process to give him an opportunity to rebut the charges against him. The Commissioner finds and concludes that respondent has identified a sufficient legitimate interest and a particularized need for the above information.¹

Accordingly, the August 8, 2012 Order of the ALJ is hereby set aside. I hereby direct the Board to supply respondent with a listing of the names of the students who were in the classes where the comments forming the basis of its tenure charges were allegedly made and these students' dates of attendance in these classes. The ALJ is hereby requested to conduct an *in camera* review of the records of the accusing students as to issues 3 and 4 above. If the ALJ's review reveals pertinent documentation in this regard, the Board should be directed to provide respondent with copies of such documentation.

Sincerely,


Christopher D. Cerf
Commissioner

CDC/MKD/MH

c: Honorable Tiffany M. Williams, ALJ

Sandra Hlatky, Deputy Clerk, OAL

Via Facsimile and Regular Mail

c: Kurt Schwartz, Deputy Clerk OAL

Faxed & Mailed 8/29/12

¹ It is noted that the Board charges that respondent already has, in his possession, the names of those students who he taught and the grades obtained by those students – citing to materials entitled “Grade Posting Status Reports,” attached to its materials here as Exhibit A. That respondent may have knowledge of this limited number of documents – spanning a period from March 2011 to December 2011 – is not a valid ground for objection to providing the requested discovery. See R. 4:10-2(a).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street, 7th Floor
Newark, New Jersey 07102

Tiffany M. Williams
Administrative Law Judge

LETTER/ORDER
DENYING MOTION TO COMPEL DISCOVERY

Stephen Bacigalupo, II Esq.
Schwartz Simon Edelstein & Celso
100 South Jefferson Road
Whippany, NJ 07981

Edward Cridge, Esq.
Melik O'Neill
10 Nassau Street
P.O. Box 614
Princeton, NJ 08542

RE: I/M/O Tenure Hearing of James Lang / School District of Woodbridge
OAL DOCKET NO. EDU 5643-12

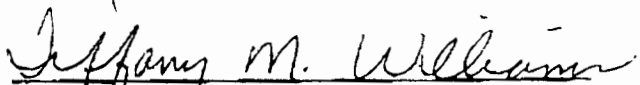
Dear Counsel:

In response to petitioner's Motion to Compel Discovery dated July 30, 2012, and respondent's opposition filed August 2, 2012, please be advised that the motion is **DENIED**. Petitioner fails to cite legal authority to support a court order for the disclosure of sensitive student records which are historically and carefully guarded under state and federal law. See N.J.S.A. 18A:36-19; State v. Krivacska, 341 N.J. Super. 1, 35 (App. Div.), cert. denied, 170 N.J. 206 (2001). Accordingly, I find no factual or legal basis to support the need for such records or to dispense with the well-settled notion of their confidentiality.

Please be advised that this matter is scheduled to proceed on August 14, 2012 at 9:00 a.m. and petitioner's request to use that date for oral argument is **DENIED**.

This Order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

Dated: August 8, 2012


TIFFANY M. WILLIAMS, ALJ

\rr

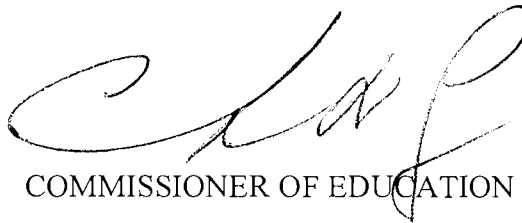
OAL DKT. NO. EDU 2581-12
AGENCY DKT. NO. 17-1/12

MARIA SANTANA, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF : DECISION
 THE CITY OF ELIZABETH, :
 UNION COUNTY, :
 :
 RESPONDENT. :

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C. 17:1-19.1* have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 8/29/12

Date of Mailing: 8/29/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 02581-12N

AGENCY DOCKET NO. 17-1/12

MARIA SANTANA,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF

ELIZABETH, UNION COUNTY,

Respondent.

Adam M. Epstein, Esq. appearing on behalf of petitioner (Caruso, Smith, Edell, Picini)

Karen A. Murray, Esq., for respondent (Elizabeth Public Schools)

Record Closed: July 24, 2012

Decided: July 25, 2012

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on February 24, 2012, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted on March 8, 2012. A status conference was held on April 26, 2012 during which time the hearing was scheduled for July 10, 2012. Prior to the hearing date a status conference was conducted and the parties advised they reached a tentative settlement and requested an

adjournment of the hearing. On July 25, 2012 the parties submitted a copy of the signed Settlement Agreement and Board Resolution, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

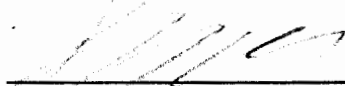
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement meets the requirements of N.J.A.C. 1:1-19.1 and that the stipulation should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 26, 2012
DATE


KIMBERLY A. MOSS, ALJ

Date Received at Agency:

7-30-12

Date Mailed to Parties:
ljb

JUL 30 2012


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

CARUSO SMITH EDELL PICINI, P.C.
60 Route 46 East
Fairfield, NJ 07004
(973) 667-6000
Attorneys for: Petitioner, Maria Santana

Maria Santana,

Petitioner,

v.

Elizabeth Board of Education,

Respondent

Before the Commissioner of Education
OAL Docket No.: EDU 02581-2012-N

**SETTLEMENT AGREEMENT AND
GENERAL RELEASE**

This Settlement Agreement and General Release is made by and between the Elizabeth Board of Education (the "Board") whose administrative offices are located at 500 North Broad Street, Elizabeth, New Jersey 07207 and Maria Santana ("Santana"), whose address is 207 Magnolia Avenue, 1st Floor, Elizabeth, New Jersey 07206. In consideration of mutual promises and undertakings contained in this Settlement Agreement and General Release and for good and valuable consideration the receipt of which is hereby acknowledge, the undersigned parties state:

WHEREAS, on June 2, 2011, Santana was employed as a bus driver by the Board; and

WHEREAS, on June 2, 2011, a quasi-criminal traffic complaint was issued against Santana for allegedly driving the wrong way on a one-way street during the course of Santana's employment with the Board; and

WHEREAS, on July 26, 2011, the West Orange Municipal Court dismissed the above-referenced quasi-criminal Complaint against Santana;

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Santana's defense counsel forwarded a demand letter to the Board, on or about December 27, 2011, seeking reimbursement from the Board for Santana's attorney's fees and costs associated with Santana's legal defense relative to West Orange Municipal Court Complaint, Summons No. ECS 128012;

WHEREAS, Santana subsequently filed the Petition at issue demanding reimbursement from the Board in the amount of \$13,459.49;

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Settlement Agreement and General Release in order to avoid the need for further litigation; and

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Four Thousand Five Hundred Dollars **(\$4,500.00)** as full and complete indemnification of the attorney's fees and costs incurred by Santana in relation to the West Orange Municipal Court Complaint, Summons No. ECS 128012. The Board shall make this payment payable to Caruso Smith Edell Picini P.C., and shall send it directly to Santana's legal counsel, Caruso Smith Edell Picini P.C. whose offices are located at 60 Route 46 East Fairfield, NJ 07004.
2. For and in consideration of the Indemnification set forth in Paragraph One (1) above, Santana and her heirs, executors, administrators, successors and assigns, hereby forever release and discharge the Elizabeth Board of Education, its members, successors and assigns and all of its or their past or future members, officers, agents, employees, administrators, attorneys, fiduciaries, successors and assigns (whether acting as agents for the Board, its affiliates or its related entities or in their individual capacities) from any and all claims, demands, causes of action, fees and liabilities of any kind whatsoever (upon any legal or equitable theory, whether contractual, common-law, statutory, federal, state, local, or otherwise), whether known or unknown, which Santana ever had, now has or hereafter may have against the Board by reason of any actual or alleged act, omission, transaction, practice,

conduct, occurrence or other matter relating to any and all allegations contained in the Petition entitled Maria Santana v. Elizabeth Board of Education, and bearing OAL Docket No.: EDU 02581-2012-N.

3. The parties agree that if any of the provisions, terms, clauses, waivers and releases of claims and rights contained in this Settlement Agreement and General Release are declared illegal, unenforceable, or ineffective in a legal forum of competent jurisdiction, such provisions, terms, clauses, waivers and releases of claims or rights shall be modified, if possible, in order to achieve, to the extent possible, the intentions of the parties. If any such provisions, terms, clauses, waivers and releases of claims and rights contained in this Settlement Agreement and General Release cannot be modified, the remaining provisions, terms, clauses, waivers and releases of claims and rights contained in this Agreement shall remain in full force and effect.

4. This Settlement Agreement and General Release set forth the entire terms between the parties, and fully supersedes any and all prior Agreements or understanding between them pertaining to the subject matter thereof.

5. Nothing contained in this Settlement Agreement and General Release constitutes an admission of any wrongdoing by either party and neither party shall be considered to be a prevailing party in this matter.

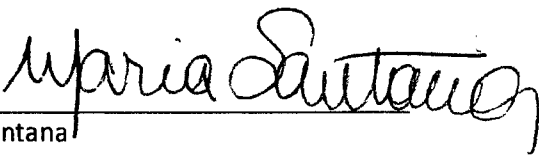
6. All terms of this Settlement Agreement and General Release are deemed material. The parties agree that this Settlement Agreement and General Release may not be altered, amended, modified, superseded, canceled or terminated except by an express written Agreement duly executed by all the parties or their attorneys on their behalf, which makes specific reference to this Settlement Agreement and General Release.

7. Santana agrees that she has been fully and fairly represented by legal counsel throughout this proceeding.

8. This Settlement Agreement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

9. This Settlement Agreement and General Release is an agreement that shall be construed in accordance with the laws of the State of New Jersey.

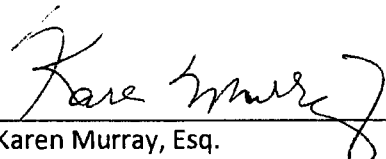
10. All parties hereby agree that the terms of this Settlement Agreement and General Release are binding upon all parties, their heirs and their assigns.



Maria Santana

Dated: 7/13/12

Harold E. Kennedy, Jr.
Business Administrator/Board Secretary
ELIZABETH BOARD OF EDUCATION
Dated:

 For the Elizabeth Bd of Education

Karen Murray, Esq.
Board Counsel/Director for H.R.
ELIZABETH BOARD OF EDUCATION
Dated:

C
O
P
Y

10m

BOARD OF EDUCATION

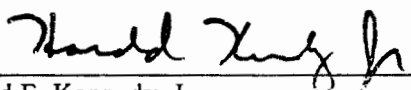
RESOLUTION

WHEREAS, the Elizabeth Board of Education and Maria Santana (M.S.) have discussed a resolution of OAL Docket No. EDU 02581-2012 N; and

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case.

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts and approves the terms of the confidential settlement agreement on file in the Office of the School Business Administrator/Board Secretary.

TRUE COPY APPROVED AND ADOPTED AT
THE ELIZABETH BOARD OF EDUCATION MEETING
HELD ON **July 19, 2012**



Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

Elizabeth, New Jersey
July 19, 2012

12-13

SARAH BECKER,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE CITY :		
OF ELIZABETH, UNION COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioner appealed the decision of the respondent Board to terminate her employment as a teacher through a reduction in force (RIF) at the end of the 2009-2010 school year. She contended that following her termination, the Board continued to employ teachers without tenure and with less seniority than petitioner, in violation of her tenure and seniority rights. Petitioner sought reinstatement and back pay retroactive to the date of her termination.

The ALJ found that: petitioner failed to appear for a hearing in this matter on July 30, 2012, despite having received appropriate notice; and attorney for the petitioner appeared at the hearing and confirmed on record his ongoing inability to reach his client via telephone, and via certified and regular mail. Accordingly, the ALJ concluded that petitioner had abandoned this matter and ordered the case returned to the Department for appropriate disposition.

Upon careful and independent review, the Commissioner concurred with the ALJ's findings and conclusions and, accordingly, adopted the Initial Decision of the OAL as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 10478-10
 AGENCY DKT. NO. 390-8/10

SARAH BECKER,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE CITY :	:	
OF ELIZABETH, UNION COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

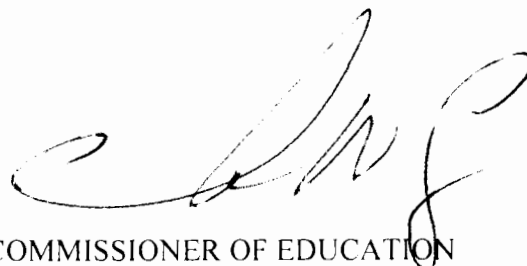
Petitioner was a tenured teacher in respondent's district and one of hundreds of employees terminated by respondent in June 2010. She was also one of approximately eighty employees who appealed respondent's action as violative of the tenure laws in place at the time.

As explained in the Initial Decision of the Office of Administrative Law (OAL), due to the commonality of the issues in most of the above-referenced eighty petitions, they were managed together. Ultimately, a hearing was set for July 30, 2012 and each petitioner was so advised by a notice from the OAL – which notice warned that the petitioner's "APPEARANCE [WAS] MANDATORY. FAILURE TO APPEAR [WOULD] RESULT IN DISMISSAL OF [HER] PETITION." A copy of the notice sent directly to the instant petitioner is in the file for this case.

Notwithstanding the notice, petitioner did not appear at the July 30 hearing. Her counsel – who did appear – represented that she had attempted to contact petitioner to discuss the need for petitioner's appearance, but was unable to reach her.

As no explanation for her non-appearance was received from petitioner subsequent to the hearing, the Administrative Law Judge concluded that petitioner had abandoned her appeal and directed that the file be returned to the Department of Education pursuant to *N.J.A.C.* 1:1-14.4(a). The Commissioner similarly concludes that the appeal has been abandoned, and dismisses the petition for petitioner's failure to prosecute.

IT IS SO ORDERED.¹



COMMISSIONER OF EDUCATION

Date of Decision: 8/29/12

Date of Mailing: 8/29/12

¹ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

FAILURE TO APPEAR

OAL DKT. NO. EDU 10478-10

AGENCY DKT. NO. 390-8/10

SARAH BECKER,

Petitioner,

v.

BOARD OF EDUCATION OF THE

CITY OF ELIZABETH,

Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman and Barrett, attorneys)

Marvin Lehman, Esq., for respondent

Record Closed: July 30, 2012

Decided: August 1, 2012

BEFORE **ELLEN S. BASS, ALJ:**

STATEMENT OF THE CASE

Petitioner, Sarah Becker, a teacher formerly employed by the Board of Education of the City of Elizabeth (the Board), asserts that the Board terminated her employment in contravention of her tenure and seniority rights under N.J.S.A. 18A:28-5 et seq. She seeks reinstatement and back pay retroactive to the date of her termination.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Becker filed her appeal with the Commissioner of Education (the Commissioner) on August 12, 2010. An answer was filed on behalf of the Board, and the contested case was transmitted to the Office of Administrative Law (OAL), on September 27, 2010.

In or about June 2010, the Board terminated several-hundred employees pursuant to a reduction in force (RIF); more than eighty of these employees have pending petitions challenging their terminations as violative of the tenure laws. Discovery and settlement discussions relative to these cases have been the subject of bi-monthly status conferences between counsel and me. In the aftermath of the RIF, many of the petitioners were reinstated by the Board, or secured alternative employment. Counsel and I agreed that many claims might be ripe for withdrawal or settlement, and that by disposing of these claims we would be better able to efficiently focus upon the claims that presented factual or legal complexities. Counsel were directed to communicate with their clients and share with the Board a settlement proposal that fully outlined the back and pay benefits sought by each petitioner, or in the alternative, to promptly withdraw any claim that was no longer viable.

At several case management conferences counsel advised me of ongoing difficulties in securing the cooperation of some of the petitioners and of counsel's inability to obtain the information needed to make a settlement proposal to the Board, or to counsel a client that it was appropriate to withdraw his or her claim. Accordingly, in my order dated May 15, 2012, I directed counsel to supply me with a list of petitioners with whom they have been unable to communicate regarding the nature and extent of their claims. Becker was among these petitioners, per correspondence from her attorney dated May 23, 2012.

A notice of hearing was issued on June 5, 2012, requiring Becker's appearance on July 30, 2012. Becker was notified by the Clerk of the Office of Administrative Law, that her appearance was mandatory, and that a failure to appear would result in dismissal of her petition. The notice was sent both to her attorney and directly to

Becker at the address on record via regular mail. The OAL received no return of the notice as undeliverable.

Becker's attorney appeared at the hearing and confirmed on the record his ongoing inability to reach his client. He confirmed that he has attempted to communicate with Becker via telephone and by certified and regular mail, all to no avail. He tried, without success, to discuss the need for Becker to appear at the scheduled proceeding. Becker did not appear on July 30, 2012.

ANALYSIS AND CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Becker has abandoned this matter and that it should be returned to the transmitting agency.

N.J.A.C. 1:1-14.4(a) provides that, if, after appropriate notice, a party does not appear in any proceeding scheduled by a judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge may direct the Clerk to return the matter to the transmitting agency for appropriate disposition. Becker failed to appear at the scheduled proceeding, and she failed to provide an explanation one day following her nonappearance. Accordingly, the Clerk should return this matter to the Department of Education.

ORDER

It is **ORDERED** that the Clerk return this matter to the Department of Education for appropriate disposition.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

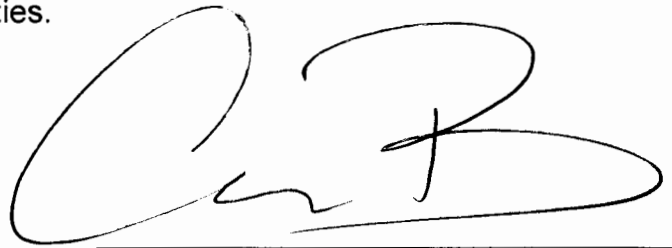
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 1, 2012

DATE



ELLEN S. BASS, ALJ

Date Received at Agency:

August 1, 2012
John P. Dardis

Date Mailed to Parties:

AUG - 2 2012

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NINA ARMENTO, :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE CITY :
OF ELIZABETH, UNION COUNTY, :
RESPONDENT. :
_____ :

SYNOPSIS

Petitioner appealed the decision of the respondent Board to terminate her employment as a teacher through a reduction in force (RIF) at the end of the 2009-2010 school year. Petitioner was continuously employed by the Board from September 2003 through June 2010. Petitioner contended that following her termination, the Board continued to employ teachers without tenure and with less seniority than petitioner, in violation of her tenure and seniority rights. Petitioner sought reinstatement and back pay retroactive to the date of her termination.

The ALJ found that: petitioner failed to appear for a hearing in this matter on July 30, 2012, despite having received appropriate notice; and attorney for the petitioner appeared at the hearing and confirmed on record her ongoing inability to reach her client via telephone, and via certified and regular mail. Accordingly, the ALJ concluded that petitioner had abandoned this matter and ordered the case returned to the Department for appropriate disposition.

Upon careful and independent review, the Commissioner concurred with the ALJ's findings and conclusions and, accordingly, adopted the Initial Decision of the OAL as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
--

OAL DKT. NO. EDU 10146-10
 AGENCY DKT. NO. 349-8/10

NINA ARMENTO,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE CITY :	:	
OF ELIZABETH, UNION COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

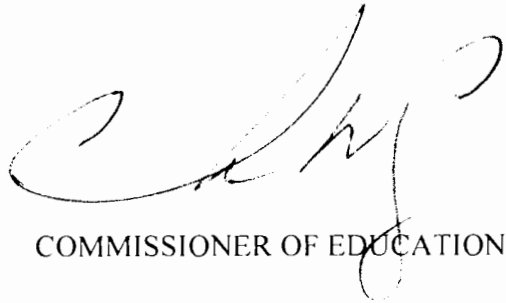
Petitioner was a tenured teacher in respondent's district and one of hundreds of employees terminated by respondent in June 2010. She was also one of approximately eighty employees who appealed respondent's action as violative of the tenure laws in place at the time.

As explained in the Initial Decision of the Office of Administrative Law (OAL), due to the commonality of the issues in most of the above-referenced eighty petitions, they were managed together. Ultimately, a hearing was set for July 30, 2012 and each petitioner was so advised by a notice from the OAL – which notice warned that the petitioner's "APPEARANCE [WAS] MANDATORY. FAILURE TO APPEAR [WOULD] RESULT IN DISMISSAL OF [HER] PETITION." A copy of the notice sent directly to the instant petitioner is in the file for this case.

Notwithstanding the notice, petitioner did not appear at the July 30 hearing. Her counsel – who did appear – represented that she had attempted to contact petitioner to discuss the need for petitioner's appearance, but was unable to reach her.

As no explanation for her non-appearance was received from petitioner subsequent to the hearing, the Administrative Law Judge concluded that petitioner had abandoned her appeal and directed that the file be returned to the Department of Education pursuant to *N.J.A.C. 1:1-14.4(a)*. The Commissioner similarly concludes that the appeal has been abandoned, and dismisses the petition for petitioner's failure to prosecute.

IT IS SO ORDERED.¹



COMMISSIONER OF EDUCATION

Date of Decision: 8/29/12

Date of Mailing: 8/29/12

¹ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

FAILURE TO APPEAR

OAL DKT. NO. EDU 10146-10

AGENCY DKT. NO. 349-8/10

NINA ARMENTO,

Petitioner,

v.

BOARD OF EDUCATION OF THE

CITY OF ELIZABETH,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld Cohen, attorneys)

Marvin Lehman, Esq., for respondent

Record Closed: July 30, 2012

Decided: August 1, 2012

BEFORE **ELLEN S. BASS, ALJ:**

STATEMENT OF THE CASE

Petitioner, Nina Armento, a teacher formerly employed by the Board of Education of the City of Elizabeth (the Board), asserts that the Board terminated her employment in contravention of her tenure and seniority rights under N.J.S.A. 18A:28-5 et seq. She seeks reinstatement and back pay retroactive to the date of her termination.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Armento filed her appeal with the Commissioner of Education (the Commissioner) on August 9, 2010. An answer was filed on behalf of the Board, and the contested case was transmitted to the Office of Administrative Law (OAL), on September 14, 2010.

In or about June 2010, the Board terminated several-hundred employees pursuant to a reduction in force (RIF); more than eighty of these employees have pending petitions challenging their terminations as violative of the tenure laws. Discovery and settlement discussions relative to these cases have been the subject of bi-monthly status conferences between counsel and me. In the aftermath of the RIF, many of the petitioners were reinstated by the Board, or secured alternative employment. Counsel and I agreed that many claims might be ripe for withdrawal or settlement, and that by disposing of these claims we would be better able to efficiently focus upon the claims that presented factual or legal complexities. Counsel were directed to communicate with their clients and share with the Board a settlement proposal that fully outlined the back and pay benefits sought by each petitioner, or in the alternative, to promptly withdraw any claim that was no longer viable.

At several case management conferences counsel advised me of ongoing difficulties in securing the cooperation of some of the petitioners and of counsel's inability to obtain the information needed to make a settlement proposal to the Board, or to counsel a client that it was appropriate to withdraw his or her claim. Accordingly, in my order dated May 15, 2012, I directed counsel to supply me with a list of petitioners with whom they have been unable to communicate regarding the nature and extent of their claims. Armento was among these petitioners, per correspondence from her attorney.

A notice of hearing was issued on June 4, 2012, requiring Armento's appearance on July 30, 2012. Armento was notified by the Clerk of the Office of Administrative Law, that her appearance was mandatory, and that a failure to appear would result in dismissal of her petition. The notice was sent both to her attorney and directly to

Armento at the address on record via regular mail. The OAL received no return of the notice as undeliverable.

Armento's attorney appeared at the hearing and confirmed on the record her ongoing inability to reach his client. She confirmed that she has attempted to communicate with Armento via telephone and by certified and regular mail, all to no avail. She tried, without success, to discuss the need for Armento to appear at the scheduled proceeding. Armento did not appear on July 30, 2012.

ANALYSIS AND CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Armento has abandoned this matter and that it should be returned to the transmitting agency.

N.J.A.C. 1:1-14.4(a) provides that, if, after appropriate notice, a party does not appear in any proceeding scheduled by a judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge may direct the Clerk to return the matter to the transmitting agency for appropriate disposition. Armento failed to appear at the scheduled proceeding, and she failed to provide an explanation one day following her nonappearance. Accordingly, the Clerk should return this matter to the Department of Education.

ORDER

It is **ORDERED** that the Clerk return this matter to the Department of Education for appropriate disposition.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 1, 2012

DATE



ELLEN S. BASS, ALJ

Date Received at Agency:

August 1, 2012

Date Mailed to Parties:

AUG - 2 2012

Heena Pandey

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

VA'NECHIA SIMMONS,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the decision of the respondent Board to terminate her employment as a teacher through a reduction in force (RIF) at the end of the 2010-2011 school year. Petitioner was continuously employed by the Board from October 2006 through June 2010. Petitioner contended that the Board offered teaching contracts to other school employees with less seniority than petitioner, in violation of her tenure and seniority rights. Petitioner sought reinstatement and back pay retroactive to the date of her termination.

The ALJ found that: petitioner failed to appear for a hearing in this matter on July 30, 2012, despite having received appropriate notice; and attorney for the petitioner appeared at the hearing and confirmed on record his ongoing inability to reach his client via telephone, and via certified and regular mail. Accordingly, the ALJ concluded that petitioner had abandoned this matter and ordered the case returned to the Department for appropriate disposition.

Upon careful and independent review, the Commissioner concurred with the ALJ's findings and conclusions and, accordingly, adopted the Initial Decision of the OAL as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 00854-11
AGENCY DKT. NO. 706-12/10

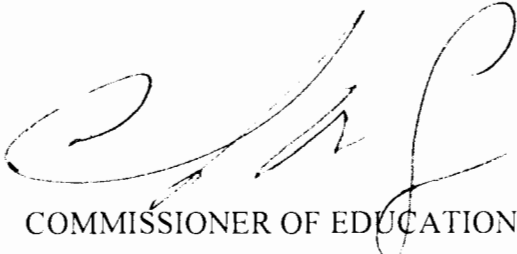
VA'NECHIA SIMMONS,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge that – because petitioner failed to appear at the July 30, 2012 hearing in this matter, after having received due notice of such hearing – this matter is appropriately dismissed for failure to prosecute.

Accordingly, the recommended decision of the OAL is adopted and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 8/29/12

Date of Mailing: 8/29/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

FAILURE TO APPEAR

OAL DKT. NO. EDU 00854-11

AGENCY DKT. NO. 706-12/10

VA'NECHIA SIMMONS,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
CITY OF ELIZABETH,**

Respondent.

Jason Sokolowski, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Marvin Lehman, Esq., for respondent

Record Closed: July 30, 2012

Decided: August 1, 2012

BEFORE **ELLEN S. BASS, ALJ:**

STATEMENT OF THE CASE

Petitioner, Va'Nechia Simmons, a teacher formerly employed by the Board of Education of the City of Elizabeth (the Board), asserts that the Board terminated her employment in contravention of her tenure and seniority rights under N.J.S.A. 18A:28-5

et seq. She seeks reinstatement and back pay retroactive to the date of her termination.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Simmons filed her appeal with the Commissioner of Education (the Commissioner) on December 9, 2010. An answer was filed on behalf of the Board, and the contested case was transmitted to the Office of Administrative Law (OAL), on January 18, 2011.

In or about June 2010, the Board terminated several-hundred employees pursuant to a reduction in force (RIF); more than eighty of these employees have pending petitions challenging their terminations as violative of the tenure laws. Discovery and settlement discussions relative to these cases have been the subject of bi-monthly status conferences between counsel and me. In the aftermath of the RIF, many of the petitioners were reinstated by the Board, or secured alternative employment. Counsel and I agreed that many claims might be ripe for withdrawal or settlement, and that by disposing of these claims we would be better able to efficiently focus upon the claims that presented factual or legal complexities. Counsel were directed to communicate with their clients and share with the Board a settlement proposal that fully outlined the back and pay benefits sought by each petitioner, or in the alternative, to promptly withdraw any claim that was no longer viable.

At several case management conferences counsel advised me of ongoing difficulties in securing the cooperation of some of the petitioners and of counsel's inability to obtain the information needed to make a settlement proposal to the Board, or to counsel a client that it was appropriate to withdraw his or her claim. Accordingly, in my order dated May 15, 2012, I directed counsel to supply me with a list of petitioners with whom they have been unable to communicate regarding the nature and extent of their claims. Simmons was among these petitioners, per correspondence from her attorney dated May 23, 2012.

A notice of hearing was issued on June 1, 2012, requiring Simmons's appearance on July 30, 2012. Simmons was notified by the Clerk of the Office of Administrative Law, that her appearance was mandatory, and that a failure to appear would result in dismissal of her petition. The notice was sent both to her attorney and directly to Simmons at the address on record via regular mail. The OAL received no return of the notice as undeliverable.

Simmons's attorney appeared at the hearing and confirmed on the record his ongoing inability to reach his client. He confirmed that he has attempted to communicate with her via telephone and by certified and regular mail, all to no avail. He tried, without success, to discuss the need for her to appear at the scheduled proceeding. Simmons did not appear on July 30, 2012.

ANALYSIS AND CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Simmons has abandoned this matter and that it should be returned to the transmitting agency.

N.J.A.C. 1:1-14.4(a) provides that, if, after appropriate notice, a party does not appear in any proceeding scheduled by a judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge may direct the Clerk to return the matter to the transmitting agency for appropriate disposition. Simmons failed to appear at the scheduled proceeding, and she failed to provide an explanation one day following her nonappearance. Accordingly, the Clerk should return this matter to the Department of Education.

ORDER

It is **ORDERED** that the Clerk return this matter to the Department of Education for appropriate disposition.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 1, 2012

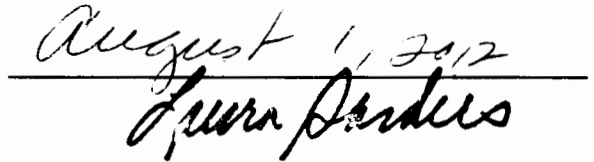
DATE

Date Received at Agency:

Date Mailed to Parties:



ELLEN S. BASS, ALJ

August 1, 2012


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG - 2 2012

OAL DKT. NO. EDU 1281-12
 AGENCY DKT. NO. 374-12/11

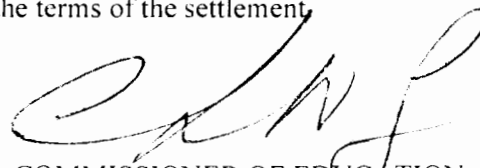
SYEED ABDUR-RAHMAN,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE CITY	:	
OF ELIZABETH, UNION COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter, the proposed "Settlement Agreement and Release (Agreement) and the Initial Decision of the Office of Administrative Law pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

The Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following observation. Sections 1 and 2 of the Agreement reference actions that may have already taken place, and have therefore preceded consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have either successfully implemented the settlement terms, or have agreed upon mutually satisfactory alternate dates for the effectuation of same. Assuming the foregoing, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

Date of Decision: 8/29/12

Date of Mailing: 8/29/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01281-12

AGENCY DKT. NO. 374-12/11

SYEED ABDUR-RAHMAN,

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY
OF ELIZABETH, UNION COUNTY,**

Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Karen A. Murray, Esq., for respondent

Record Closed: July 25, 2012

Decided: July 26, 2012

BEFORE **JAMES A. GERAGHTY, ALJ:**

This matter was transmitted to and filed with the Office of Administrative Law ("OAL") on January 31, 2012, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that settlement should be approved. Accordingly, I approve the settlement **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

7/26/12
DATE

James A. Geraghty
JAMES A. GERAGHTY, ALJ

Date Received at Agency:

7-31-12

Date Mailed to Parties:

JUL 31 2012

jb

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

BERGMAN & BARRETT
BY: MICHAEL T. BARRETT, ESQUIRE
9 TAMARACK CIRCLE
SKILLMAN, NJ 08558
(609) 921-1502
Attorneys for Petitioner, Syeed Abdur-Rahman

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SYEED ABDUR-RAHMAN,
Petitioner

V

ELIZABETH BOARD OF
EDUCATION,
Respondent

BEFORE THE OFFICE OF
ADMINISTRATIVE LAW

Dkt. No.: **EDU 01281-2012N**
Agency Ref. No.: **374-12/11**

**SETTLEMENT AGREEMENT
AND RELEASE**

The Respondent, City of Elizabeth Board of Education, and Petitioner, Syeed Abdur-Rahman (collectively, "the Parties"), hereby agree to settle the above-captioned matter subject to terms and conditions contained herein:

WHEREAS, Petitioner has been a long term employee of the Respondent in the maintenance department; and

WHEREAS, Petitioner was injured on October 20, 2009 during the course of employment; and

WHEREAS, a disagreement between the parties arose as to whether Petitioner was authorized to remain out of work as a result of the injury; and

WHEREAS, Respondent, effective December, 2008, continued to pay Petitioner his salary but did so by using his accumulated sick leave; and

WHEREAS, Petitioner felt as though his sick leave was improperly taken; and

WHEREAS, Petitioner filed a Verified Petition of Appeal before the

Commissioner of Education on or about December 30, 2011 ("Petition") claiming, among other things, that Respondent owed to him the value of approximately 25 days of salary that had been withheld; and

WHEREAS, Respondent disagreed with this claim and filed an Answer on or about January 26, 2012; and

WHEREAS, the Petition was transmitted by the Department of Education to the Office of Administrative Law on or about February 1, 2012 and a hearing in this matter was scheduled to commence on April 3, 2012; and

WHEREAS, the parties in good faith have discussed and negotiated concerning this matter and have a desire to settle this matter in order to avoid the necessity of a hearing and assure finality to the dispute in this matter by entering into this Settlement Agreement in order to reach a full and final settlement to all of the issues involved in this matter as follows.

1. Respondent shall pay Petitioner the amount of \$3,000.00 representing payment related to the claim made by Petitioner. Payment shall be made within thirty (30) days of approval and execution of this Settlement Agreement by Respondent. It is specifically agreed and understood that the Petitioner will not pursue any further claims for back or front pay or any other benefits of any nature whatsoever against Respondent.

2. Petitioner shall withdraw this matter, with prejudice, by letter, a copy of which is attached hereto and made a part hereof. Any and all claims presented in the Petition with respect to Petitioner's claimed entitlement to back this issue as raised in this Petition in this or any or forum.

3. This Agreement shall not be construed as an admission of liability by Petitioner or Respondent in this or any other proceeding.

4. The Parties hereby irrevocably and unconditionally waive, release and forever discharge any claims or rights against each other, either pursuant to the collective bargaining agreement, statute or common law, up to now or in the future, arising out of the above-captioned matter except for any legal claims presently filed and pending in another forum.

5. It is agreed that all of the terms of this Agreement are interdependent and that the terms will remain confidential to the maximum extent permitted by law.

6. This Agreement represents the entire Agreement between the parties and will not be modified in whole or in part except by a mutual subsequent written and signed agreement. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily without duress or coercion, and with the opportunity to consult with counsel of their choosing and option. Petitioner consulted with Michael Barrett, Esq., of the law firm of Bergman & Barrett and acknowledges that he is represented by competent counsel and that he understands the contents of this Agreement. Respondent consulted with Heather Savage Ford, Esquire and acknowledges that it is satisfied with her representation and that the contents of this Agreement are fully understood.

7. This Agreement constitutes full and final settlement of any and all claims which were or could have been raised to date in the Petition. This Agreement shall be governed by the Laws of the State of New Jersey.

8. This Agreement shall be signed and notarized by the Petitioner and shall be

authorized for signature by Board Resolution by the Respondent.

CITY OF ELIZABETH
BOARD OF EDUCATION

SYEED ABDUR-RAHMAN

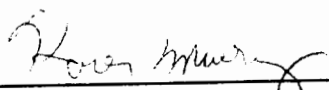
Board President



Date:

Date:

ATTEST:



~~Board Secretary/Business Administrator~~

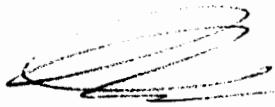
of Labor Council

Date:

STATE OF NEW JERSEY
COUNTY OF Mercer

SS:

I CERTIFY that on May 21, 2012, Syeed Abdur-Rahman personally came before me and acknowledged, under oath and to my satisfaction, that this person: (a) is named in and personally signed this document; and (b) signed, sealed and delivered this document as his act and deed.



Attorney or Notary Public

Michael T. Brown
Attorney at Law (NJ)

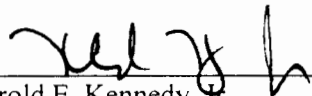
BOARD OF EDUCATION**RESOLUTION**

WHEREAS, the Elizabeth Board of Education and Syeed Abdur-Rahman have discussed a resolution of OAL Docket No. EDU 01281-2012N; and

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreement on file in the Office of the School Business Administrator/Board Secretary.

TRUE COPY APPROVED AND ADOPTED AT
THE ELIZABETH BOARD OF EDUCATION MEETING
HELD ON **June 28, 2012**



Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

E.A.A. on behalf of minor child E.A.Z., :
 PETITIONER, : COMMISSIONER OF EDUCATION
 V. : DECISION
 BOARD OF EDUCATION OF THE :
 TOWNSHIP OF NORTH BRUNSWICK, :
 MIDDLESEX COUNTY, :
 RESPONDENT. :

SYNOPSIS

Petitioner filed a *pro se* residency appeal challenging the determination of the respondent Board that his daughter was not eligible for a free public education in the North Brunswick school district during the 2011-2012 school year. Petitioner contended that his daughter lived primarily with him in North Brunswick, but also spent time in New Brunswick at her mother's residence. The respondent Board asserted – based on substantial evidence produced during a residency investigation – that E.A.Z. lived in New Brunswick with her mother during the 2011-2012 school year. The Board sought reimbursement for tuition for the 2011-2012 school year in the amount of \$10,250. This matter was originally heard at the OAL in April 2012, after which the ALJ issued an Initial Decision determining that E.A.Z. was not eligible for a free education in the district's schools until December 2011 or January 2012; accordingly the ALJ ordered petitioner to pay the Board tuition for one half of the 2011-2012 school year. Subsequently the Commissioner remanded the case back to the OAL for supplementation of the record to establish the actual amount of tuition owed by petitioner to the Board.

On remand, the ALJ found that: the respondent Board sent the OAL a letter dated July 27, 2012, stating that the amount of tuition owed by petitioner for the 2011-2012 school year had been settled, and attaching an invoice in the amount of \$5,295.42; and the Board's correspondence stated that after settlement discussions, the Board agreed to accept payment of \$3,000 from petitioner in full settlement of the matter. The ALJ concluded that the letter confirming settlement and the tuition reimbursement invoice fully disposed of all issues on remand and met the requirements of *N.J.A.C.* 1:1-19.1 and accordingly approved the settlement.

Upon a full and independent review, the Commissioner found that there is no legal indication whatsoever that petitioner has agreed to the terms contained in the Board's letter. Accordingly, the Commissioner rejected the purported settlement agreement and returned the matter to the OAL for supplementation of the record to conclusively evidence that *both* parties have agreed to the reported terms.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 9420-12
(EDU 2578-12 ON REMAND)
AGENCY DKT. NO. 27-2/12

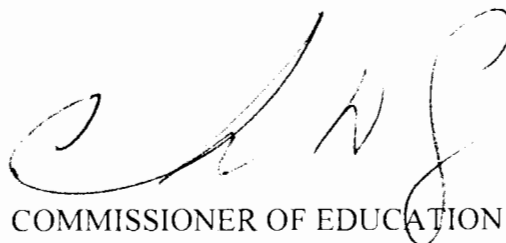
E.A.A., on behalf of minor child, E.A.Z.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF NORTH BRUNSWICK,	:	
MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, advising that the parties have settled this matter, have been reviewed.

Upon review, the Commissioner cannot find – on this record – that the parties have agreed to settle this matter. Specifically, appended to the Administrative Law Judge's decision are a Tuition Reimbursement Invoice from the Board indicating that it has calculated the tuition due and owing to be \$5,295.42 for the period of minor child E.A.Z.'s ineligible attendance in its schools. Also attached is a letter from Board counsel, Anthony T. Betta, reporting that – after settlement discussions – the Board has agreed to accept payment of \$3,000 from the petitioner in full settlement of this matter. Noticeably absent, however, is any legal indication whatsoever that petitioner has agreed to these terms.

Accordingly, the purported settlement agreement of the OAL is rejected and this matter is being returned to the OAL for supplementation of the record to conclusively evidence that *both* parties have agreed to the reported terms.

IT IS SO ORDERED.



Handwritten signature of the Commissioner of Education, consisting of a stylized 'C' followed by 'E' and 'D'.

Date of Decision: 8/30/12

Date of Mailing: 8/30/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09420-12

AGENCY DKT. NO. 27-2/12

E.A.A., ON BEHALF OF E.A.Z.,

Appellants,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF NORTH BRUNSWICK, MIDDLESEX COUNTY,**

Respondent.

ON REMAND

OAL DKT. NO. EDU 02578-12

E.A.A., appellant, pro se

Anthony B. Vignuolo, Esq., and Anthony T. Betta, Esq. representing
respondent (Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, attorneys)

Record Closed: August 6, 2012

Decided: August 6, 2012

BEFORE **SANDRA ANN ROBINSON, ALJ:**

STATEMENT OF THE CASE

In August 2010, E.A.A., appellant, signed a Lease Agreement for a one-bedroom apartment located in North Brunswick, New Jersey. Appellant registered his daughter for school, but instead of her attending the school closest to the apartment, Judd

School, he asked that she attend Parsons School. Since Judd School had maximized enrollment capacity, the North Brunswick Board of Education (NBBOE), respondent, approved appellant's request for his daughter to attend Parsons only during the 2011/2012 school year (SY). Parsons School was requested by appellant to accommodate his childcare concerns.

Prior to the end of the 2010/2011 SY, Parson School officials informed the NBBOE that appellant's daughter had told some of her friends that she lives in New Brunswick.

Appellant did not make a request of NBBOE in the 2011/2012 SY for his daughter to attend Parsons School. However, on August 11, 2011, the NBBOE through Dr. Brian Zychowski, superintendent of North Brunswick Township Schools, wrote to appellant to advise him that his daughter would be transferred back to Judd School if he could not prove she resided in North Brunswick.

On September 2, 2011, appellant visited the NBBOE offices to inquire why his daughter could no longer attend Parsons School. Appellant met with Dr. Zychowski and was advised of the NBBOE suspicions that his daughter resided in New Brunswick. Appellant assured Dr. Zychowski that he and his daughter reside in North Brunswick and his wife and his daughter's mother live in New Brunswick. Appellant also told the superintendent that his daughter splits her time between parents and usually stays with him on Monday, Tuesday, and Friday.

Based on the information provided to the superintendent, appellant's daughter was permitted to remain at Parsons School for the 2011/2012 SY. Dr. Zychowski requested a residency check to commence when school started. On December 12, 2011, the NBBOE held a residency hearing and the Student Services Committee determined that appellant's daughter did not legally reside in North Brunswick with appellant, but resided in New Brunswick with her mother. The NBBOE informed appellant of the determination by letter dated December 13, 2011. A pertinent portion of the letter set forth,

This determination was made in accordance with N.J.A.C. 6A:22-3.1(i). A family member residing at 705 Birchwood Court confirmed to the Residency Investigator that child (your daughter) stays with mother at 65 Comstock Street in New Brunswick during the week and visits father on the weekend. Therefore it is the recommendation of the committee that the North Brunswick Board of Education terminates your daughter's attendance At Parsons Elementary School effective Tuesday, January 3, 2012.

Appellant contends that his daughter has split residency between her mother's home in New Brunswick and his (her father's) home in North Brunswick at the beginning of the 2011/2012 SY. On appellant's "Pro Se Residency Appeal Petition" and during his testimony and oral presentation he disclosed that his daughter moved in completely to live with him in North Brunswick, starting on December 17, 2011.

Respondent, through Investigator Mauer, submitted substantial evidence to support respondent's suspicions that appellant's daughter's residency during the 2011/2012 SY is in New Brunswick. Respondent seeks reimbursement for services and calculates tuition charges due and owing from appellant for the full 183-day enrollment ineligibility in North Brunswick during the 2011/2012 SY, to be \$10,250.

On May 29, 2012, the Initial Decision in this matter was filed with the Commissioner of the Department of Education and transmitted to the parties. It was determined that the weight of the evidence indicates that appellant's daughter resided in New Brunswick and not in North Brunswick for the first half of the 2011/2012 SY. The **ORDER** in decision required a modification of the amount of tuition appellant owes respondent to reflect the school days appellant's daughter did not reside in North Brunswick during the first half of the 2011/2012 SY.

PROCEDURAL HISTORY ON REMAND

The within matter was transmitted to the Office of Administrative Law (OAL) **ON REMAND** on July 12, 2012, for a determination of the actual amount of tuition owed

based on a calculation prepared by the undersigned after listening to and admitting evidence in regard to days of school and tuition rates.

On July 30, 2012, OAL received correspondence from respondent, Board of Education of North Brunswick Township, dated July 27, 2012, to confirm that the matter **On Remand**—OAL Docket Number 09420-12—pertaining to the amount of tuition owed for the 2011/2012 SY, had been settled.

FINDINGS AND CONCLUSION

I have reviewed both the Tuition Reimbursement Invoice, dated June 5, 2012, and the letter confirming the settlement, dated July 27, 2012, and I **FIND**:

1. Respondent, Board of Education of North Brunswick Township calculated the tuition owed by appellants E.A.A. and E.A.Z. to be \$5,295.42 for the first half of the 2011/2012 SY.
2. The parties entered into settlement discussions. At the conclusion of discussions respondent agreed to accept appellant's payment of \$3,000, instead of the calculated \$5, 295.42, as payment in full for tuition for the first half of the 2011/2012 SY.
3. The Letter confirming settlement and the Tuition Reimbursement Invoice fully disposes of all issues **On Remand** and is consistent with the law.

I therefore **CONCLUDE** that the Letter and the Invoice meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved.

ORDER

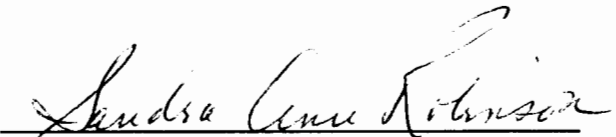
I approve the **SETTLEMENT** and hereby **ORDER** that the parties comply with the payment terms, and that these proceedings be concluded, pending approval by the Commissioner of Education.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 6, 2012

DATE

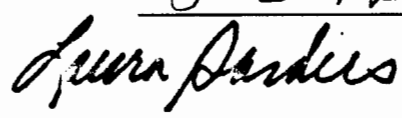

SANDRA ANN ROBINSON, ALJ

Date Received at Agency:

Date Mailed to Parties:

lr

AUG - 8 2012

8-8-12

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Attachments:

Letter and Invoice

BORRUS, GOLDIN, FOLEY
VIGNUOLO, HYMAN & STAHL

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

2875 US HIGHWAY #1
ROUTE 1 & FINNEGANS LANE
P.O. BOX 7463
NORTH BRUNSWICK, N.J. 08902
(732) 422-1000

Anthony T. Betta, Esq.
Email: abetta@borrus.com

FAX: (732) 422-1016
E-mail: attys@borrus.com

July 27, 2012

MARTIN S. GOLDIN
(1962-2007)

RECEIVED
OFFICE OF THE
STATE OF NEW JERSEY
2012 JUL 30 P 3:12

VIA FACSIMILE (973)648-2348 and REGULAR MAIL

Honorable Sandra A. Robinson, A.L.J.
Office of Administrative Law
33 Washington Street, 7th Floor
Newark, New Jersey 07102

**Re: E.A.A. On Behalf of Minor Child E.A.Z. v. Board of Education Of North
Brunswick Township, Middlesex County
Docket No. EDU #02578-12**

Dear Judge Robinson:

My firm is counsel for the Board of Education of North Brunswick Township. Pursuant to my conversation with Your Chambers, I am writing to confirm that this matter has been settled. As evidenced by the Invoice attached hereto, the Board of Education calculated the tuition owed by the Petitioner for the first half of the 2011-2012 school year to be \$5,295.42. After settlement discussions, the Board of Education agreed to accept payment of \$3,000.00 from the Petitioner in full settlement of this matter.

Should Your Honor have any questions or comments, I can be reached at (732) 422-1000, Extension 224.

Respectfully Submitted,

Anthony T. Betta
ANTHONY T. BETTA

ATB:kdv
Enclosure

cc. Edwin A. Ani. Via Regular and Certified Mail
cc. Dr. Brian Zychowski. Superintendant

North Brunswick Board Of Education**INVOICE**

Maple Meade School – PO Box 6016
North Brunswick, New Jersey 08902
Phone 732-289-3000 Fax 732-297-8567

INVOICE #1
DATE: JUNE 5, 2012

TO:

Mr. Edwin Ani
705 Birchwood Court
North Brunswick, New Jersey 08902

FOR:

Tuition Reimbursement for Emily Zavala

DESCRIPTION	DAYS	RATE	AMOUNT
Tuition for attendance at Parsons School:			
<u>2011-2012 School Year:</u>			
Annual Tuition for Elementary K-5: \$10,250			
Daily Tuition: \$56.94			
September	17	\$56.94	\$967.98
October	21	\$56.94	\$1,195.74
November	17	\$56.94	\$967.98
December	17	\$56.94	\$967.98
January	21	\$56.94	\$1,195.74
TOTAL DUE:			\$5,295.42
MAKE ALL CHECKS PAYABLE TO:			
NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION			

2012 JUN 30 P 3:12
OFFICE OF THE
STATE CLERK
TREASURER
OF THE STATE
OF NEW JERSEY

ALBERT CAMPBELL, :

PETITIONER, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE CITY :
OF CAMDEN, CAMDEN COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner – who has been employed in respondent’s district since 1977, most recently as an elementary vice principal – appealed the determination of the respondent Board to withhold his 2011-2012 salary increment, claiming that he had not received prior written notice of this action, nor the reasons therefore as required under *N.J.S.A.* 18A:29-14. The Board contended, *inter alia*, that petitioner’s appeal – which was filed on October 31, 2011 – was untimely pursuant to *N.J.A.C.* 6A:3-1.3, as he had been notified by letter dated May 19, 2011 of the Board’s decision to withhold his increment. The Board filed a motion for summary decision, to which petitioner failed to respond.

The ALJ found, *inter alia*, that: counsel for petitioner notified the OAL that his client had failed to communicate with him regarding an answer to the Board’s motion to dismiss, and indicated that the petition might be withdrawn; because such withdrawal was not forthcoming, the matter was decided on the papers; the uncontested documents presented with the motion to dismiss show, *inter alia*, that the Board notified petitioner in writing on May 19, 2011 that his increment would be withheld for the coming year; further, by letter dated July 8, 2011, petitioner was notified that the reason for the increment withholding was his “unsatisfactory performance as Vice Principal” as detailed in “multiple memorandums from the principal at Davis Elementary School between October 2010 and June 2011”; and the Board heard argument from petitioner at a “Donaldson Hearing” as to why his increment should not be withheld, but declined to change its determination to withhold the increment. The ALJ concluded that petitioner was fully aware that his increment was to be withheld by the end of May 2011 yet failed to file his appeal until the end of October 2011, well beyond the 90 day limit for the filing of a petition. Accordingly, the ALJ dismissed the petition as untimely.

Upon independent review and consideration – and noting that the file includes a July 30, 2012 letter from petitioner’s counsel purporting to withdraw the petition subsequent to the issuance of the decision of the OAL on July 27, 2012 – the Commissioner concurred with the ALJ’s findings and conclusions in this matter. Accordingly, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 480-12
 AGENCY DKT. NO. 320-10/11

ALBERT CAMPBELL,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE CITY :	:	
OF CAMDEN, CAMDEN COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

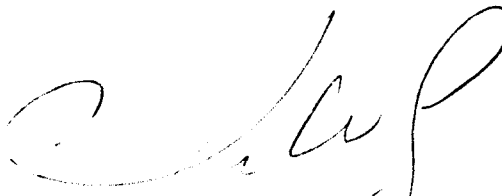
This controversy was initiated on October 31, 2011 as a challenge to respondent's decision to withhold petitioner's increment for the 2011-2012 school year. On March 22, 2012 – after the matter had been transmitted to the Office of Administrative Law (OAL) for fact-finding – respondent moved for summary decision alleging, *inter alia*, that petitioner had failed to institute the case within the time period allowed by *N.J.A.C.* 6A:3-1.3(i) and that, consequently, the Commissioner lacked jurisdiction to adjudicate the matter. Petitioner never responded to the motion.

On July 27, 2012 an Initial Decision was issued in the OAL, wherein the Administrative Law Judge (ALJ) found that petitioner had not timely instituted his challenge to the increment withholding action by respondent. The ALJ accordingly recommended dismissal of the petition.

Upon review of the record and Initial Decision, the Commissioner concurs with the ALJ's determination that the petition was untimely filed. For this reason, and in light of petitioner's "withdrawal" from the case by way of a letter dated July 30, 2012 from his counsel,

the Commissioner adopts the Initial Decision as the final decision in this case. The petition is dismissed with prejudice.

IT IS SO ORDERED.¹



COMMISSIONER OF EDUCATION

Date of Decision: 8/30/12

Date of Mailing: 8/30/12

¹ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Appellate Division of the Superior Court.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 480-12

AGENCY DKT. 320-10/11

ALBERT CAMPBELL,

Petitioner,

v.

**BOARD OF EDUCATION
OF THE CITY OF CAMDEN, CAMDEN
COUNTY,**

Respondent.

Robert M. Schwartz, Esq. for petitioner

Louis R. Lessig, Esq., and Eric D. Milavsky, Esq., for respondent
(Brown & Connery, attorneys,)

Record Closed: July 11, 2012

Decided: July 27, 2012

BEFORE JEFF S. MASIN, ALJ:

In this contested case, Albert Campbell filed a petition with the Commissioner of Education challenging a decision of the Camden City Board of Education to withhold his increment for the 2011-12 school year. The petition was filed by Campbell on October 31, 2011 and was transferred to the Office of Administrative Law on January 10, 2012. A prehearing conference was held on February 21, 2012. On March 22, 2012, counsel for the Board filed a motion to dismiss the petition, contending in part that it was filed beyond the ninety-day period permitted for the filing of such a challenge to the Board's action. In addition, the respondent argued that Mr. Campbell had failed to present any

argument against the Board's action that did not fail as a matter of law.¹ No reply to the motion was received. On May 25, 2012, Mr. Schwartz advised this judge in writing that he had sent his client a letter on April 5, 2012, concerning the reply to the motion but that as of May 25, he had not yet heard from Mr. Campbell. He indicated that he would try to reach Campbell and would advise me as to "what course of action we will take." Thereafter, no reply to the motion, nor any other indication of the position of the petitioner, has been received, this despite an indication that the petition might be withdrawn. At this date, it is no longer appropriate to wait for any reply to the motion, and no withdrawal having been received, a decision is therefore rendered.

According to the uncontested documents presented with its motion to dismiss, the Board notified Campbell by letter dated April 19, 2011, that it intended to discuss a personnel matter respective to his position at its meeting of May 17, 2011. He was invited to advise of any desire that the personnel matter be discussed in the public portion of the meeting, as opposed to a discussion during a private meeting. On May 19, 2011, the Board advised Campbell, in writing, that it had determined at its May 17, 2011, meeting to withhold his increment for the 2011-12 school year. The letter also advised that if he desired, the Board would "provide a right to an informal appearance to request that the Board reconsider the decision to withhold your increment." He was told that if he desired such an appearance he should notify the Board office. By letter, he did so, on May 27, 2011. In the letter he noted his astonishment and dismay at the decision. In response to the letter, the Board advised that he could appear on August 2, 2011 at a "Donaldson Hearing." By letter dated July 8, 2011, the Board's Acting Assistant Director of Human Resources notified Campbell that the reason for the increment withholding was his "unsatisfactory performance as Vice Principal at Davis Elementary School" as detailed in "multiple memorandums from the principal at Davis Elementary School between October 2010 and June 2011." The Board did hear argument from Campbell, but declined to change its previously announced determination to withhold his increment.

The Board contends that Campbell's petition was filed outside of the allowable period for challenging the Board's action. N.J.S.A. 18A:29-14 provides that

¹ Campbell argues that the action was arbitrary and capricious, done without notice to him of the Board's intentions, was a "retroactive" decision, and violated his tenure rights.

Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. . . .

A petition filed with the Commissioner challenging such a withholding must be filed in a timely manner, as defined by N.J.A.C. 6A:3-1.3(i),

The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

The ninety-day rule expresses a public policy that favors a measure of repose to school districts, stabilizing the relationship between teachers and administration. It allows for the proper and efficient administration of the school laws. The rule has been upheld as a "fair and reasonably-necessary requirement for the proper and efficient resolution of disputes under the school laws." Kaprow v. Bd. of Ed. of Berkeley Township, 131 N.J. 572, 582 (1993). The significant factor used in measuring the start of the ninety-day period is "adequate notice." The party presenting a claim must have received some form of notice adequate to alert "an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. . . . [T]he notice requirement should effectuate concerns for individual justice by not triggering the limitations period until [the petitioner has been alerted to the existence of facts that would be adverse to it]. At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." Borough of Park Ridge v. Salimone, 21 N.J. 28, 48 (1956)." Id. at 587. The form of notice deemed adequate to place someone on notice of adverse action can

be either formal, such as a letter from the secretary of the Board of Education informing the petitioner that someone else has been given her job, Kaprow, supra, or informal, such as the issuance of a check that does not contain a salary increase (North Plainfield Ed. Ass'n. v. Bd. of Ed. of North Plainfield Borough, 96 N.J. 587 (1984)). While the law does recognize that there are some extremely limited instances where the enforcement of the ninety-day rule should be waived in the interests of public policy, such as where important and novel constitutional questions or matters of important public rather than private interests are in need of adjudication or where there are informal or ex parte determinations of legal questions by administrative officials, in general, the rule has been strictly enforced. Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975); Bland-Carter v. State-Operated School District of the City of Newark, (EDU 1505-00, Initial Decision, (July 21, 2000), <http://lawlibrary.Rutgers.edu/oal/search.html>., adopted Comm'r (September 11, 2000) (refusing to relax the ninety-day rule when the petitioner filed outside of the time limitation where genuine personal problems of the petitioner occurred during the first part of the ninety-day period and the petitioner returned to work several weeks before the ninetieth day).

Here, I **FIND** that the Board notified Mr. Campbell that his increment would be withheld by letter dated May 19, 2011. This letter followed upon the earlier April 19 letter advising that he was to be the subject of a discussion regarding a personnel matter at the Board's May meeting. Thus, as of May 19, or a day or two thereafter, I **FIND** that Campbell was fully aware that his increment was to be withheld, and his May 27, letter to the Board requesting to appear before it confirms that he knew of the Board's May 17 decision and was certainly troubled by it. Despite this, he did not file a petition with the Commissioner until, according to the Controversies and Disputes date stamp, October 31, approximately 166 days after he was aware of the Board's action. The ninety-day period for filing the appeal expired on or about August 17, 2011. Clearly, the petition was filed well outside of the allowable time. And Mr. Campbell has neither denied this nor offered any explanation or excuse for his failure to file in a timely manner. He has not presented any response, and as such, has not suggested that any of the limited grounds for waiving the ninety-day rule apply to his case.

Based upon the uncontested facts relevant to the issue of the timelines of the petition, and without comment upon the substantive issues as the ninety-day rule is jurisdictional. I **CONCLUDE** that Mr. Campbell's petition was filed outside of the time permitted by N.J.A.C. 6A:3-1.3i and that, as such, it is not a timely objection to the Board's decision and the Commissioner is without jurisdiction to act upon the petition. The Petition is therefore **DISMISSED with prejudice**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

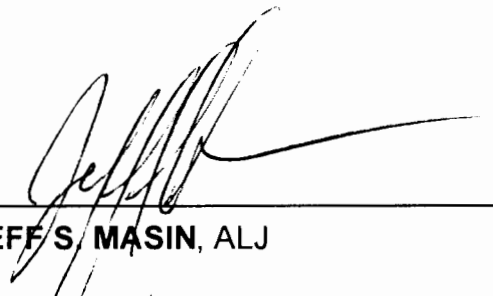
July 27, 2012

DATE

Date Received at Agency:

Date Mailed to Parties:

mph



JEFF S. MASIN, ALJ

7/27/12

7/27/12

OAL DKT. NO. EDU 5905-12
AGENCY DKT. NO. 101-4/12

D.G., on behalf of minor child, S.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF MAPLE SHADE,	:	
BURLINGTON COUNTY,	:	
RESPONDENT.	:	
_____	:	

The record of this matter, the parties' proposed Consent Order, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Commissioner approves the parties' settlement¹ and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

Date of Decision: 8/30/12
Date of Mailing: 8/30/12

¹ It is noted that provision 1.c. of the parties agreement states "...Respondent will not seek to collect the tuition due and owing to the Maple Shade School District as set forth in paragraph b. above unless S.M. is *legally* enrolled in the Maple Shade School District at a date subsequent to this agreement." (emphasis added) It is determined that the parties' agreement intended this provision to read "illegally" enrolled.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5905-12

AGENCY DKT. NO. 101-4/12

D.G., ON BEHALF OF MINOR CHILD, S.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF MAPLE SHADE,

BURLINGTON COUNTY,

Respondent.

Diane Gill, petitioner, pro se

Shannon L. Hudak, Esq. for respondent

Record Closed: August 2, 2012

Decided: August 8, 2012

BEFORE JOHN F. RUSSO, JR., ALJ:

This matter was transmitted to the Office of Administrative Law on May 3, 2012, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have executed a Consent Order indicating the terms thereof, which is attached and fully incorporated herein and the

Maple Shade Board of Education has approved the settlement as evidenced by a Board of Education Resolution, which is also attached..

I have reviewed the record and the terms of settlement and I **FIND**:

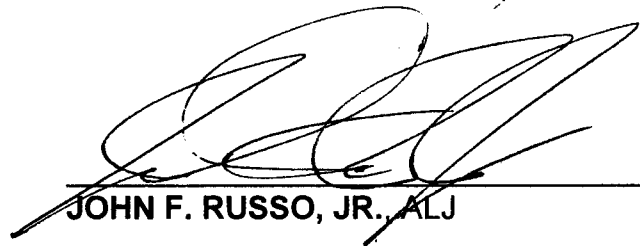
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the (title of agency head) does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 8, 2012
DATE



JOHN F. RUSSO, JR., ALJ

Date Received at Agency:

Date Mailed to Parties:

8/9/12

/bdt

APPENDIX

EXHIBITS

JOINT:

J-1 - Consent Order

J-2 Maple Shade Board of Education Resolution

File No. 06310-0003

Law Offices
PARKER McCAY P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054
(856) 596-8900
Attorneys for Respondent, Maple Shade Board of Education

DIANE GILL,

Petitioner/Cross-Respondent,

v.

MAPLE SHADE TOWNSHIP BOARD
OF EDUCATION,

Respondent/Cross-Petitioner.

OFFICE OF ADMINISTRATIVE LAW

OAL Docket No.: *EDU 5905-10*
Agency Reference No.: 101-4/12

CIVIL ACTION

CONSENT ORDER

THIS MATTER having been opened to the Court upon the filing of a Petition of Appeal by the Petitioner, Diane Gill ("Petitioner"), and an Answer and Cross-Petition of Appeal by the Respondent, Maple Shade Township Board of Education ("Respondent"); and the parties having consented to the form and entry of the within Order; and good cause having been shown;

IT IS on this *2nd* day of *August* 2012 ORDERED AND ADJUDGED as follows:

1. All claims and cross-claims asserted by the Petitioner and Respondent in this matter have been fully resolved as follows:

a. Petitioner admits that during the 2009-2010, 2010-2011, and 2011-2012 school years, S.M. illegally attended school in Maple Shade in violation of N.J.S.A. 18A:38-1 et seq. and N.J.A.C. 6A:22-1.1 et seq. Petitioner admits

that S.M.'s parents and legal guardians were not residents of Maple Shade. Petitioner further admits that S.M. has resided with the Petitioner solely for the purpose of receiving a free public education in Maple Shade. Petitioner further admits that she has not supported S.M. gratis, and that S.M.'s parents and legal guardians were capable of supporting and providing care to S.M. during the school years at issue.

b. Accordingly, tuition is due and owing to the Maple Shade School District in the following amounts:

2009-2010	\$18,842 per year (\$104.68 per day)
2010-2011	\$13,690 per year (\$76.06 per day)
2011-2012	\$14,287 per year (\$79.37 per day)

c. In lieu of proceeding to a full evidentiary hearing, Respondent will not seek to collect the tuition due and owing to the Maple Shade School District as set forth in paragraph b. above unless S.M. is legally enrolled in the Maple Shade School District at a date subsequent to this agreement.

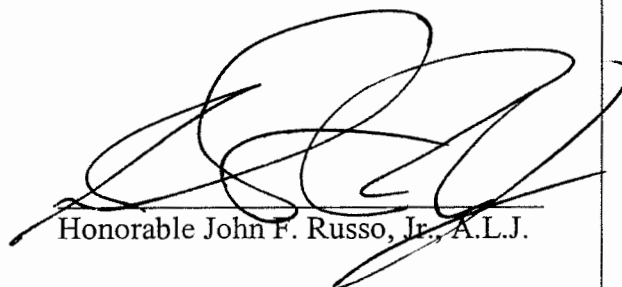
d. Petitioner will ensure that S.M. is immediately enrolled in her proper school district of residence for the 2011-2012 school year, and will provide proof of the same to the Maple Shade School District no later than August 2, 2012.

e. This Consent Order is subject to formal approval by the Maple Shade Board of Education, the Administrative Law Judge assigned to hear this case, and the Commissioner of Education.

f. Petitioner acknowledges that she had the right to be represented by legal counsel during the negotiations of this Consent Order and all

proceedings leading to the entry into this Consent Order.

g. Petitioner hereby states that she is signing this Consent Order voluntarily of her own free will and not under duress or coercion of any kind.

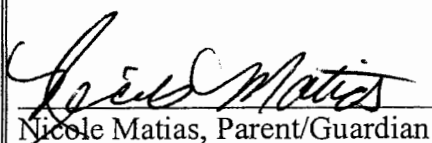


Honorable John F. Russo, Jr., A.L.J.

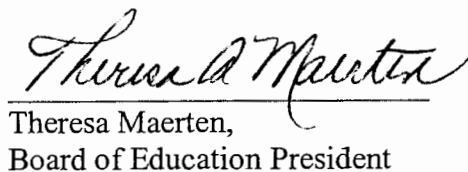
We hereby consent to the form and
Entry of this Order.



Diane Gill, Petitioner



Nicole Matias, Parent/Guardian



Theresa Maerten,
Board of Education President

0-2

Telephone : (856) 779-1750

Fax: (856) 779-7488



MAPLE SHADE BOARD OF EDUCATION

Administration Building

170 Frederick Avenue, Maple Shade, N.J. 08052-3299

Michael Livengood
Superintendent of Schools

Joseph Langowski
Assistant Superintendent of Curriculum

Diana Cawood
School Business
Administrator/Board Secretary

July 27, 2012

I certify that at the meeting of July 25, 2012, the Maple Shade Board of Education took action to adopt:

7.2b Consent Order in Commissioners Residency Appeal

A motion was made by Mr. McClure and seconded by Mr. Lovell that the Board of Education approve the Consent Order in Commissioners Residency Appeal.

Roll Call

Mr. Adams	Absent
Mrs. Gatton	Yes
Mr. Kauffman	No
Mr. Lovell	Yes
Mr. McClure	Yes
Mrs. Mealy	Yes
Mr. Natale	Yes
Ms. Wiest	No
Mrs. Maerten	Yes

Sincerely,

Diana Cawood
School Business Administrator
Board Secretary

Encl.

DC/ds

OAL DKT. NO. EDU 11302-12

AGENCY DKT. NO. 228-8/12

M.L., on behalf of minor children, J.F. and D.F.; :
 E.O. and B.O., on behalf of minor children, :
 D.O. and G.O.; J.P. and M.P., on behalf of :
 minor children, A.P. and M.P.; and :
 L.R. and M.R., on behalf of minor children, :
 S.R. and F.R., :

PETITIONERS,

COMMISSIONER OF EDUCATION

V.

DECISION ON MOTION

BOARD OF EDUCATION OF THE BOROUGH :
 OF INTERLAKEN, MONMOUTH COUNTY; :
 BOARD OF EDUCATION OF THE CITY :
 OF ASBURY PARK, MONMOUTH COUNTY; :
 BOARD OF EDUCATION OF THE :
 BOROUGH OF WEST LONG BRANCH, :
 MONMOUTH COUNTY; AND :
 BOARD OF EDUCATION OF THE :
 SHORE REGIONAL SCHOOL DISTRICT, :
 MONMOUTH COUNTY, :

RESPONDENTS.

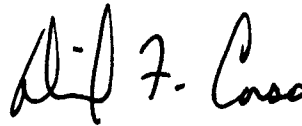
The record of this emergent matter – which included a digital recording of the hearing conducted at the Office of Administrative Law (OAL) on August 27, 2012 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed by the Assistant Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34.

Upon full consideration of the entire record, the Assistant Commissioner adopts the recommended Order granting emergent relief as he concurs with the ALJ – for the reasons

fully presented in her decision – that petitioners have satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 N.J. 126 (1982).

Accordingly, petitioners' emergent application is granted. This matter shall proceed at the OAL for such further action as may be necessary to bring it to conclusion.

IT IS SO ORDERED.¹

A handwritten signature in black ink, appearing to read "Alfred J. Corso".

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 8/30/12

Date of Mailing: 8/30/12

Faxed

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENT RELIEF

OAL DKT. NO. EDU 11302-12

AGENCY DKT. NO. 228-8/12

**M.L. O/B/O MINOR CHILDREN J.F. AND D.F.;
E.O. AND B.O., O/B/O MINOR CHILDREN D.O.
AND G.O.; J.P. AND M.P. O/B/O MINOR
CHILDREN A.P. AND M.P.; L.R. AND M.R. O/B/O
MINOR CHILDREN S.R. AND F.R.,**

Petitioners,

v.

**BOARD OF EDUCATION OF BOROUGH
OF INTERLAKEN, MONMOUTH COUNTY,
BOARD OF EDUCATION OF THE
CITY OF ASBURY PARK, MONMOUTH
COUNTY, BOARD OF EDUCATION OF
THE BOROUGH OF WEST LONG BRANCH,
MONMOUTH COUNTY AND BOARD OF
EDUCATION OF SHORE REGIONAL SCHOOL
DISTRICT, MONMOUTH COUNTY.**

Respondents.

Thomas M. Murphy, Esq., for petitioners

Anthony P. Sciarrillo, Esq., and Jennifer Osborne, Esq. for respondent, Interlaken Board of Education (Lindabury, McCormack, Estabrook & Cooper, attorneys)

Michael Gross, Esq., for respondent Board of Education of the City of Asbury Park, Monmouth County (Kenney, Gross, Kovats & Parton, attorneys)

Viola Lordi, Esq., for respondent West Long Branch Board of Education, Monmouth County, respondent (Wilentz, Goldman & Spitzer, attorneys)

Alexis Tucci, Esq., for respondent Shore Regional Board of Education, Monmouth County (Tucci, Hot & Crupi, attorneys)

BEFORE **PATRICIA M. KERINS, ALJ**:

Petitioners are the parents of eight children, ages five through twelve, who reside in the Borough of Interlaken (Borough) and whose public education is to be provided by the Board of Education of Interlaken (Interlaken). They seek an Emergent Order allowing their children to enroll in the West Long Branch School District (West Long Branch)¹ along with other Interlaken students. The petition and request for emergent relief was filed with the Department of Education on August 17, 2012, and transmitted to the Office of Administrative Law (OAL) on August 21, 2012. Pleadings in response were filed by the parties up to August 24, 2012, and oral argument on the request for emergent relief was heard on August 27, 2012 at the OAL in Mercerville, New Jersey. Only respondent Board of Education of Asbury Park (Asbury Park) has objected to the relief sought by petitioners.

The right of Interlaken students to attend either West Long Branch schools or Shore Regional High School rather than Asbury Park schools was the subject of a prior May 11, 2012, emergent order in Board of Education of the Borough of Interlaken v. Board of Education of the City of Asbury Park, OAL Docket No. EDU 5340-2012

¹ All of the petitioners are children of an age to attend the West Long Branch elementary schools rather than Shore Regional.

(Interlaken I). That order allowed Interlaken students to attend those districts pending a decision in the underlying dispute between Asbury Park and Interlaken over the existence of a sending-receiving relationship between the two districts.² That Order was affirmed by the Commissioner of Education (Commissioner) on June 14, 2012. The legal and factual discussions set forth those Orders are incorporated herein.

At issue in this request for emergent relief is whether the prior order allowing Interlaken students to attend West Long Branch and Shore Regional schools should be applied to the approximately fifty school age children resident in the Borough, rather than just the twenty students who were currently attending those schools on the date of the entry of the order in Interlaken I. As set forth by petitioners, Interlaken did not allow their children to enroll in the West Long Branch district for the 2012-13 school year based upon its interpretation of the emergent order entered on May 11, 2012 and the Commissioner's subsequent affirmance.

In Interlaken I, the Borough requested several forms of relief, including an Order maintaining the status quo, allowing the twenty Interlaken students currently attending West Long Branch and Shore Regional schools to continue their attendance in those districts, and an Order, pending the outcome of its underlying petition for relief, permitting any additional Interlaken students who wish to enroll in the West Long Branch or Shore Regional schools to do so for the 2012-13 school year. In pertinent part, the May 11, 2012 Order reads:

....Its request for maintenance of the status quo is **GRANTED** and Interlaken students may continue to attend West Long Branch and Shore regional schools pending a determination by the Commissioner of Interlaken's Verified Petition for Relief.

In affirming that Order the Commissioner stated:

Accordingly, the Order of the OAL is adopted. Petitioner's students will continue their educations in the schools where they currently are enrolled, pending an ultimate determination concerning petitioner's

² Interlaken I has not yet been scheduled for a hearing as the completion date for the feasibility study required under the statute regarding sending-receiving relationships is February 1, 2013.

application to replace or supplement the send-receive relationship that it previously maintained with the respondent Asbury Park Board of Education. The matter is hereby returned to the OAL for a plenary hearing on the merits.

The standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982) and are codified at N.J.A.C. 6A:3-1.6. They include irreparable harm if the relief is not granted, a settled legal right underlying petitioner's claim, likelihood that petitioner will prevail on the merits of the underlying claim, and, balancing the equities and interests, that petitioner will suffer greater harm than respondent.

While neither Order specifically addresses the question of whether Interlaken students not currently enrolled in West Long Branch or Shore Regional schools can enroll in those schools, the language of each order is broad enough to encompass that eventuality. Further, the legal analysis applied in each anticipates such a result. In allowing Interlaken students to continue attending the receiving districts of West Long Branch or Shore Regional both orders cited the underlying dispute between Interlaken and Asbury Park as to the existence and extent of the sending-receiving relationship between them. Although a hearing is required to determine whether such a relationship exists, and if so whether Interlaken has met the statutory requirements for terminating such a relationship, under the Crowe standard, it was determined that Interlaken had a likelihood of prevailing on the merits. That likelihood of success was one of the factors allowing Interlaken students to attend West Long Branch and Shore Regional as receiving districts for Interlaken.

Crowe further requires that petitioners show a settled legal right to the relief sought. In this matter, the children of Interlaken have a right to a public education under the law of New Jersey. While Asbury Park has disputed Interlaken's right to enter into sending-receiving relationships with West Long Branch and Shore Regional, it has nevertheless done so. Although the relationships are disputed, all of the children of Interlaken have a settled legal right to the public education made available by Interlaken. As Interlaken has been allowed to maintain the status quo of those sending receiving relationships with West Long Branch and Shore Regional pending the resolution of Interlaken I, access to those schools must be provided to all its resident

children. To do otherwise calls into question their settled legal right to a public education.

The standard for emergent relief further requires that petitioners suffer irreparable harm should the relief not be granted. In this matter, petitioners' children are entitled to a public education. If they are unable to receive that education, they will be denied a constitutional right, clearly suffering irreparable harm. Interlaken maintains no schools of its own and has disputed its sending-receiving relationship with Asbury Park. It has however, entered into sending-receiving relationships with West Long Branch and Shore Regional. As those relationships have been permitted to continue, they should be available to all of the approximately fifty school age children residing in the Borough. To do otherwise would deprive the remaining children of access to the schools available to other residents, raising a serious issue regarding their equal access to the public education already being provided to those children already attending West Long Branch or Shore Regional.

The final prong of the Crowe analysis is whether upon a balancing of the equities and interests, petitioners will suffer greater harm than respondent. As noted in Interlaken I, a balancing of the equities shows that the children of Interlaken have a greater stake in this matter than the only objecting respondent, Asbury Park. Their right to a public education is at stake in this dispute between the two districts. Interlaken has chosen to enter into sending-receiving relationships with West Long Branch and Shore Regional and to contest the existence and extent of the relationship with Asbury Park. Pending the outcome of the Interlaken I case, the status quo of the West Long Branch and Shore Regional relationships has been maintained and petitioners have chosen to enroll their children in the same manner as other Interlaken children. To deny them that right raises issues of equal access and subjects their children's right to a public education to the uncertainty of Interlaken's disputed relationship with Asbury Park. In contrast, as noted in Interlaken I, no regular education Interlaken students have attended Asbury Park schools since the mid 1990s, and any harm to it is merely speculative at this point.

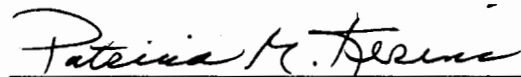
Petitioners' request for an emergent order is **GRANTED** and all Interlaken students may attend West Long Branch and Shore Regional Schools pending the final determination in the matter of Board of Education of the Borough of Interlaken v. Board of Education of the City of Asbury Park, et al., OAL Docket No. EDU 5340-2012. It is so **ORDERED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

August 27, 2012

DATE

/lam



PATRICIA M. KERINS, ALJ

KATHLEEN BIGGIANI,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
BOROUGH OF RIDGEFIELD,	:	
BERGEN COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured secretarial employee whose position was abolished in a reduction in force (RIF) in June 2010, alleged that the respondent Board violated her tenure and seniority rights when it failed to rehire her for a secretarial position which was posted in August 2011, and instead selected a non-tenured employee to fill the vacancy. After transmittal of the case to the Office of Administrative Law (OAL), the Board filed a motion for summary disposition, contending that petitioner had no legal entitlement to a position created after her employment was terminated in a RIF. In its motion to dismiss, the Board referenced the well-settled principle that secretaries are not protected by the seniority system that applies to teaching staff members. The ALJ assigned to the case denied the motion to dismiss, after which the Board sought an interlocutory review of the ALJ's August 7, 2012 order by the Commissioner of Education.

The Commissioner reviewed the ALJ's order and the parties' submissions in this matter, and determined that reversal of the ALJ's August 7, 2012 order is appropriate; consequently, an evidentiary hearing is not necessary for the disposition of this case. Citing prior case law, the Commissioner found, *inter alia*, that – while tenured secretaries may “bump” into the secretarial positions of untenured employees at the time of a RIF – in the absence of contractual seniority for secretaries, a board of education is not obliged to maintain a seniority list and call a secretary back when a secretarial job opens up subsequent to the elimination of his or her prior position. In light of this finding, the Commissioner determined that petitioner did not have a legal right to the secretarial position that opened up in respondent's district over a year after her prior employment was terminated. Accordingly, the Commissioner granted summary disposition in favor of respondent and issued a final decision dismissing the petition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 31, 2012

OAL DKT. NO. EDU 13932-11
 AGENCY DKT. NO. 315-10/11

KATHLEEN BIGGIANI,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
BOROUGH OF RIDGEFIELD,	:	
BERGEN COUNTY,	:	
	:	
RESPONDENT.	:	

Respondent Board of Education of the Borough of Ridgefield has sought interlocutory review of an August 7, 2012 order by an Administrative Law Judge (ALJ) in the Office of Administrative Law (OAL) which denied respondent's application for summary decision dismissing the petition. Having reviewed both the ALJ's order and the parties' submissions, and having decided to undertake such interlocutory review, the Commissioner has determined that reversal of the August 7, 2012 order is appropriate.

As discussed in the Interlocutory Order, petitioner was a tenured secretary in respondent's district whose position was eliminated on June 30, 2010 as the result of an economically induced reduction in force (RIF). Petitioner does not allege that the RIF itself was improper, nor does she contend that at the time of the RIF there were vacant secretarial positions or secretarial positions held by non-tenured employees to which she might have been entitled. Rather, petitioner contends that in August 2011 – over a year after the RIF – when a new secretarial position opened in the district, respondent was obliged to offer it to her in preference to any non-tenured candidate, so long as she was qualified for the job.

Respondent moved for summary disposition, arguing that as a matter of law petitioner had no legal entitlement to a position created after her employment was terminated via a reduction in force. In so arguing, respondent made reference to the settled principle that secretaries are not protected by the seniority system enjoyed by teaching staff members. *See, e.g., Ferronto v. Bd. of Educ. of the Township of Weymouth, et al.*, State Board of Education Decision #36-05, decided February 1, 2006; *Sheridan v. Board of Education of the Township of Ridgefield Park, Bergen County*, 1976 S.L.D. 995, 997.

Consequently, while tenured secretaries may “bump” into the secretarial positions of untenured employees at the time of a RIF, *Lisa Salimbene v. Board of Education of the Township of Dennis, Cape May County*, Commissioner Decision No. 511-11, decided November 10, 2011, at 2, in the absence of contractual seniority for secretaries a board of education is not obliged to maintain a seniority list and call a secretary back when a secretarial job opens up subsequent to the elimination of his or her prior position. *Gloria Dezuzio v. Board of Education of the Borough of Bound Brook, Somerset County*, Commissioner Decision No. 387-08, decided September 18, 2008, at 2.

Significantly, such decisions as *Dezuzio, supra*, and *Judith A. DiNapoli v. Board of Education of the Township of Verona, Essex County*, Commissioner Decision No. 281-12M, decided July 16, 2012 (Slip Op.), at 2, hold that school secretaries enjoy neither seniority privileges nor recall rights. Thus, a tenured secretary can exercise his or her right to “bump” a non-tenured secretary solely at the time of the RIF. Indeed, in the absence of a system of seniority, there is no fair and practical way of determining who, among multiple “RIF’d” tenured secretaries, might properly be “recalled” or offered a position that is created or vacated

subsequent to a RIF. And the longer the interval of time between the RIF and the opening of a secretarial position, the more compounded the issue can become.

In light of the foregoing, petitioner did not have a legal right to the secretarial position which opened up in respondent's district over a year after her prior employment was terminated. Consequently, an evidentiary hearing regarding her qualifications for the position is not necessary for the disposition of this case.

Accordingly, summary disposition is granted in favor of respondent, and a final decision dismissing the petition is hereby issued.

IT IS SO ORDERED.¹


COMMISSIONER OF EDUCATION

Date of Decision: 8/31/12

Date of Mailing: 8/31/12

¹ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTERLOCUTORY ORDER

MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 13932-11

AGENCY NO. 315-10/11

KATHLEEN BIGGIANI,

Petitioner,

v.

BOROUGH OF RIDGEFIELD BOARD OF EDUCATION,

BERGEN COUNTY,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld Cohen, attorneys)

Maria Wolfe, Esq., for respondent (Ferrara, Turitz, Harraka and Goldberg,
attorneys)

BEFORE **SANDRA ANN ROBINSON, ALJ:**

STATEMENT OF THE CASE

Kathleen Biggiani, petitioner, was a secretary for the Board of Education Borough of Ridgefield, in Bergen County New Jersey. Biggiani was hired in a twelve-month secretarial position in November 2006 and was terminated June 30, 2010, due to fiscal constraints and a reduction in workforce (RIF) pursuant to the vote taken at a June 10 public meeting. (Resp't's Br. at 1; Pet'r's Br. at 1). Petitioner's position was abolished

effective June 30, 2010. Petitioner charges that in August 2011 she became aware of an opening for a twelve-month secretary position and applied for the position. The position was awarded to a non-tenured individual. Petitioner argues that the award to a non-tenured person is in violation of her (petitioner's) tenure rights.

PROCEDURAL HISTORY

On February 15, 2011, this matter was transferred to the Office of Administrative Law (OAL) from the New Jersey Department of Education for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. On March 27, 2012, respondent filed a Motion for Summary Decision, and on May 11, 2012, petitioner submitted a Brief in Opposition to the Motion for Summary Decision. July 6, 2012, was set as the deadline for submission of reply briefs.

MOTION FOR SUMMARY DECISION

When considering a Motion for Summary Decision, this tribunal must determine whether the pleadings, admissions, certifications and affidavits demonstrate that no genuine issue of material fact exists. Motions for Summary Decision are the administrative counterpart to Summary Judgment and should be granted if the pleadings, discovery and certifications "show there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5; Contini v. Bd. of Educ., 286 N.J. Super. 106, 121 (App. Div. 1995). In Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 541 (1995), the New Jersey Supreme Court encouraged trial courts to grant summary judgment whenever the proper circumstances present themselves. When the evidence is so one-sided that one party must prevail, courts should not hesitate to grant summary judgment. Brill, supra, 142 N.J. at 540; R. 4:46-2; Boyle v. Bd. of Educ. of the City of Bayonne, EDU 11549-96, Initial Decision (October 27, 1997), <http://lawlibrary.rutgers.edu/collections/oal/search.html>.

An adverse party's mere reliance on argument in a brief and the bare allegations of the complaint, without more is insufficient to create a genuine issue of fact. In re

LaRusso, 97 N.J.A.R.2d (EDU) 506 (citations omitted); Camuso v. City of Newark, CSV 3667-98, Initial Decision (October 26, 1999), <http://lawlibrary.rutgers.edu/collections/oal/search.html>; Baran v. Clouse Trucking, 225 N.J. Super. 230, 234 (App. Div. 1988), certif. denied, 113 N.J. 353 (1988). Relevant to the inquiry regarding a Motion for Summary Decision is whether the competent evidential materials, which have been presented, when viewed in the light of the most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issues in favor of the non-moving party. Brill, supra, 142 N.J. at 540. In order for the non-movant to prevail, a responding affidavit must be offered setting forth specific facts, which indicate that there is a genuine issue of a material fact that can only be determined in an evidentiary proceeding. 37 New Jersey Practice, Administrative Law and Practices, 194 at 202 (Lefelt) (1988).

In the instant case, additional fact-finding is necessary to determine whether Biggiani, possesses the precise skills and necessary qualifications to efficiently perform the duties of the newly created and sought-after secretarial position.

Citing Sheridan v. Board of Education of Township of Ridgefield Park, 1976 S.L.D. 995, 997, the Administrative Law Judge (ALJ) in Harrington v. Sussex Board of Education, EDU 09137-08, Initial Decision (April 11, 2011), <http://lawlibrary.rutgers.edu/collections/oal/search.html>, reiterated that although no statutory right empowers tenured secretaries to bump non-tenured secretaries, such a right may be established in the aftermath of a reduction in force (RIF) "only if the tenured secretary possesses the skills and necessary qualifications to efficiently perform the duties of such secretarial position." Ibid. The ALJ noted that "[i]n such cases, 'title alone is not dispositive and actual duties should control over labels.'" Ibid. (quoting Hibo v. Bd. of Educ. of the W. Essex Reg'l Sch. Dist., EDU 1226-96, Initial Decision (November 12, 1997), <http://lawlibrary.rutgers.edu/collections/oal/search.html>).

In Salimbene v. Board of Education of the Township of Dennis, Cape May County, EDU 9322-10, Initial Decision (October 5, 2011), <http://lawlibrary.rutgers.edu/collections/oal/search.html>, which addressed whether a tenured secretary RIF'd from a twelve-month position to a ten-month position had rights

to an alternate twelve-month position occupied by a non-tenured secretary, the Commissioner of Education remanded the ALJ's decision, which had granted such a right to the petitioner. The Commissioner stated that while "a tenured secretary may 'bump' into another secretarial position held by a non-tenured employee," such a result requires "careful[] analy[sis] and compar[ison] [of] the evidence relating to the duties and responsibilities of the eliminated or reduced position and the position sought by the RIF'd employee." Id. at 2. The Commissioner determined that the ALJ's finding that the tenured secretary could bump the non-tenured secretary was based "solely upon the assumption that petitioner's tenure in her secretarial position signifies that she possesses [such] skills." Id. at 4. Therefore, despite there being only a single discrepancy between the job descriptions of the RIF'd position and the position sought—specifically "organizational skills" (Id. at 3)—the case was remanded to OAL due to the "record [being] devoid of fact-finding on the issue of whether petitioner has mastered the skills required for the [non-tenured secretarial] position." Id. at 4.

In the present case, respondent contends that "no such claim" is being made, i.e., as to entitlement to the non-tenured secretary's position based on the tenured secretary's possessing the requisite skills and necessary qualifications to bump the non-tenured secretary. (Resp't's Br. at 4.) Respondent characterizes petitioner's argument as instead reliant upon "tenure and right of recall." Ibid. However, petitioner, quoting Sheridan, specifically avers "[i]t has long been held that a tenured secretary is entitled to the non-tenured secretary's position 'if the tenured secretary possesses the skills and necessary qualifications to efficiently perform the duties of such secretarial position.'" (Resp't's Br. (quoting Sheridan, supra, 76 S.L.D. at 999)).

The case at-hand is therefore reminiscent of Salimbene and requires a finding of whether Biggiani's RIF'd position in fact mirrors the position sought. That is, if further fact-finding and comparison between the contested position's job duties and Biggiani's pre-RIF duties reveals Biggiani to be in possession of the "skills and necessary qualifications" to "efficiently perform" the duties of the secretarial position the District created post-RIF, and, if, Biggiani may be entitled to that position.

FINDING

In the instant matter, the attorneys for petitioner and for respondent submitted briefs that present a material issue as to whether Biggiani possesses the precise skills and necessary qualifications to efficiently perform the duties of the newly created secretarial position. In sum, further fact-finding is required to produce a fair and unbiased decision. The information provided between the parties is void of the information needed for a decision to be rendered in this matter via Motion for Summary Decision.

CONCLUSION

Having considered the submissions of both counsel and for reasons hereon expressed, I **CONCLUDE** that a Motion to decide this case via Summary Decision is not appropriate.

ORDER

Based on the foregoing, I hereby **ORDER** that respondent's Motion for Summary Decision be and is hereby **DENIED**.

It is further **ORDERED** that the de novo hearing of this matter will commence at 9 a.m. on **Thursday January 24, 2013**, and continue on **Friday January 25, 2013**, at the Administrative Law Court 33 Washington, Street, 7th Floor, Newark, New Jersey 07102.

This order may be reviewed by **COMMISSIONER OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6



August 7, 2012

DATE

SANDRA ANN ROBINSON, ALJ

STATE BOARD OF EXAMINERS DKT. NO. 0910-102
AGENCY DKT NO. 4-5/12A

IN THE MATTER OF THE :
REVOCATION OF THE CERTIFICATES : COMMISSIONER OF EDUCATION
OF JUDITH PITCHER BY THE : DECISION
STATE BOARD OF EXAMINERS. :

Order of Revocation by the State Board of Examiners, April 2, 2012

For the Respondent-Appellant, Gail Oxfeld Kanef, Esq.

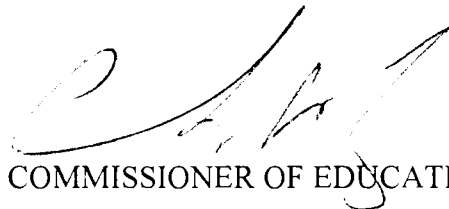
For the Petitioner-Respondent State Board of Examiners, Angela L. Valez,
Deputy Attorney General (Paula T. Dow, Attorney General of New Jersey)

The Commissioner has thoroughly reviewed the record and the papers filed in connection with the appellant Judith Pitcher's appeal of the State Board of Examiners' April 2, 2012 Order revoking her Teacher of Nursery School and Elementary School certificates. On appeal, the appellant maintains that the Board's decision to revoke her certificates was based on facts that were not in the record. Specifically the appellant argues that the findings by the Board that she "humiliate[d] and frightened her young students in front of their peers," and that she had a "dismissive attitude regarding the harm she inflicted" were not supported by the record. The appellant further maintains that it was these findings that resulted in the Board's determination that the revocation of appellant's certificates was the appropriate penalty.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute his judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it was arbitrary, capricious or unreasonable. *N.J.A.C. 6A:4-4.1(a)*.

After full consideration of the record and all submissions, the Commissioner finds that the record adequately supports the Board's determination that the appellant engaged in unbecoming conduct, and that revocation of the appellant's certificates was the appropriate penalty. Contrary to the appellant's assertions on appeal, the credible evidence in the record supported the Board's findings that the appellant "humiliate[d] and frightened her young students in front of their peers," and had a "dismissive attitude regarding the harm she inflicted." The Initial Decision of the Administrative Law Judge contains several findings regarding the inappropriate conduct of the appellant that caused her kindergarten-age students to be frightened and humiliated, i.e. calling a student an idiot; directing other students to shout out the "idiot of the day;" angrily grabbing and brusquely moving students; yelling at the students; and bringing students to tears. It is also clear from the record that the appellant's unbecoming conduct was not an isolated incident, but rather a pattern of conduct that took place over a 13 year period from 1995 through 2008 – despite the fact that school administrators had warned the appellant about her inappropriate behavior. The Board's penalty determination in this case was not based on any one fact but rather the totality of the circumstances and, as a result, there is nothing in the record to suggest that the Board's decision was arbitrary, capricious or unreasonable. Consequently, the Commissioner finds no basis upon which to disturb the decision of the State Board of Examiners.

Accordingly the decision of the State Board of Examiners is affirmed for the reasons expressed therein.*



COMMISSIONER OF EDUCATION

Date of Decision: 9/13/12
Date of Mailing: 9/14/12

*This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*.

IN THE MATTER OF : NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF : STATE BOARD OF EXAMINERS
JUDITH PITCHER : ORDER OF REVOCATION
_____ : DOCKET NO: 0910-102

At its meeting of October 22, 2009, the State Board of Examiners (Board) reviewed information it had received from the Stillwater Township School District (Stillwater) regarding Judith Pitcher. Stillwater reported that Pitcher resigned from her teaching position after the district filed tenure charges alleging unbecoming conduct and other just cause in regard to her conduct toward students. The district alleged that Pitcher used demeaning language toward her kindergarten students including using the words "hate" and "idiot" and calling at least one child "stupid." She had also allegedly asked her class "who's our idiot of the day?" and had the students chant a child's name back to her. Pitcher also allegedly grabbed one student by the arm and swung him around in an arc so that his back struck a nearby school bus; had refused to allow students to use the bathroom; had thrown a book bag at a student and had refused to follow an administrative directive that she discontinue the use of harsh, demeaning or inappropriate words in the classroom. She also had repeatedly used improper and excessive physical force and had publicly identified students as being on a "good list" or a "bad list." Pitcher holds Teacher of Nursery School and Teacher of Elementary School certificates, both issued in August 1976. Upon review of the above information, at its January 7, 2010 meeting, the Board voted to issue an Order to Show Cause to Pitcher as to why her certificates should not be revoked.

The Board sent Pitcher the Order to Show Cause by regular and certified mail on January 13, 2010. The Order provided that Pitcher must file an Answer within 30 days. Pitcher responded on February 17, 2010. In her Answer, Pitcher emphatically denied the charges in the Order and stated that she had never engaged in any of the alleged conduct. (Answer, ¶ 2). Pitcher stated that she

resigned from the district because she “was not interested in continuing to work for a district that would make such inaccurate accusations against me.” (Answer, ¶ 3). She added that, because the district offered to pay her close to a year’s salary in return for her resignation, she resigned for those reasons and “not because any of the allegations against me were true.” (Answer, ¶ 3).

Since there were material facts in dispute, on March 5, 2010, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. Administrative Law Judge (ALJ) Ellen Bass heard the matter on several days in April and June, 2011. The record closed on October 21, 2011 and the ALJ issued an Initial Decision on December 5, 2011. *In the Matter of the Teaching Certificates of Judith Pitcher*, Dkt. No. EDE 03376-10 (Initial Decision, December 5, 2011).

In that decision, ALJ Bass found that Pitcher was employed by Stillwater as a kindergarten and first grade teacher for twenty years. (Initial Decision, slip op. at 2). In 1995 Pitcher was observed by the Chief School Administrator, S. William Shelton, brusquely escorting a young child down the hallway, by holding his elbow up in the air, with his feet barely touching the ground. *Id* at 4. Shelton told Pitcher that he never wanted to see anything like that happen in the future. *Ibid*. ALJ Bass also found that Pitcher received a memo in 1995 from Shelton stating that other staff members had reported concerns regarding Pitcher’s disciplinary techniques, including speaking to students at the top of her voice and brusquely moving one child by the arm to the front of a line. *Id* at 4-5. In 2002, Pitcher’s principal, Anna Elizabeth Mommelaar, observed Pitcher escorting her students to the busses at the end of the day when Pitcher grabbed a student roughly and swung him toward the side of the bus. *Id* at 6. The ALJ found Mommelaar credible when recounting this event. *Id*. at 7. ALJ Bass also found that in 2006, a visiting teacher, Sue Pierson, overheard Pitcher refer angrily to a student in the class as an idiot. *Id*. at 9. A few moments later, Pierson heard Pitcher ask the class “who is our idiot of the day?” and heard the class chant a student’s name. *Ibid*. Pitcher then repeated the question and the student’s name was chanted again. *Ibid*. The ALJ also found that in the 2007-

2008 school year Pitcher had angrily disciplined two young boys by holding them by the elbows with their arms above their heads and had, on another occasion, screamed so loudly at a kindergarten boy who could not put his coat on quickly enough that a teacher from across the hall came into her room to offer assistance. *Id.* at 11-13. The other teacher had to calm both the boy and a sixth-grade student aide, both of whom were in tears. *Id.* at 13.

After assessing the evidence, ALJ Bass concluded that the Board had proven that Pitcher engaged in unbecoming conduct. *Id.* at 15-16. The ALJ noted that Pitcher's "demeanor with the very young students in her charge, at times, lacked the restraint, controlled behavior, and compassion demanded of a public school teacher." *Id.* at 16. Most tellingly, ALJ Bass observed that "Pitcher taught her students that in school, if you do not move quickly enough, a teacher may roughly move you along; if you do not follow instructions quickly enough you might be yelled at; and if you do something incorrectly you might be publicly humiliated and called 'idiot'." *Ibid.* The ALJ acknowledged that Pitcher had a long, mostly successful career, and balanced that against the proven instances of unbecoming conduct. *Id.* at 16-17. ALJ Bass therefore concluded that "under the totality of the circumstances, the appropriate response to Pitcher's breach of her professional responsibilities is a two-year suspension of her teaching certificates. *Id.* at 17. Both parties submitted Exceptions in the case.

In her Exceptions, the Deputy Attorney General (DAG) representing the Board agreed with the ALJ's finding that Pitcher engaged in unbecoming conduct but argued that the penalty imposed was too lenient. (DAG Exceptions, p. 1). The DAG recounted the various incidents which demonstrated Pitcher's unbecoming conduct and stated that "revocation is the appropriate penalty in this instance because Pitcher's conduct was directed at students of a tender age and continued over the course of thirteen years despite repeated admonitions by school administrators." (DAG Exceptions, p. 4).

Conversely, in her Exceptions, Pitcher argued that while the ALJ found that she had “engaged in discrete acts of inappropriate treatment of students,” her long-standing career filled with excellent evaluations and accolades merited a much less severe penalty than a two-year suspension of her certificates. (Pitcher Exceptions, pp. 1-3). Pitcher noted that the district treated these incidents as isolated events because it never imposed progressive discipline and she never had her increment withheld. (Pitcher Exceptions, p. 2). Pitcher argued that her behavior was not egregious and that it did not violate corporal punishment rules. (Pitcher Exceptions, pp. 3-6). She therefore argued that a two-year suspension of her certificates was “simply excessive.” (Pitcher Exceptions, p. 6).

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of January 19, 2012, the Board reviewed the Initial Decision and Exceptions from both parties. After full and fair consideration of the Decision and submissions, the Board voted to adopt the Initial Decision, with modification as to penalty.

As noted above, ALJ Bass concluded that Pitcher’s behavior constituted conduct unbecoming a teaching staff member. (Initial Decision, slip op. at 15-16). The Board agrees. The Board disagrees with the ALJ, however, as to the consequences that Pitcher’s behavior merits. “Teachers ... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.” *Tenure of Sammons*, 1972 S.L.D. 302, 321. Pitcher has clearly engaged in conduct that negates her status as a role model for students and, even worse, has acted to undermine students’ trust in relying on their teachers to make them feel safe and respected.

The Board is also well aware of Pitcher’s long and mostly untarnished career. Yet, her actions in humiliating and frightening her young students in front of their peers cannot and should not be lightly dismissed. Thus, when weighing these counterbalancing considerations, the Board

believes that a two-year suspension of Pitcher's certificates is too lenient a penalty. Unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 N.J.L. 369, 371 (1943), *aff'd*, 131 N.J.L. 326 (E & A 1944). In this case, there were repeated instances of excessive behavior that concerned the other adults around her. Moreover, Pitcher's argument that her discipline should be light because her conduct did not rise to the level of corporal punishment, speaks volumes about her dismissive attitude regarding the harm she has inflicted. It also reinforces the Board's belief that the only appropriate response to Pitcher's breach is revocation.

Accordingly, on January 19, 2012, the Board voted to adopt, with modification, the Initial Decision and ordered to revoke Pitcher's teaching certificates. On this 2nd day of April 2012, the Board of Examiners formally adopted its written decision to adopt, with modification, the Initial Decision in this matter, and it is therefore ORDERED that Judith Pitcher's Teacher of Nursery School and Teacher of Elementary School certificates be hereby revoked effective immediately. It is further ORDERED that Pitcher return her certificates to the Secretary of the State Board of Examiners, Office of Licensure, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Robert R. Higgins, Secretary
State Board of Examiners

Date of Mailing:

Appeals may be made to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-38.4.

CHRISTINA SILVEIRA FRANCISCO, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

CITY OF ELIZABETH, UNION COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner – who contends that she had been employed by the respondent Board as a vice principal or principal for four years prior to a reduction –in-force (RIF) at the end of the 2009-2010 school year – filed a petition asserting that she had attained tenure in the position of vice principal. Petitioner claimed that the vice principals who lost their positions due to the RIF in June 2010 were reinstated in March 2011, but petitioner was not offered a vice principal position and remains a class room teacher. The Board contended that petitioner never achieved tenure as a vice principal.

The ALJ found, *inter alia*, that: there is no dispute that by September 2009, the petitioner had successfully completed all of the requirements for a Standard Certificate – Principal, which would entitle her to that certificate; petitioner did not, however, file her required paperwork to complete the certification process in September 2009; the New Jersey Department of Education (Department) did not issue petitioner’s Standard Certificate – Principal until August 2010, at which time the certificate was made retroactive to September 2009; the Department’s action to make petitioner’s certificate retroactive to September 2009 was *ultra vires*, as there is no statutory or regulatory authority governing the retroactive issuance of certificates; therefore, petitioner failed to earn time toward tenure as a vice principal during the 2009-2010 school year because she did not hold the Standard Certificate - Principal until it was issued in August 2010. The ALJ concluded that petitioner never achieved tenure as a vice principal or principal; accordingly, the Board’s decision in June 2010 to return the petitioner to her original teaching position – in which she is tenured – was appropriate. The ALJ dismissed the petition.

Upon comprehensive review, the Commissioner rejected the Initial Decision of the OAL, finding, *inter alia*, that the ALJ acted beyond the scope of his jurisdiction in finding the Department’s action *ultra vires*. In so determining, the Commissioner noted that the Department was not a party to this action and that the actual issue in dispute – whether the petitioner is tenured as a vice principal – was not properly adjudicated because the matter erroneously morphed into a case about the Department’s certification process. Accordingly, the matter was remanded to the OAL for a determination of the petitioner’s tenure and seniority rights based upon the fact that she received a valid Standard Certificate – Principal on August 22, 2010, which bears an effective date of September 2009.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 9192-11
 AGENCY DKT. NO. 192-7/11

CHRISTINA SILVEIRA FRANCISCO,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF ELIZABETH, UNION COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the petitioner Christina Silveira Francisco, and the Board of Education. This matter was transferred from the Superior Court of New Jersey for a determination as to whether the petitioner has obtained tenure as a vice principal.¹

The Board did not take exception to the Administrative Law Judge's (ALJ) Initial Decision, but instead urged the Commissioner to issue a final decision that included an order revising the petitioner's Standard Certificate – Principal to have an effective date of August 2010.

The petitioner filed exceptions arguing that the Initial Decision should not be adopted because the ALJ made several errors in law and fact, and exceeded the scope of his authority and the jurisdiction of the OAL. Specifically, the petitioner maintains that the ALJ's conclusion that the Department of Education's (Department) practice of backdating certifications in limited circumstances is an *ultra vires* act. The petitioner points out that the dispute as to

¹ The parties are currently involved in litigation in the Superior Court of New Jersey involving other aspects of the petitioner's employment.

whether the petitioner had obtained tenure was limited to a dispute between the petitioner and the Board, and that the Department was not even a party to the contested case. As a result, the petitioner argues that the ALJ exceeded his authority when he determined that the Department's backdating of the petitioner's certification was *ultra vires*. The petitioner also contends that the ALJ's decision to adjudicate the credibility of the petitioner regarding whether she filed her application with the appropriate fee was beyond the scope of the contested case. Petitioner stresses that her credibility was not at issue because the Department had deemed that she was entitled to a certificate effective September 2009.

Additionally, the petitioner takes exception to the ALJ's determination that the Department's practice of backdating certifications is in violation of the rulemaking requirements contained in *Metromedia, Inc. v. Director, Division of Taxation*, 97 N.J. 313, 331-332 (1984). The petitioner also contends that the ALJ's Initial Decision exalts form over substance, noting that the ALJ found that the petitioner "was eligible to receive her Standard Certificate – Principal in September 2009 as, by then, she had met all of the necessary requirements." The petitioner stresses that the Board employed petitioner as a principal until June 2010 despite the fact that her provisional certificate expired in September 2009.

Further, the petitioner contends that the ALJ made findings of fact without the presentation of evidence, i.e. that a reduction-in-force occurred in June 2010 and that it was the reduction-in-force that led to the petitioner's removal as a principal. The petitioner also points out that the alleged reduction-in-force was for vice principals, not principals. Finally notwithstanding the backdating issue, the petitioner contends that the ALJ incorrectly ignored the fact that the Board violated New Jersey law and the contract that the petitioner and the Board entered into in May 2010.

Upon a comprehensive review of the record in this matter, the Commissioner finds that the ALJ acted beyond the scope of his jurisdiction when he found that the Department's action to issue the petitioner's Standard Certificate-Principal retroactive to September 2009 was *ultra vires*. The Commissioner further finds that the ALJ's determination that the Department's process of backdating certifications is in violation of *Metromedia, supra*, is also beyond the scope of his jurisdiction.

It is important to recognize that the Department was not a party to this action and that the underlying issue in this case was limited to a determination as to whether the petitioner obtained tenure as a vice principal. Certainly, a decision deeming a Department process to be *ultra vires* – which would invariably affect other certifications and the certification process as a whole – should not be addressed as a collateral issue in a case where the Department was not even afforded an opportunity to participate in the litigation. If the Board believes that the action of the Department in issuing the petitioner's certification was arbitrary, capricious or unreasonable, the Board would be required to institute an action against the Department challenging the validity of its decision.

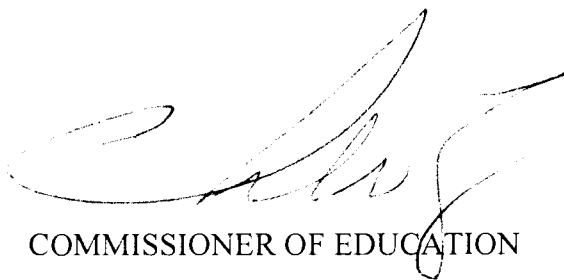
With respect to the rulemaking issue: in the course of this matter, the ALJ concluded that the Department violated *Metromedia, supra*, when it failed to promulgate a rule that governs the circumstances under which certificates may be backdated and the procedure to do so. It is, however, well settled that the action or inaction of an administrative agency is a challenge which belongs in the Superior Court of New Jersey, Appellate Division, pursuant to *R. 2:2-3(a)(2)*. See *N.J. Civil Service Ass'n v. State*, 88 N.J. 605, 612 (1982). It is without question that the alleged failure to promulgate a rule constitutes agency inaction. Therefore, the OAL is

not the proper forum to determine whether the Department must issue a rule that provides guidelines for the backdating of certifications pursuant to *Metromedia, supra*.

The limited issue in this case is whether the petitioner obtained tenure as a vice principal. Yet the testimony at the April 30, 2012 hearing focused on the Department's procedures for processing applications and issuing certifications, and the petitioner's assertions with respect to her application. In the absence of an actual ruling that the certification issued by the Department was invalid, the issues emphasized at the hearing were beyond the scope and authority of the OAL. In light of the fact that this matter erroneously morphed into a case about the Department's certification process, the actual issue in dispute was not properly adjudicated. It is undisputed that the petitioner received her Standard Certificate – Principal on August 11, 2010, and that the certificate was effective September 2009. As such, the certificate is valid on its face, and it is in the context of these facts that the petitioner's tenure and seniority rights must be evaluated.

Accordingly the Initial Decision is rejected; this matter is remanded to the OAL for a determination of the petitioner's tenure and seniority rights in the District based upon the fact that she received a valid Standard Certificate – Principal on August 11, 2010 with a September 2009 effective date.²

IT IS SO ORDERED.³



COMMISSIONER OF EDUCATION

Date of Decision: 9/14/12

Date of Mailing: 9/14/12

² The tenure and seniority analysis should not be limited to a determination based solely on the petitioner's status during the 2009-2010 school year, but rather a complete evaluation of her employment with the District.

³ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 09192-11

AGENCY DKT. NO. 192-7/11

CHRISTINA SILVEIRA FRANCISCO,

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY
OF ELIZABETH, UNION COUNTY,**

Respondent.

Lawrence N. Lavigne, Esq., for petitioner

Karen A. Murray, Esq., and Marvin Lehman, Esq., for respondent

Record Closed: June 19, 2012

Decided: July 31, 2012

BEFORE **JESSE H. STRAUSS, ALJ:**

STATEMENT OF THE CASE

Petitioner Christina Silveira Francisco (Francisco) challenges the determination of the Elizabeth Board of Education (Board) that she did not have tenure as a Vice Principal. She contends that she held the position of Vice Principal for more than two consecutive calendar years and should be tenured in that position pursuant to N.J.S.A. 18A:28-6. At issue is whether Francisco held an appropriate certificate for a sufficient period to have afforded her tenure, and, if so, whether the District's return of her to a teaching position as a result of a reduction in force was improper.

PROCEDURAL HISTORY

Petitioner filed her petition with the Commissioner of Education on July 14, 2011. After the Board filed an Answer on August 2, 2011, the Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education (Department) transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, on August 4, 2011, for determination as a contested case. On March 16, 2012, I denied Francisco's Motion for Summary Decision. I conducted a hearing on April 30, 2012, and closed the record on June 19, 2012, upon the receipt of briefs from each party.

STATEMENT OF FACTS

I **FIND** the following uncontested **FACTS** of this case:

1. Francisco was appointed to a position of Seventh Grade Teacher at Alexander Hamilton School on September 1, 2001, and received an Elementary School Teacher Standard Certificate on June 20, 2002.
2. She received a Standard Certificate for Teacher of English on June 29, 2004, when she first applied, and it was backdated to June 29, 2002.
3. On September 1, 2004, she was appointed to the position of Teacher-Instructional Coach-Alexander Hamilton School.
4. On February 8, 2006, she received a Certificate of Eligibility-Principal.
5. On September 1, 2006, she was appointed to the position of Interim Vice Principal-Alexander Hamilton School.
6. On December 15, 2006, she was appointed to the position of Vice Principal-Alexander Hamilton School.
7. On July 1, 2007, she was appointed to the position of Vice Principal-Alexander Hamilton School.
8. On September 10, 2007, she was appointed Assistant House Director-EHS-Jefferson.

9. On January 9, 2008, she received a Provisional Certificate-Principal backdated to an effective date of November 2007.
10. On July 1, 2008, she was appointed to the position of Assistant House Director-EHS-Jefferson.
11. On June 16, 2009, she was appointed to the position of Interim House Director-EHS-Jefferson.
12. On July 2, 2009, her Provisional Certificate-Principal expired.
13. On July 1, 2009, she was appointed to the position of Principal-EHS-Jefferson.
14. By the end of the 2009-2010 school year, Francisco had performed as a Vice Principal or Principal for four years.
15. On August 11, 2010, the Department issued to Francisco a Standard Certificate-Principal backdated to September 2009.

Additional Evidence:

While Francisco held the Provisional Certificate-Principal, she worked with a mentor and had paperwork filled out by the Superintendent of Schools. In 2010, while Francisco held the position of Interim Principal, she learned that a reduction in force would be occurring. In March 2010, Assistant Superintendent of Schools, Aida Garcia, recommended that Francisco be reappointed as Principal. Toward the end of the 2009-2010 school year, the Board offered Francisco a contract for the position of Principal. She testified that she signed and returned it. However, Superintendent of Schools, Pablo Munoz, thereafter notified her that, due to a reduction in force, all the positions of vice principal were being abolished, and she was being returned to the classroom, which was her last tenured position. She had believed that she was a tenured Vice Principal.

Prior to the discussion with Munoz, Assistant Superintendent Olga Hueglemeyer had informed Francisco in May or June that the Board did not have a copy of her Standard Certificate-Principal and needed to know the status of it.

Francisco testified that she contacted the Department and spoke with Director of the Office of Certification and Induction, Robert Higgins. According to her, he told her

not to worry and that she was good for September 2009, and she was in good standing, but that the Department had not received her application or \$200 check in the mail. When she told him she had sent the check and application in September 2009, he instructed her to send another copy of the application with a check. Higgins sent her an application form which she filled out and returned on June 26, 2010. The State Board of Examiners thereafter issued a Standard Certificate-Principal on August 11, 2010, with a retroactive issuance date of September 2009. After her discussion with Higgins, she contacted Hueglemeyer and explained that she did not have the paper certificate to give to her because the Department had not sent it to her due to the failure to get Francisco's original check.

Francisco did not retain a copy of the earlier application she allegedly filed in September 2009, because she did not feel that it was necessary. She recalled sending it in September because she had completed her New Jersey Leaders to Leaders program and signed all the paperwork with her mentor by July 2009 when her Provisional Certification expired. She did not recall notifying anyone at the Board that her Provisional Certification had expired; that she had completed her program for Standard Certification; or that she was awaiting her Standard Certification. She also did not retain a copy of the money order or certified check she allegedly sent in with her application in September 2009. She never made an attempt to obtain verification that she had either a money order or a certified check from a bank in September 2009. She could not recall how she paid for the money order or certified check or whether she used a debit or credit card to obtain the money order or certified check. Until the discussion with Hueglemeyer near the end of the school year, Francisco never made any follow-up inquiries to the Department as to the status of her September 2009 application. She was already on the job as a Principal, so it did not occur to her that she had not received an actual certificate in the mail.

Department of Education Director of the Office of Certification and Induction, Dr. Robert Higgins, testified. He oversees the process of reviewing applications for certification submitted to the State Board of Examiners, which number between 50,000 and 55,000 per year. There are no regulations, written guidelines, memos or website postings with regard to backdating a certificate to the date on which someone applied

for the certification. He reviewed the Department's system log which is accessible only by his office and the various county boards of education, but not by school districts. The log shows when an application is received. The log indicates that, on July 15, 2010, the Department received Francisco's application dated June 26, 2010, and \$200 payment for a Standard Certification-Principal. (P-20.) The Department affixed a tracking number for Francisco of 342855. The records indicate that now retired Department Coordinator Ray Levy reviewed the application on July 22, 2010. The processed application has a handwritten notation from Levy "Issued September 2009." Levy was the coordinator for the issuance of provisional and standard certificates for principals and other administrators. Higgins testified that Francisco's certification did not actually issue in September 2009 but was subsequently issued in July or August 2010 to be effective September 2009. No certification issued in September 2009.

Higgins did not recall a telephone conversation with Francisco in May or June 2010, but could have had one.

The Department does not issue a certificate without the \$200 payment being made. If the Department receives an incomplete application or there is no payment, it either sends the application back, calls the applicant or sends a new blank form. Typically, the Department makes a notation of such an event in either a paper file or a system file. In April 2009, the Department received Mentor Richard O'Malley's Formative Assessment Report for Francisco from the New Jersey Leaders to Leaders program with a letter directed to Levy. (P-23.) Levy then wrote a September 2009 letter to Kristina Covington of the Office of Licensing and Credentials informing her that Francisco had successfully completed the training requirements of licensure for the Standard Licensure: Principal. It also stated, "[u]pon receipt of an application for licensure and fee (certified check or money order) payable to the Commissioner of Education, could you please issue a standard license to the candidate. The candidate has been advised to forward application and fee to the attention of Raymond Levy, Coordinator, Administrator Training." It also indicated that a copy of the letter was sent to Christina Silveira (Francisco). (P-23.) Upon receipt of such documentation that one has met the requirements for a certification, the Department typically thereafter sends an application package to someone such as Francisco. The Department log indicates

that, on September 24, 2009, it sent Francisco a packet containing instructions, fees billed and a standard certificate request. (P-23, Bate 00047.) An additional document entitled "Principal Candidate File Review" has checkmarks with a September 24, 2009, date under the headings "Fees Billed" and "Request for Standard Certification." (P-23, Bate 00050.) No certificate issues until the application is filed with the fee payment even if the mentoring and all other requirements have been completed. According to Higgins, if the requirements for a certification are met, and the application and fees have been submitted, the certification is backdated to the date the application is sent to the individual considering that it might take the Department a few months to process the matter.

Higgins testified that, generally, the rule is to date a certificate to the month in which the application has been completed. It is the applicant's responsibility to pursue her application and make inquiries. He also testified, however, that Levy, albeit rarely, exercised discretion to accept someone's compelling claim such as that she did not receive the application for reasons beyond her control; that the application must have been lost; that there was a mailing problem, or that she sent it back despite the Department not having received it. In such a situation, Levy would make an exception and backdate the certification to the date when eligibility was attained rather than when the paperwork is filed. Levy never communicated with Higgins as to why he was backdating Francisco's certification to the date when the original packet was sent to her in September 2009. There was no claim of an improper address. Higgins testified that Levy either inherited or adopted the practice of backdating certifications regardless of when the paperwork is filed. According to Higgins, there are no guidelines, memorialized internally or made available to boards, explaining when exceptions to the certification date would be made or how far back the Department would go to backdate a certificate. Instead, boards and applicants have access to an on-line "Application Status Check." This on-line source accessed by the Board indicates for Francisco that her Standard Certificate-Principal issued on August 11, 2010. (P-15, Ex. 5.) There is no notification process to applicants to make inquiries of the Department if they hear nothing from the Department within a specified time.

Although Francisco contends that she timely sent her application and \$200 payment to the Department in September 2009, I cannot credit her testimony in this regard. It is not likely that she sent the paperwork in September and that it was either lost in the mail or lost within the Department. A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Francisco's testimony does not pass this test. It is implausible that she, particularly as a trained professional, would not have retained a copy of her application in 2009 if for no other reason than to support a claim that it was filed but lost in the event that such were to occur. It is equally implausible that she would not have retained a copy or receipt of a certified check or money order for a \$200 payment. If it were paid by certified check, the bank would have a retrievable record or Francisco would have learned that her account was out of balance. If she had purchased a money order from a bank, the bank would most likely have had a record of this. Francisco did not attempt to retrieve such information in light of this dispute. Most importantly, eight or nine months elapsed from September 2009, and Francisco made no inquiry of the Department of the status of her supposed application when her status as a Principal importantly and vitally depended on the receipt of an appropriate certificate. Indeed, she made no inquiry until Hueglemeyer questioned her about the certificate. It is irrelevant whether Francisco negligently or intentionally ignored her obligation to file the application and pay the fee to consummate the issuance of the Standard Certification-Principal in September 2009.

I make the following additional **FINDINGS** of **FACT**. There is no dispute that Francisco had successfully completed all of the requirements for a Standard Certificate-Principal to entitle her to that certificate by September 2009. It is also clear that the Department, upon learning that she had satisfied the prerequisites, provided Francisco with notice of its position and a packet of instructions and an application on or about September 24, 2009. However, Francisco did not file her required paperwork in September 2009 to complete the certification process at that time. The Department did not issue her Standard Certificate-Principal until August 2010, and, at that time, made it retroactive to September 2009.

When the Board received no Standard Certificate-Principal or Provisional Certificate-Principal from Francisco in June 2010, it transferred her on June 24, 2010, effective September 1, 2010, to her last certificated position as a teacher.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

I **CONCLUDE** that the Department's action to make Francisco's Standard Certificate-Principal in August 2010 retroactive to September 2009 was ultra vires. The certification process for teaching staff is highly regulated—and with good reason.¹ It is important to insure that school districts employ only qualified personnel to improve the quality of education to New Jersey students. The rules also protect the tenure and seniority rights of teaching staff personnel, insure consistency, and alert both teaching staff and boards of their rights and responsibilities in navigating this process. To this end, the Department has established a rigorous system of licensure. N.J.A.C. 6A:9-1.2. The Board of Examiners is charged with issuing appropriate certificates. All actions taken by the Board of Examiners shall be taken pursuant to adopted rules. N.J.A.C. 6A:9-4.2 (a). In exercising its statutory and regulatory authority, the Board of Examiners and staff assigned to it may issue certificates that qualify individuals to seek employment as teaching staff members; recommend and develop procedures that govern the certification of teaching staff members; maintain and report data on the supply and quality of newly certified teaching staff members; and assist district boards of education in the employment of teaching staff members. N.J.A.C. 6A:9-4.2 (c). Chapter 9, Subchapter 5 is entitled "General Certification Policies" and includes a regulation regarding the fees that must accompany an application for certification. N.J.A.C. 6A:9-5.4.

The Board of Examiners shall **issue the appropriate certificate upon the candidate's completion of all certification requirements**. The candidate shall be subject to all requirements in effect at the time the application is received in the Office. **Requirements include**, but are not limited to, coursework, degree, tests, **fees**, GPA and all certificate rules pursuant to N.J.A.C. 6A:9-8, 11, 12, and 13.

¹ The Department has established rules governing the preparation, licensure and professional development of those educators required by their positions to be certified. N.J.A.C. 6A:9-1.1.

Applications shall be deemed filed with the Office when the application and all required supporting documentation has been received. The teacher shall maintain possession of the original certificate.

[N.J.A.C. 6A:9-5.16] [emphasis added].

There is no reference to the circumstances by which a certificate may be granted retroactively to a date before the submission of an application and fee.

In this matter there is no dispute that, in June 2010 when the Board returned Francisco to her teaching position, the Department had not yet acted to grant Francisco a Standard Certificate-Principal. There is also no dispute that the Department, through Levy, granted this certificate on August 11, 2010, and made it retroactive to September 2009, a time when Francisco had met all of the qualifications for such certification (but, as found above, had not filed her application or paid her fee). According to Higgins, Levy, during his service in the Department's Office of Certification and Induction, occasionally made retroactive certifications. Higgins concedes that, in doing so, Levy acted without express statutory or regulatory authority. He followed no guidelines, no standards, no precedence and no established exceptions as to when to designate a date of certification for teaching staff members. He exercised unfettered discretion as to when and how far back to backdate a certification. Although Higgins supervised Levy, there was no requirement to notify or obtain authorization from Higgins.

Once qualifications for a certification have been obtained and an application for certification has been submitted to the Department, certainly a reasonable period of time is expected for the Department to review and process the application.² Here, though, Levy backdated the Certification by approximately ten months obviously for reasons other than the normal internal application processing time. There is nothing in the record as to why Levy backdated the certificate. Without an authorization to

² Indeed, Francisco dated her application for Standard Certification-Principal on June 26, 2010. Date stamps on the application, which bears a June 26, 2010, signature date by Francisco, and Department logs indicate that the Licensure of Credentials Division of the Department received it and the \$200 fee on July 15, 2010, and designated a processing number on July 23, 2010. (P-20.) The Department issued the certification document on August 11, 2010. (P-15, Ex. 5.)

backdate an application for good cause, Levy's action was ultra vires. Francisco notified the Department of an issue with her certification nine months after she qualified for the certification, claiming that an earlier application had been filed and must have been lost. Would Levy have been authorized to exercise his discretion to backdate the certification if the gap had been one year or three years?

An administrative rule under the Administrative Procedure Act means an agency statement that describes the organization, procedure or practice of an agency. N.J.S.A. 52:14B-2 (e). Each agency shall adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available. N.J.S.A. 52:14B-3 (2).

- a. A State agency shall follow the administrative rule-making requirements set forth in the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), and shall only implement rules that have been adopted in accordance with those rule-making requirements.
- b. No State agency shall utilize regulatory guidance documents that have not been adopted as rules in accordance with P.L.1968, c.410 unless the agency makes such documents readily available to the regulated community through appropriate means, including but not limited to posting in a prominent place on the website for the agency. [N.J.S.A. 52:14B-3a.]

Levy's actions should have been, but were not, the product of the Department's rulemaking responsibility under the Administrative Procedure Act as required by Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313 (2001).

Not every circumstance, concept and idea falling within the jurisdiction of an agency must be addressed by rulemaking. As explained In re Certain Sections of the Unif. Admin. Procedure Rules, 90 N.J. 85, 92 (1982) quoting Securities and Exchange Comm'n v. Chenery Corp., 332 U.S. 201, 202, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995, 2002 (1947),

The function of filling in the interstices of [an enabling act] should be performed, as much as possible, through th[e]

quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. * * * Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order

Metromedia instructs that an agency determination should be implemented by regulation, as opposed to de facto rulemaking when it

(1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
[97 N.J. at 331-32.]

Higgins testified that the Department processes between 50,000 and 55,000 certification applications a year. The process of backdating certificates could affect this large community.

One would contemplate that reasons for backdating a certification would be applied generally and uniformly to all similarly situated persons. The problem here is that there is nothing to test whether Levy's use of this procedure was uniform. There may be legitimate reasons for backdating where there is good cause to find that an application or fee was transmitted but lost, where a mentor failed to send the required

materials in a timely fashion, or where an applicant made a timely inquiry as to her status. Such a published rule would alert an applicant of her responsibility to follow through as well as to alert other certificated teaching staff as well as boards of education that their expectations regarding the exercise of seniority in the event of a reduction-in-force or the status of tenure may be different than what appears on the Department's website.

Higgins did not indicate that the backdating practice was not intended to operate in the future. One would expect that it would operate in the future under published good-cause guidelines contemplating the potential snags mentioned above that are through no fault of the applicant.

The consideration of faultless delays should use a standard which is not clearly and obviously inferable from the enabling statutory authorization. The applicable statutes do not speak of faultless delays in the certification process.

The practice in question appears to reflect an administrative policy applied for a number of years, which undisputedly was not previously expressed in any official and explicit agency determination, adjudication or rule.

Finally, although not set forth anywhere, the practice seems to reflect a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. N.J.A.C. 6:9-5.16 provides that the Board of Examiners shall issue a certificate when the candidate has completed all of the certification requirements, which includes the submission of an applicable fee. Applications are deemed filed when the application and all supporting documentation has been received. If there are good-cause exceptions for delays through no fault of the candidate, a rule should advise the public that the timeline of N.J.A.C. 6:9-5.16 will not always be followed.

In sum, Levy's decision to backdate Francisco's Standard Certificate-Principal lacked statutory or regulatory authority. Although not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule, the circumstances here warrant a different conclusion. The backdating

affects, not only the status of the certificate candidate. It also affects the status of colleagues potentially impacted by a reduction-in-force. It affects the ability of a board of education to implement an orderly reduction-in-force based on its best good-faith determinations of employee status from the resources available from the Department.

Again, Levy never articulated a reason for backdating Francisco's certificate. If his decision was based on acceptance that an earlier application and fee was filed but had been lost through no fault of Francisco, that basis was factually wrong as found above. If his decision was based on the fact that Francisco had qualified for the Standard Certificate-Principal in September 2009 and it did not matter whether she filed an application and fee at that time, such a position is contrary to the statutory and regulatory roadmap set forth above for perfecting the application process by meeting all requirements including the filing of a fee. See, N.J.A.C. 6A:9-5.16. In such case Levy's and the Department's action was improper regardless of whether it was ultra vires.

"... where primary responsibility for acquisition of certification rests with the teacher and the controlling regulations are clear on their face, the law makes no provision for retroactive accreditation even in the absence of fault or deliberate delay on the part of the teacher." Morano v. Board of Educ. of Verona, 1990 S.L.D. 1192, 1201-1202 (A.L.J.D. June 27, 1990, aff'd, Commissioner, August 10, 1990).

The Tenure Act, N.J.S.A. 18A:28-1 et. seq., specifically defines the conditions under which teachers achieve tenure protection. Spiewak v. Board of Educ. of Rutherford, 90 N.J. 63, 72 (1982). More specifically, N.J.S.A. 18A:28-5 provides:

The services of all teaching staff members ... which require them to hold appropriate certificates issued by the board of examiners, serving in any school district ..., excepting those who are not the holders of proper certificates in full force and effect ... shall be under tenure during good behavior and efficiency ... after employment in such district or by such board for:

- (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
- (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

- (c) The equivalent of more than three academic years within a period of any four consecutive academic years. ...

In other words, Francisco is entitled to tenure only if (1) she worked in a position for which a teaching certificate is required (conceded by the parties); (2) she held the appropriate certificate; and (3) she served the requisite period of time. See, Spiewak v. Board of Educ. of Rutherford, supra, 90 N.J. at 74. "In order to acquire the status of a permanent teacher under a tenure law and with it the consequent security of permanent employment, a teacher must comply with the precise conditions articulated in the statute." Zimmerman v. Newark Board of Education, 38 N.J. 65, 72 (1962), cert. den. 371 U.S. 956 (1963). No teaching staff member shall acquire tenure in any position in the public schools who is not the holder of an appropriate certificate for such position issued by the State Board of Examiners, in full force and effect. N.J.S.A. 18A:28-4.

N.J.S.A. 18A:1-1 defines "teaching staff member" as:

... a member of the professional staff of any district ... holding ... position ... of such character that the qualifications, for such ... position, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his ... position, ... issued by the State Board of Examiners ... [emphasis added].

A standard certificate is a "permanent certificate issued to candidates who have met all requirements for State certification." N.J.A.C. 6A:9-6.1. A provisional certificate is "a two-year certificate issued to candidates who have met requirements for initial employment as part of a State-approved school district training program or residency leading to standard certification." N.J.A.C. 6A:9-6.2.

It is of no consequence that the District may have improperly carried Francisco in the position of Principal from September 2009 (after her provisional certificate had expired) until June 2010, despite the absence of a proper certificate due either to its or Francisco's mistake. Simply, she did not possess a type of certificate during this period which could be recognized for tenure purposes. Service performed under an inappropriate certificate or no certificate cannot be credited toward seniority regardless

of fault for the defect. See, McAneny v. Bd. of Educ. of the School District of the Chathams, 92 N.J.A.R. 2d (EDU) 208 (1991); Jennings v. Highland Park Bd. of Educ., 1989 S.L.D. 1097 (St. Bd. February 28, 1989). Instead, the focus is on objective statutory criteria rather than the subjective intent of the parties. Spiewak v. Board of Educ. of Rutherford, supra, 90 N.J. at 77. There can be no recognition of tenure based merely upon "eligibility" for endorsement rather than the actual existence of an endorsement. To do so would erode the authority of the regulatory system, result in uncertainty and confusion, and deny the endorsed and authorized teachers their rights afforded by the statutory and regulatory system. See, Morano v. Board of Educ. of the Borough of Verona, supra.

Unquestionably, Francisco was eligible to receive her Standard Certificate-Principal in September 2009 as, by then, she had met all of the necessary requirements. Based on the findings above, however, the delay in perfecting her certification was her own failure to file the requisite application and pay the requisite fee in a timely manner and not some breakdown in the process by the Department. "Ultimately the 'primary responsibility' for obtaining appropriate certification belongs to the teacher. While local school officials share some responsibility for checking that teaching staff members in the district are properly certified, it is the individual's obligation to obtain any necessary certificates". McAneny, supra. (citations omitted.) For this reason Francisco's reliance on Ruiz v. Fort Lee Bd. of Educ. EDU 8187-10, Initial Decision (May 19, 2007), remanded, Comm'r (August 17, 2011), EDU 9871-11, Initial Decision on Remand, adopted, Comm'r (March 26, 2012) <http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>, is misplaced. The Commissioner rejected Ruiz's claim that he was unable to earn a standard certification through no fault of his own and that he should not be penalized for ministerial errors by his board and the Department. Here a finding has been made that Francisco was at fault for the failure to complete the certification process in a timelier manner.

Simply, Francisco did not hold the Standard Certificate-Principal at the time the Board initiated its reduction-in-force process in 2010 leading to Francisco's removal from the position of Principal. Information to which the Board would have had access at that time would not have shown that she held the certificate. In order to protect the

tenure and seniority rights and interests of all employees potentially affected by a reduction-in-force, a Board has a right and obligation to ascertain a snapshot of the status of all such employees at the time it embarks on a reduction-in-force process that affects multiple employees.

Absent a Standard Certificate-Principal during the 2009-2010 school year, Francisco did not earn time toward her tenure during that period. As indicated above, N.J.S.A. 18A:1-1 defines a teaching staff member as a person holding a valid and effective standard, provisional or emergency certificate. She held none of those certificates for Principal during that period. As a Certificate of Eligibility does not fall within this definition, Francisco's time as an Interim Vice Principal between September 1, 2006, and December 15, 2006, and then a Vice Principal between December 15, 2006 and November 2007, cannot be used for tenure purposes. Her time between November 2007 and July 2, 2009, during which Francisco held a Provisional Certificate-Principal, can be used for tenure purposes as she then met the definition of a teaching staff member. During the time between the expiration of the Provisional Certificate-Principal in July 2009 and the perfecting of the Standard Certificate-Principal in August 2010, she held no certificate within the definition of a teaching staff member upon which tenure can be calculated. Francisco's reliance on Smith v. Bd. of Ed. of Atl. Cty. Vo-Tech. Sch., 1985 S.L.D. 704, 717 and K'Burg v. Bd. of Ed. of Lower Alloways Creek, 1973 S.L.D. 636 is inapposite because Smith and K'Burg held emergency certificates which fall within the definition and were properly countable for the purpose of attaining tenure in conjunction with meeting all the qualifications for a Standard Certificate. Such was not the case with Francisco. Her time under the Provisional Certificate-Principal was insufficient to earn tenure. Accordingly, I **CONCLUDE** that Francisco never achieved tenure as a Vice Principal and/or Principal prior to the Board's return of her to her original teaching position.

ORDER

It is hereby **ORDERED** that Francisco's Petition be **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 31, 2012
DATE

Date Received at Agency:

Date Mailed to Parties:

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

7/31/12

7/31/12

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

Christina Silveira Francisco

For Respondent:

Robert R. Higgins

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

- P-1 Excluded
- P-2 Excluded
- P-3 Certificate of Eligibility
- P-4 Excluded
- P-5 Excluded
- P-6 Excluded
- P-7 Silveira Provisional Certificate, November 2007
- P-8 Letter, Board to Francisco, April 25, 2008
- P-9 Silveira Standard Certificate-Principal
- P-10 Excluded
- P-11 Memo, Garcia to Munoz, Recommendation for Reappointment, March 12, 2010
- P-12 Francisco Employment Contract for 2010-2011 School Year
- P-13 Excluded
- P-14 Excluded
- P-15 Joint Stipulation of Facts
- P-16 Excluded
- P-17 Certification of Francisco in Support of Motion for Summary Decision
- P-18 Certification of Robert Higgins

- P-19 E-mail, Higgins to Murray, January 26, 2012
- P-20 Francisco Application for Standard Certification, June 26, 2010
- P-21 Excluded
- P-22 Excluded
- P-23 Subpoena on Higgins and Attorney General Response, April 18, 2012, in
Black Binder
- P-24 Excluded
- P-25 Excluded
- P-26 Silveira, Standard Certification-Elementary School Teacher

For Respondent:

None

#372-12M

OAL DKT. NO. EDU 11302
AGENCY DKT. NO. 228-8/12

M.L., on behalf of minor children J.F.	:	
and D.F., E.O. and B.O., on behalf of minor	:	
children D.O. and G.O., J.P. and M.P.	:	
on behalf of minor children A.P. and M.P.,	:	
and L.R. and M.R. on behalf of minor	:	
children S.R. and F.R.,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	
	:	DECISION ON MOTION
V.	:	
	:	
BOARD OF EDUCATION OF THE BOROUGH	:	
OF INTERLAKEN, MONMOUTH COUNTY,	:	
BOARD OF EDUCATION OF THE CITY OF	:	
ASBURY PARK, MONMOUTH COUNTY,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	
OF WEST LONG BRANCH, MONMOUTH	:	
COUNTY AND BOARD OF EDUCATION	:	
OF THE SHORE REGIONAL SCHOOL	:	
DISTRICT, MONMOUTH COUNTY,	:	
	:	
RESPONDENTS.	:	

The instant motion by the respondent Board of Education of Asbury Park (Asbury Park) is for a stay of the August 30, 2012 commissioner decision granting emergent relief to several residents of Interlaken – a non-operating school district – who applied for an order allowing their eight children to attend school in West Long Branch along with other domiciliaries of Interlaken.

The right, *vel non*, of Interlaken students to attend school in West Long Branch (or Shore Regional High School, depending on the age of the student) rather than in Asbury Park

is the subject of a prior petition and emergent application, *i.e.*, *Board of Education of the Borough of Interlaken, Monmouth County v. Board of Education of the City of Asbury Park, Monmouth County*, Agency Dkt. No. 109-4/12; OAL Dkt. No. EDU 5340-12 (Interlaken I). In that case the Interlaken Board of Education (Interlaken) asked the Commissioner to resolve, on an emergent basis, a dispute between Asbury Park and Interlaken over the existence *vel non* of a send-receive relationship between the two districts, and requested that – pending a decision on the merits – the Interlaken students be allowed to attend school in West Long Branch and/or Shore Regional High School.

The Commissioner ordered that the Interlaken students “stay put” in the West Long Branch or Shore Regional schools pending adjudication of the merits and sent the case back to the Office of Administrative Law (OAL) for a plenary hearing. *Board of Education of the Borough of Interlaken, Monmouth County v. Board of Education of the City of Asbury Park, Monmouth County*, Commissioner Decision No. 238-12E dated June 14, 2012. Interlaken I is still pending.

The petitioners herein are domiciled in Interlaken but have previously sent their children to private schools because of concerns that the Asbury Park schools are lacking. When they learned that Interlaken students would be permitted to attend school in West Long Branch, they unsuccessfully tried to enroll their children with the Interlaken Board of Education. They instituted Interlaken II, urging that the emergent relief issued in Interlaken I should also apply to their children.

In recommending that the relief requested by the Interlaken II petitioners be granted, the Administrative Law Judge opined that the applicable standards set forth in *N.J.A.C. 6A:3-1.6(b)* and *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) were satisfied by the

circumstances of the case, and correctly pointed out that a significant issue regarding equal access to public education would be created if the Interlaken II petitioners' children were not allowed the same public education enjoyed by other Interlaken domiciliaries. Interlaken II Initial Decision (August 27, 2012) at 4-5. The Assistant Commissioner, to whom the matter had been delegated pursuant to *N.J.S.A.* 18A:4-34, concurred. Interlaken II Commissioner Decision No. 361-12E, decided August 30, 2012.

Asbury Park now moves for a stay of the Interlaken II decision while it appeals same to the Superior Court, Appellate Division. As Asbury Park acknowledges, the bases for stays are the same as the standards for emergent relief.¹ Significantly, the Assistant Commissioner charged with responsibility for making a decision already determined – in his August 30, 2012 award of emergent relief to petitioners – that a *Crowe v. DeGioia* analysis of the available facts mitigates in their favor. Asbury Park's application for a stay is consequently tantamount to a request for reconsideration of the August 30, 2012 decision.

N.J.A.C. 6A:3-1.15(b)(2) requires that a party, when asking the Commissioner to reconsider a decision, must make a showing of at least one of the following four conditions:

- i. Claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for the purposes of this section;

¹ A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to *Crowe v. DeGioia*, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

N.J.A.C. 6A:3-1.6(b)

- ii. Newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
- iii. Newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation or misconduct could not have been previously known; or
- iv. Reversal of a prior judgment on which the present matter is based.

Asbury Park invokes *N.J.A.C. 6A:3-1.15(b)(2)(iv)*, contending that a stay must be granted because the Commissioner's decisions of June 14, 2012 and August 30, 2012 are inconsistent with each other. (Asbury Park's letter brief at 2) The Assistant Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A. 18A:4-34* – disagrees.

It is well-established that judgments or orders normally do not bind non-parties. *North Haledon Fire Co. No. 1 v. Borough of North Haledon*, 425 *N.J. Super.* 615, 628 (App. Div. 2012), citing *In Re Application of Mallon*, 232 *N.J. Super.* 249, 254 n.2, (App. Div. 1989) citing *State v. Redinger*, 64 *N.J.* 41, 46, (1973) and *Biddle v. Biddle*, 166 *N.J. Super.* 1, 7 (App. Div. 1979). The instant petitioners were not parties to Interlaken I and were consequently not considered by the Commissioner when he issued his June 14, 2012 “stay put” decision directing that currently enrolled Interlaken public school students would temporarily be permitted to attend school in West Long Branch or Shore Regional pending a resolution on the merits of Interlaken I. Hence, the Commissioner rendered no mandate one way or the other concerning Interlaken domiciliaries who had been attending private school. There are consequently no inconsistencies between the Commissioner's June 14, 2012 grant of relief in Interlaken I and the August 30, 2012 decision in Interlaken II granting relief to the instant petitioners.

Thus, because Asbury Park has failed to establish justification for reconsideration by the Commissioner of the August 30, 2012 decision on motion for emergent relief, Asbury Park's motion for a stay of that emergent relief is denied.

IT IS SO ORDERED.²



ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9/14/12
Date of ~~Mailing~~ 9/14/12
faxing:

² Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Appellate Division of the Superior Court.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENT RELIEF

OAL DKT. NO. EDU 11302-12

AGENCY DKT. NO. 228-8/12

M.L. O/B/O MINOR CHILDREN J.F. AND D.F.;
E.O. AND B.O., O/B/O MINOR CHILDREN D.O.
AND G.O.; J.P. AND M.P. O/B/O MINOR
CHILDREN A.P. AND M.P.; L.R. AND M.R. O/B/O
MINOR CHILDREN S.R. AND F.R.,

Petitioners,

v.

BOARD OF EDUCATION OF BOROUGH
OF INTERLAKEN, MONMOUTH COUNTY,
BOARD OF EDUCATION OF THE
CITY OF ASBURY PARK, MONMOUTH
COUNTY, BOARD OF EDUCATION OF
THE BOROUGH OF WEST LONG BRANCH,
MONMOUTH COUNTY AND BOARD OF
EDUCATION OF SHORE REGIONAL SCHOOL
DISTRICT, MONMOUTH COUNTY.

Respondents.

Thomas M. Murphy, Esq., for petitioners

Anthony P. Sciarrillo, Esq., and Jennifer Osborne, Esq. for respondent, Interlaken Board of Education (Lindabury, McCormack, Estabrook & Cooper, attorneys)

Michael Gross, Esq., for respondent Board of Education of the City of Asbury Park, Monmouth County (Kenney, Gross, Kovats & Parton, attorneys)

Viola Lordi, Esq., for respondent West Long Branch Board of Education, Monmouth County, respondent (Wilentz, Goldman & Spitzer, attorneys)

Alexis Tucci, Esq., for respondent Shore Regional Board of Education, Monmouth County (Tucci, Hot & Crupi, attorneys)

BEFORE **PATRICIA M. KERINS, ALJ:**

Petitioners are the parents of eight children, ages five through twelve, who reside in the Borough of Interlaken (Borough) and whose public education is to be provided by the Board of Education of Interlaken (Interlaken). They seek an Emergent Order allowing their children to enroll in the West Long Branch School District (West Long Branch)¹ along with other Interlaken students. The petition and request for emergent relief was filed with the Department of Education on August 17, 2012, and transmitted to the Office of Administrative Law (OAL) on August 21, 2012. Pleadings in response were filed by the parties up to August 24, 2012, and oral argument on the request for emergent relief was heard on August 27, 2012 at the OAL in Mercerville, New Jersey. Only respondent Board of Education of Asbury Park (Asbury Park) has objected to the relief sought by petitioners.

The right of Interlaken students to attend either West Long Branch schools or Shore Regional High School rather than Asbury Park schools was the subject of a prior May 11, 2012, emergent order in Board of Education of the Borough of Interlaken v. Board of Education of the City of Asbury Park, OAL Docket No. EDU 5340-2012

¹ All of the petitioners are children of an age to attend the West Long Branch elementary schools rather than Shore Regional.

(Interlaken I). That order allowed Interlaken students to attend those districts pending a decision in the underlying dispute between Asbury Park and Interlaken over the existence of a sending-receiving relationship between the two districts.² That Order was affirmed by the Commissioner of Education (Commissioner) on June 14, 2012. The legal and factual discussions set forth those Orders are incorporated herein.

At issue in this request for emergent relief is whether the prior order allowing Interlaken students to attend West Long Branch and Shore Regional schools should be applied to the approximately fifty school age children resident in the Borough, rather than just the twenty students who were currently attending those schools on the date of the entry of the order in Interlaken I. As set forth by petitioners, Interlaken did not allow their children to enroll in the West Long Branch district for the 2012-13 school year based upon its interpretation of the emergent order entered on May 11, 2012 and the Commissioner's subsequent affirmance.

In Interlaken I, the Borough requested several forms of relief, including an Order maintaining the status quo, allowing the twenty Interlaken students currently attending West Long Branch and Shore Regional schools to continue their attendance in those districts, and an Order, pending the outcome of its underlying petition for relief, permitting any additional Interlaken students who wish to enroll in the West Long Branch or Shore Regional schools to do so for the 2012-13 school year. In pertinent part, the May 11, 2012 Order reads:

....Its request for maintenance of the status quo is **GRANTED** and Interlaken students may continue to attend West Long Branch and Shore regional schools pending a determination by the Commissioner of Interlaken's Verified Petition for Relief.

In affirming that Order the Commissioner stated:

Accordingly, the Order of the OAL is adopted. Petitioner's students will continue their educations in the schools where they currently are enrolled, pending an ultimate determination concerning petitioner's

² Interlaken I has not yet been scheduled for a hearing as the completion date for the feasibility study required under the statute regarding sending-receiving relationships is February 1, 2013.

application to replace or supplement the send-receive relationship that it previously maintained with the respondent Asbury Park Board of Education. The matter is hereby returned to the OAL for a plenary hearing on the merits.

The standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982) and are codified at N.J.A.C. 6A:3-1.6. They include irreparable harm if the relief is not granted, a settled legal right underlying petitioner's claim, likelihood that petitioner will prevail on the merits of the underlying claim, and, balancing the equities and interests, that petitioner will suffer greater harm than respondent.

non decision
While neither Order ~~specifically addresses~~ the question of whether Interlaken students (not currently enrolled in West Long Branch or Shore Regional schools can enroll in those schools, the language of each order is broad enough to encompass that eventuality. Further, the legal analysis applied in each anticipates such a result. In allowing Interlaken students to continue attending the receiving districts of West Long Branch or Shore Regional both orders cited the underlying dispute between Interlaken and Asbury Park as to the existence and extent of the sending-receiving relationship between them. Although a hearing is required to determine whether such a relationship exists, and if so whether Interlaken has met the statutory requirements for terminating such a relationship, under the Crowe standard, it was determined that Interlaken had a likelihood of prevailing on the merits. That likelihood of success was one of the factors allowing Interlaken students to attend West Long Branch and Shore Regional as receiving districts for Interlaken.

Crowe further requires that petitioners show a settled legal right to the relief sought. In this matter, the children of Interlaken have a right to a public education under the law of New Jersey. While Asbury Park has disputed Interlaken's right to enter into sending-receiving relationships with West Long Branch and Shore Regional, it has nevertheless done so. Although the relationships are disputed, all of the children of Interlaken have a settled legal right to the public education made available by Interlaken. As Interlaken has been allowed to maintain the status quo of those sending receiving relationships with West Long Branch and Shore Regional pending the resolution of Interlaken I, access to those schools must be provided to all its resident

children. To do otherwise calls into question their settled legal right to a public education.

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on Asbury

The standard for emergent relief further requires that petitioners suffer irreparable harm should the relief not be granted. In this matter, petitioners' children are entitled to a public education. If they are unable to receive that education, they will be denied a constitutional right, clearly suffering irreparable harm. Interlaken maintains no schools of its own and has disputed its sending-receiving relationship with Asbury Park. It has however, entered into sending-receiving relationships with West Long Branch and Shore Regional. As those relationships have been permitted to continue, they should be available to all of the approximately fifty school age children residing in the Borough. To do otherwise would deprive the remaining children of access to the schools available to other residents, raising a serious issue regarding their equal access to the public education already being provided to those children already attending West Long Branch or Shore Regional.

The final prong of the Crowe analysis is whether upon a balancing of the equities and interests, petitioners will suffer greater harm than respondent. As noted in Interlaken I, a balancing of the equities shows that the children of Interlaken have a greater stake in this matter than the only objecting respondent, Asbury Park. Their right to a public education is at stake in this dispute between the two districts. Interlaken has chosen to enter into sending-receiving relationships with West Long Branch and Shore Regional and to contest the existence and extent of the relationship with Asbury Park. Pending the outcome of the Interlaken I case, the status quo of the West Long Branch and Shore Regional relationships has been maintained and petitioners have chosen to enroll their children in the same manner as other Interlaken children. To deny them that right raises issues of equal access and subjects their children's right to a public education to the uncertainty of Interlaken's disputed relationship with Asbury Park. In contrast, as noted in Interlaken I, no regular education Interlaken students have attended Asbury Park schools since the mid 1990s, and any harm to it is merely speculative at this point.

Petitioners' request for an emergent order is **GRANTED** and all Interlaken students may attend West Long Branch and Shore Regional Schools pending the final determination in the matter of Board of Education of the Borough of Interlaken v. Board of Education of the City of Asbury Park, et al., OAL Docket No. EDU 5340-2012. It is so **ORDERED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.



August 27, 2012

DATE

/lam

PATRICIA M. KERINS, ALJ

361-12E

OAL DKT. NO. EDU 11302-12
 AGENCY DKT. NO. 228-8/12

M.L., on behalf of minor children, J.F. and D.F.; :
 E.O. and B.O., on behalf of minor children,
 D.O. and G.O.; J.P. and M.P., on behalf of :
 minor children, A.P. and M.P.; and
 L.R. and M.R., on behalf of minor children, :
 S.R. and F.R., :

PETITIONERS,

COMMISSIONER OF EDUCATION

V.

DECISION ON MOTION

BOARD OF EDUCATION OF THE BOROUGH
 OF INTERLAKEN, MONMOUTH COUNTY; :
 BOARD OF EDUCATION OF THE CITY
 OF ASBURY PARK, MONMOUTH COUNTY; :
 BOARD OF EDUCATION OF THE
 BOROUGH OF WEST LONG BRANCH, :
 MONMOUTH COUNTY; AND
 BOARD OF EDUCATION OF THE :
 SHORE REGIONAL SCHOOL DISTRICT,
 MONMOUTH COUNTY, :

RESPONDENTS. :

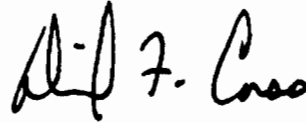
The record of this emergent matter – which included a digital recording of the hearing conducted at the Office of Administrative Law (OAL) on August 27, 2012 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed by the Assistant Commissioner to whom this matter has been delegated pursuant to N.J.S.A. 18A:4-34.

Upon full consideration of the entire record, the Assistant Commissioner adopts the recommended Order granting emergent relief as he concurs with the ALJ – for the reasons

fully presented in her decision – that petitioners have satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 N.J. 126 (1982).

Accordingly, petitioners' emergent application is granted. This matter shall proceed at the OAL for such further action as may be necessary to bring it to conclusion.

IT IS SO ORDERED.¹



ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 8/30/12

Date of Mailing: 8/30/12

Faxed

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to P.L. 2008, c. 35 (N.J.S.A. 18A:6-9.1).

J.B. on behalf of minor child, T.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF WOOD-RIDGE,	:	
BERGEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her child is not eligible for a free public education in the Wood-Ridge school district; the Board's determination relied upon the representation of S.B. – T.B.'s father, who is divorced from J.B. – that T.B. was living full-time with him in Hasbrouck Heights. Petitioner contended that she and S.B. share joint custody, but that J.B. is the "parent of primary residence."

The ALJ was informed by the respondent Board's attorney in a prehearing conference that there would be no appearance on the Board's behalf and that the respondent would rely on the petitioner's testimony and papers, which were presented at an *ex parte* hearing on June 28, 2012. The ALJ found, *inter alia*, that: J.B. credibly clarified the basis for S.B.'s representation regarding T.B.'s residency, *i.e.*, that for a period of approximately one month during the fall of 2011, T.B. spent more time with S.B. as a result of a heated argument between T.B. and his mother, but that T.B. has lived with J.B. since the divorce, and this is reflected on his driver's license and by the fact that T.B. was employed as a summer youth recreation counselor in Wood-Ridge – a position afforded only to residents of Wood-Ridge borough; it is undisputed that J.B. is domiciled in Wood-Ridge and is the primary guardian of T.B.; the record soundly reflected proof of T.B.'s domicile in Wood-Ridge; and the Board did not present any evidence to the contrary. Accordingly, the ALJ concluded that T.B. is entitled to a free public education in Wood-Ridge schools.

Upon a full and independent review, the Commissioner concurred with the findings and conclusion of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this case.

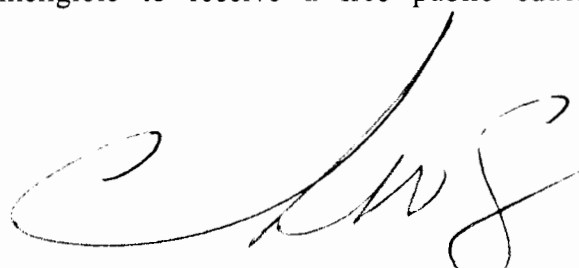
This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 4967-12
AGENCY DKT. NO. 30-2/12

J.B. on behalf of minor child, T.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF WOOD-RIDGE,	:	
BERGEN COUNTY,	:	
RESPONDENT.	:	

Upon review of the record of this matter and the Initial Decision of the Office of Administrative Law,¹ the Commissioner adopts the Initial Decision as the final decision in this case. Accordingly, petitioner's minor child, T.B., is deemed to be domiciled in respondent's district and respondent's determination that T.B. was ineligible to receive a free public education in Wood-Ridge is reversed.

IT IS SO ORDERED.²



COMMISSIONER OF EDUCATION

Date of Decision: 9/17/12

Date of Mailing: 9/18/12

¹ Neither party filed exceptions. Indeed, respondent declined to appear at the hearing and advised that it would accept the Commissioner's determination.

² This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4967-12

AGENCY DKT. NO. 30-2/12

J.B. ON BEHALF OF MINOR CHILD, T.B.,

Petitioner,

v.

BOROUGH OF WOOD-RIDGE BOARD

OF EDUCATION, BERGEN COUNTY,

Respondent.

J.B. and T.B., petitioner pro se

Michael J. Gross, Esq., for respondent (Kenney Gross Kovats & Parton,
attorneys) no appearance

Record Closed: August 1, 2012

Decided: August 2, 2012

BEFORE **TAHESHA L. WAY, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case involves an appeal by petitioner, J.B. on behalf of her son T.B., from a residency determination by respondent, Board of Education of the Borough of Wood-Ridge (Board). On or about January 19, 2012, the Board determined that T.B. was ineligible to attend the schools in the Wood-Ridge District based on information that T.B.

was living full-time with his father in Hasbrouck Heights, and had no intent on returning to live with J.B. in Wood-Ridge.

An appeal was filed on February 7, 2012. On April 5, 2012, the Board advised the New Jersey Department of Education of its intent to not file a formal answer, but to comply with any determination made by the Commissioner of Education. Accordingly, the Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on April 18, 2012, for a hearing as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On June 4, 2012, a prehearing conference occurred. At that time and by way of a June 7, 2012, correspondence, the Board's attorney represented that no appearance would be made on his client's behalf at time of hearing but a reliance on petitioner's testimony and papers submitted. On June 28, 2012, a hearing occurred *ex parte* and the record remained open for the receipt of petitioner's documents. On August 1, 2012, petitioner provided clearer copies of various documents, at which time the record closed.

FACTUAL DISCUSSION

Based upon a review of the record, I **FIND** the following are the **FACTS** in this case.

J.B. is the mother of T.B., who is a seventeen-year-old special needs student, and a daughter, S.J.B. J.B. has been divorced from her children's father, S.B., since July 17, 2009. As part of the divorce agreement, J.B. and S.B. share joint custody, but J.B. is the "parent of primary residence." In particular, the children live with J.B. every weekday but for Wednesdays,¹ and J.B. and S.B. alternate weekend visits. (P-1.)

In or around January 2012, S.B. solely attended T.B.'s IEP meeting, as J.B. was working. At that time, S.B. represented that T.B. was living full-time with him in Hasbrouck Heights. In reliance upon this representation, the Board subsequently made the determination that T.B. was ineligible to attend the Wood-Ridge schools.

¹ J.B. has resided in her Wood-Ridge home since 1990.

J.B., however, credibly clarified the basis for S.B.'s aforementioned statement. She explained that for approximately one-month during the fall of 2011, T.B. spent more time with S.B. as a result of a heated argument between him and J.B. J.B. also maintained that after the divorce T.B. has always lived with her as reflected on his driver's license. (P-1.) Moreover, T.B. presently works for Wood-Ridge as a summer youth recreation counselor to third graders, which is only afforded to its residents. (P-1)

LEGAL DISCUSSION

In New Jersey public schools are free for children so long as they meet certain residency requirements.

N.J.S.A. 18A:38-1 provides eligibility in two alternative ways as follows in pertinent part:

Public schools shall be free to the following persons over five and under 20 years of age:

a. Any person who is domiciled within the school district;

For the purpose of applying subsection (a) of the statute, the regulations of the Department of Education provide that a student is domiciled in the school district when he is with a parent or legal guardian whose permanent home is located within the school district. N.J.A.C. 6A:22-3.1.

A district board of education may deny admission to a child if the evidence does not support the validity of the resident's claim. N.J.S.A. 18A:38-1(b)(1). The resident is afforded an opportunity to contest the board's decision and is entitled to a hearing on the validity of the claim. Ibid.; N.J.A.C. 6A:22-5.1. In connection therewith, the resident bears the burden of proving, by a preponderance of the evidence, that the child is eligible for a free education under the statutory criteria. N.J.S.A. 18A:38-1(b)(1).

Based upon the applicable facts and law, I **CONCLUDE** that T.B. is entitled to a free public education in the Wood-Ridge District. Briefly, it is undisputed that J.B. is domiciled in Wood-Ridge and is the primary guardian of T.B. J.B. also cogently explained the miscommunication that T.B. was living with S.B., and the record soundly reflects proof of T.B.'s domicile in Wood-Ridge. Furthermore, the Board did not present any evidence to prove otherwise.

ORDER

I hereby **ORDER** that the determination of the respondent, Borough of Wood-Ridge Board of Education's determination that T.B. does not reside in the school district is **REVERSED** and petitioner's appeal is hereby **GRANTED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 2, 2012

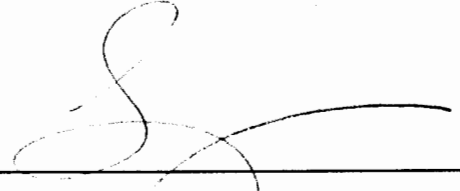
DATE

Date Received at Agency:

Date Mailed to Parties:

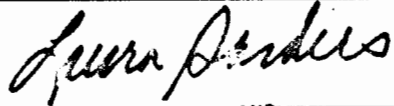
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AUG - 3 2012



TAHESHA L. WAY, ALJ

August 2, 2012



**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

APPENDIX

WITNESSES

For Petitioner:

J.B.

For Respondent:

None

EXHIBITS

For Petitioner:

P-1 J.B. and S.B.'s Divorce Agreement together with copies of T.B.'s driver's license
and pay stub as a Wood-Ridge summer youth recreation counselor

For Respondent:

None

BETH ANN CLAYTON,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner appealed the decision of the respondent Board to terminate her employment as a teacher through a reduction in force (RIF) at the end of the 2010-2011 school year. Petitioner was continuously employed by the Board from October 2005 through June 2011. Petitioner contended that after her termination, the Board continued to employ other teachers with less seniority than petitioner, in violation of her tenure and seniority rights. Petitioner sought reinstatement and back pay retroactive to the date of her termination.

The ALJ found that: petitioner failed to appear for a hearing in this matter on July 30, 2012, despite having received appropriate notice; and attorney for the petitioner appeared at the hearing and confirmed on record her ongoing inability to reach her client via telephone, and via certified and regular mail. Accordingly, the ALJ concluded that petitioner had abandoned this matter and ordered the case returned to the Department for appropriate disposition.

Subsequent to the issuance of the Initial Decision, the petitioner filed exceptions in accordance with *N.J.A.C.* 1:1-18.4. In the exceptions, counsel for the petitioner explained that Ms. Clayton failed to appear on July 30, 2012 because she had moved and never received notice of the hearing date. Accordingly, the Commissioner returned the matter to the OAL for reinstatement of petitioner's appeal.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 14386-11
 AGENCY DKT. NO. 324-11/11

BETH ANN CLAYTON,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner filed exceptions to the Initial Decision in accordance with the provisions of *N.J.A.C.* 1:1-18.4. Respondent requested and was granted an extension of time within which to file reply exceptions. These were received in accordance with the extended timelines.

In exceptions, counsel for petitioner provided the following explanation for petitioner's failure to appear at the July 30, 2012 hearing in this matter: "Ms. Clayton apparently failed to receive notice of the hearing as she had moved. Although she had moved, she did usually receive the mail sent to her at her former address. However, she did not receive the mail sent by her counsel or by the Court." Attached to counsel's exceptions is a Certification – executed by Beth Ann Clayton – attesting to the truth of these representations and further indicating that she still wishes to pursue her claim against the Board of Education of the City of Elizabeth.

Respondent's reply exceptions charge that petitioner's exceptions fail to offer any legitimate, credible reason for her failure to appear at the hearing and urge the Commissioner to adopt the Administrative Law Judge's decision dismissing her petition of appeal.

Upon review, the Commissioner concludes that interests of justice and fair play dictate that petitioner's explanation for her failure to appear – supported by her certification – be accepted and petitioner be given an opportunity to have her claim against the Board litigated.

Accordingly, in light of the above, this matter is being returned to the OAL for reinstatement of Ms. Clayton's petition of appeal.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 9/17/12

Date of Mailing: 9/18/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

FAILURE TO APPEAR

OAL DKT. NO. EDU 14386-11

AGENCY DKT. NO. 324-11/11

BETH ANN CLAYTON,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
CITY OF ELIZABETH,**

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld Cohen, attorneys)

Marvin Lehman, Esq., for respondent

Record Closed: July 30, 2012

Decided: August 1, 2012

BEFORE **ELLEN S. BASS, ALJ:**

STATEMENT OF THE CASE

Petitioner, Beth Ann Clayton, a teacher formerly employed by the Board of Education of the City of Elizabeth (the Board), asserts that the Board terminated her employment in contravention of her tenure and seniority rights under N.J.S.A. 18A:28-5 et seq. She seeks reinstatement and back pay retroactive to the date of her termination.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Clayton filed her appeal with the Commissioner of Education (the Commissioner) on October 31, 2011. An answer was filed on behalf of the Board, and the contested case was transmitted to the Office of Administrative Law (OAL), on November 22, 2011.

In or about June 2010, the Board terminated several-hundred employees pursuant to a reduction in force (RIF); more than eighty of these employees have pending petitions challenging their terminations as violative of the tenure laws. Discovery and settlement discussions relative to these cases have been the subject of bi-monthly status conferences between counsel and me. In the aftermath of the RIF, many of the petitioners were reinstated by the Board, or secured alternative employment. Counsel and I agreed that many claims might be ripe for withdrawal or settlement, and that by disposing of these claims we would be better able to efficiently focus upon the claims that presented factual or legal complexities. Counsel were directed to communicate with their clients and share with the Board a settlement proposal that fully outlined the back and pay benefits sought by each petitioner, or in the alternative, to promptly withdraw any claim that was no longer viable.

At several case management conferences counsel advised me of ongoing difficulties in securing the cooperation of some of the petitioners and of counsel's inability to obtain the information needed to make a settlement proposal to the Board, or to counsel a client that it was appropriate to withdraw his or her claim. Accordingly, in my order dated May 15, 2012, I directed counsel to supply me with a list of petitioners with whom they have been unable to communicate regarding the nature and extent of their claims. Clayton was among these petitioners, per correspondence from her attorney.

A notice of hearing was issued on June 5, 2012, requiring Clayton's appearance on July 30, 2012. Clayton was notified by the Clerk of the Office of Administrative Law, that her appearance was mandatory, and that a failure to appear would result in dismissal of her petition. The notice was sent both to her attorney and directly to

Clayton at the address on record via regular mail. The OAL received no return of the notice as undeliverable.

Clayton's attorney appeared at the hearing and confirmed on the record her ongoing inability to reach his client. She confirmed that he has attempted to communicate with her via telephone and by certified and regular mail, all to no avail. She tried, without success, to discuss the need for Clayton to appear at the scheduled proceeding. Counsel noted that Clayton responded to one attempt at contact via telephone message, but counsel's attempts to respond to that message were once again unsuccessful. Clayton did not appear on July 30, 2012.

ANALYSIS AND CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Clayton has abandoned this matter and that it should be returned to the transmitting agency.

N.J.A.C. 1:1-14.4(a) provides that, if, after appropriate notice, a party does not appear in any proceeding scheduled by a judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge may direct the Clerk to return the matter to the transmitting agency for appropriate disposition. Clayton failed to appear at the scheduled proceeding, and she failed to provide an explanation one day following her nonappearance. Accordingly, the Clerk should return this matter to the Department of Education.

ORDER

It is **ORDERED** that the Clerk return this matter to the Department of Education for appropriate disposition.

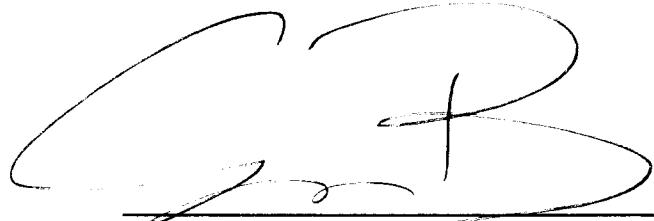
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

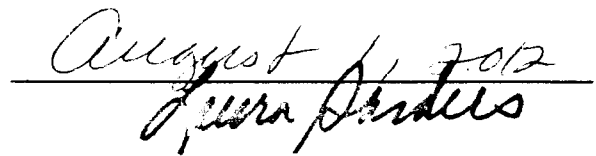
August 1, 2012

DATE



ELLEN S. BASS, ALJ

Date Received at Agency:



Date Mailed to Parties:

AUG - 2 2012

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OAL DKT. NO. EDU 13713-11
 (EDU 9322-10 ON REMAND)
 AGENCY DKT. NO. 167-7/10

LISA SALIMBENE,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF DENNIS,	:	
CAPE MAY COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C. 1:1-19.1* have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

Date of Decision: 9/21/12

Date of Mailing: 9/21/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13713-11

AGENCY DKT. NO. 167-7/10

LISA SALIMBENE,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF DENNIS, CAPE
MAY COUNTY,**

Respondent.

Ned P. Rogovoy, Esq., for petitioner

Cynthia A. Satter, Esq., for respondent (Stephen E. Gertler Law Office,
attorneys)

Record Closed: July 19, 2012

Decided: July 25, 2012

BEFORE **W. TODD MILLER, ALJ:**

This matter was transmitted to the Office of Administrative Law on November 15, 2011, for determination as a contested case¹, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

¹ This matter was not transmitted as a tenure action; therefore, the Cardonick provisions do not technically apply. Nevertheless, the attached settlement contains the essential elements of a Cardonick stipulation.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

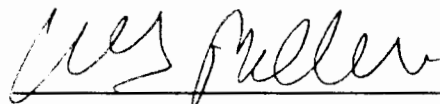
I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 25, 2012

DATE



W. TODD MILLER, ALJ

Date Received at Agency:

Date Mailed to Parties:

8/2/12

/sd

SETTLEMENT AND RELEASE AGREEMENT

This is a Settlement and Release Agreement (hereinafter "Agreement") between Lisa Salimbene ("Salimbene"), residing at 26 Cedar Mill Lane, Cape May Court House, New Jersey 08210, and the Dennis Township School District ("District"), with offices located at 601 Hagen Road, Cape May Courthouse, New Jersey 08210.

WITNESSETH:

WHEREAS, Salimbene was hired effective November 1, 1995 as Cafeteria/Playground Aide for the Dennis Township School District; and

WHEREAS, in June of 2009, Petitioner was provided with a contract indicating that she was "Tenured Secretarial Personnel; and

WHEREAS, on May 11, 2010, the District approved the reduction Salimbene's position from a twelve (12) month secretarial position to a ten (10) month position; and

WHEREAS, as a result of Board's action on May 11, 2012, Salimbene, pursuant to N.J.S.A. 18A:6-9, filed a Petition of Appeal with the New Jersey Commissioner of Education contesting the Board's actions. That matter was received by the Commissioner of Education and transmitted to the New Jersey

Office of Administrative Law as a contested case. Same case was given docket number EDU 09322-2010S;

WHEREAS, a Notice of Motion for Summary Judgment was filed on behalf of the respondent on or about September 2, 2012. The Motion for Summary Judgment was denied, however, W. Todd J. Miller, ALJ. sua sponte granted Summary Judgment to Petitioner. Exceptions were timely filed by Respondent and the matter was returned for an evidentiary hearing.

WHEREAS, prior to an evidentiary hearing before W. Todd Miller, ALJ, and prior to final determination by the Commissioner of Education on the merits considering such petition the District through its counsel and Salimbene through her counsel engaged in settlement negotiations for the purposes of avoiding protracted litigation between them; and

WHEREAS, the parties, without admitting liability or fault, and after an opportunity to consider and to confer with competent counsel of their choice, have reached a voluntary agreement with respect to any and all disputed issues in connection with Salimbene's employment relationship with the District and the separation thereof, and with a full understanding of the terms of this Agreement, desire to memorialize their settlement herein; and

WHEREAS, the parties desire to resolve all claims between them, except as is specifically provided herein,

WHEREAS, the parties have engaged in settlement negotiations in good faith,

NOW, THEREFORE, in consideration of the mutual covenants contained herein and as set forth in further detail herein, the parties agree as follows:

1. **Payment:** The District shall pay to Salimbene the total sum of SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500) as a lump sum one week from the Commissioner's acceptance of the Settlement Agreement. The District shall issue a 1099 to Salimbene. Salimbene agrees to assume full liability for applicable state, federal and local taxes, if any, that may be required by law to be paid with respect to the Settlement Amount described herein. It is the intent of the parties that the payment in the preceding paragraph will be the total payment made on behalf of or for the benefit of the District to Salimbene in full settlement of this litigation. The parties acknowledge that the payment is being made by the District's insurance carrier, Utica National. Salimbene acknowledges that Salimbene is not otherwise entitled to any additional payments of any kind. Salimbene further acknowledges that she is not relying upon the District, Utica, or any representative of the District in determining her own tax responsibility for this payment. Salimbene further agrees that she is responsible for any lien that may be placed upon payment as a result of her collection of unemployment

benefits. Salimbene acknowledges that she is not otherwise entitled to any additional payments if such an action should occur.

2. **Restoration of Position to 12 Months:** The District shall immediately restore Salimbene's position to 12 month, from its current 10 month position.
3. **Salimbene's Release:** Except for claims relating to the enforcement of this Agreement, and any claims related to payment for unused sick days, Salimbene hereby releases and forever discharges the District and all of their former and current employees, Board members, superintendents, officers, directors, overseers, trustees, students, consultants, vendors, attorneys, agents, successors and assigns ("Releasees") from any and all manner of action and actions, cause and causes of action, suits, claims, grievances, debts, sums of money, wages, compensation, bills, claims for attorneys' fees, interest, expenses and costs, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands of any nature whatsoever known or unknown, suspected or unsuspected, vested or contingent, which Salimbene ever had or now has against the Releasees arising out of Salimbene's former and existing employment relationship with them or for any other reasons which were asserted or could

have been asserted by Salimbene under any local, state or federal statute, constitution, ordinance, contract or the common law, including, but not limited to, all claims under: the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 6, ("ADEA"); Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e, ("Title VII"); the Reconstruction Era Civil Rights Act, as amended, 42 U.S.C. § 1981, § 1983, ("Civil Rights Act"); the Civil Rights Act of 1991, as amended, 42 U.S.C. § 1981a, ("ERA of 1991 "); the Americans with Disabilities Act, 42 U.S.C. § § 12101, ("ADA"); the Family and Medical Leave Act, 29 U.S.C. § 2601, ("FMLA"); the Fair Labor Standards Act, 29 U.S.C. § 201, ("FLSA"); the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et al ("ERISA"); the Equal Pay Act, 29 U.S.C. § 201, c. ("EPA"); the Rehabilitation Act, 29 U.S.C. § 701, c. ("RA"); the Pregnancy Discrimination Act, 42 U.S.C. § 2000, ("PDA"); the Whistleblower Protection Statutes, 10 U.S.C. § 2409, 12 U.S.C. § 1831j, 31 U.S.C. § 532g, 41 U.S.C. § 265, (collectively as "WPS"); the Sarbanes-Oxley Act, 18 U.S.C. 1514A, the False Claims Act, 31 U.S.C. § 3729, et seq. the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, et seq.; the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, ("LAD"), the New Jersey Family Leave Act, N.J.S.A. 34:11B-1, seq. ("FLA"); the New Jersey Conscientious

Employee Protection Act, N.J.S.A. 34:19-1, ("CEPA"); the New Jersey Worker Freedom from Intimidation Act, N.J.S.A. 34:19-9; the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a, ("WHL"); the New Jersey Discrimination in Wages Law, N.J.S.A. 34:11-56.1, c.t ("DWL"); the New Jersey Workers' Compensation Law, N.J.S.A. 34:15-3 9.1, c.t ("NJWC"); and the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, ("WPL). Salimbene expressly understands and acknowledges that it is possible that unknown losses or claims exist or that present losses may have been underestimated in amount or severity. Salimbene expressly accepts and assumes the risk of such unknown or underestimated losses or claims and acknowledges and agrees that the benefits to be provided to her pursuant to this Agreement fully compensate her for such risks. Salimbene acknowledges that none of the benefits given to her pursuant to this Agreement have been assigned or are subject to alienation (i.e., personal bankruptcy).

4. **District's Release:** Except for claims relating to the enforcement of this Agreement, the District hereby releases and forever discharges Salimbene from any and all manner of actions, claims, suits, grievances, debts, sums of money, claims for attorneys fees, sums of money, wages, compensation, bills, claims for attorneys' fees, interest, expenses and costs,

controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands of any nature whatsoever known or unknown, suspected or unsuspected, vested or contingent, which it ever had or has against Salimbene arising out of Salimbene's former or existing employment relationship with the District or for any other reasons which were asserted or could have been asserted under any local, state or federal statute, constitution, ordinance, contract or the common law,

5. **Dismissal of Pending Petition of Appeal:** Within five (5) days after execution of this agreement, the parties shall file a Stipulation of Dismissal with prejudice of the Petition of Appeal, docket number EDU 09322-2010S.
6. **Non-Admission of Liability:** The execution of this Agreement and the settlement made hereunder shall not be construed as an admission of liability by any party to this Agreement, such liability being expressly denied. It is agreed that there is no prevailing party in this litigation. Salimbene is responsible for her own attorneys' fees and costs.
7. **Confidentiality:** To the extent permitted by law, the parties shall hold confidential the terms of this Agreement, the amount paid in consideration thereof, any claims or purported admissions made

during the settlement negotiations, and any information required hereunder the terms of settlement (the "Confidential Information") and shall not disseminate the Confidential Information to anyone other than the parties, their accountants, and their counsel, other than to state in response to an inquiry that the differences between them have been resolved to their mutual satisfaction.

8. **Entire Agreement/Severability/Not Construed Against**

Drafter: This Agreement constitutes the entire understanding between the parties as it relates to the subject matter of this Agreement and supersedes all other representations, statements, and understandings or agreements pertaining to such subject matter. The provisions of this Agreement are severable, and if any provision of it is found to be unlawful or unenforceable, it shall be deemed narrowed to the extent required to make it lawful and enforceable. The Agreement was negotiated at arms-length and shall not be construed against its drafter as each party participated equally in its drafting.

9. **Consideration and Revocation Period:** Salimbene

represents and warrants that she has had an adequate time to consider the terms and conditions of this Agreement and that she has consulted with her own counsel, Ned P. Rogovoy, Esq., about it. Salimbene has a period of seven (7) calendar days after

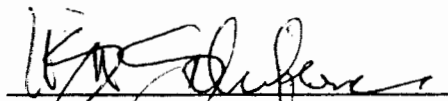
delivering the executed Agreement to the District's attorney to revoke acceptance of the Agreement.

10. **Violation of Material Provision(s):** In the event that either party violates any material provision of this Agreement, the parties will have the right to petition a court of competent jurisdiction for appropriate legal remedies, equitable remedies, or both, to compensate the aggrieved party or parties for any such violation. If a party is deemed to be the "prevailing party" in an action to enforce the terms of this Settlement Agreement, the non-prevailing party(ies) shall pay the prevailing party(ies) its reasonable legal fees and costs. For purposes of the foregoing, if either party is lawfully compelled to disclose the terms of settlement pursuant to an Open Public Records Act (OPRA) request, court order or other lawful directive, the party required to make such a disclosure shall not be considered to be in breach and the remainder of the Agreement shall remain in full force and effect.

11. **Voluntary and Knowing Agreement:** Salimbene acknowledges that she has executed this Agreement after consulting with her attorney, Ned Rogovoy, Esq., and after considering the terms of the Agreement, and further acknowledges that she has read this Agreement in its entirety, understands all of the terms and freely, voluntarily and

knowingly, without duress or coercion, assents to all the terms
and conditions contained herein.

By signing below, all Parties indicate that they have carefully read
and understand the terms of this Agreement, enter into this
Agreement knowingly, voluntarily and of their own free will,
understand its terms and significance and intend to abide by its
provisions without exception.


LISA SALIMBENE

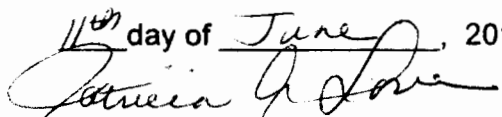
6/11/12
DATE

STATE OF NEW JERSEY

COUNTY OF CAMBERLAND

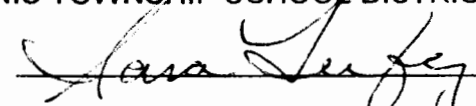
On June 11, 2012, before me personally came Lisa
Salimbene to me known and known to me to be the individual described
in, and who executed the foregoing Settlement Agreement and General
Release, and duly acknowledged to me that she executed the same.

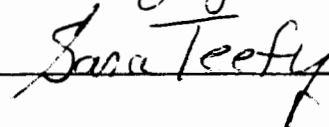
Sworn to before me on this

11th day of June, 2012.


Patricia A. Love
Notary Public of New Jersey
Commission Expires 3/15/2016

DENNIS TOWNSHIP SCHOOL DISTRICT

By:  (SIGNATURE)

SALLY TEEFY  (PRINTED NAME)

BOARD PRESIDENT (TITLE)

Date:

By: Terri Nowotny (SIGNATURE)

TERRI NOWOTNY (PRINTED NAME)

ADMINISTRATOR/BOARD SECRETARY (TITLE)

Date:

DENNIS TOWNSHIP



TERRI NOWOTNY
Business Administrator/
Board Secretary

601 Hagan Road
Cape May Court House, NJ 08210
(609) 861-2859, ext 511
FAX: (609) 861-1597

BOARD OF EDUCATION

July 30, 2012

I certify that this is a true and correct copy of the Official Minutes of the Dennis Township Board of Education meeting held June 20, 2012:

Moved by Ms. Ross and seconded by Mrs. Verdade, that the Board of Education approve to accept and approve the "Settlement and Release Agreement" by and between Lisa Salimbene and the Dennis Township Board of Education regarding Commissioner of Education case number EDU 09322-2010S. The parties, by voluntarily entering into this agreement, resolved a disputed personnel matter and avoided the possibility of protracted litigation. By accepting and approving the "Settlement and Release Agreement", the Board agrees to restore Ms. Salimbene to a twelve (12) month position effective July 1, 2012. By accepting and approving the "Settlement and Release Agreement", the Board also recognizes that any and all payments made to Salimbene to resolve this dispute were covered entirely by the Board's insurance carrier.

Voting Yes: Mr. Gery, Ms. Hand, Ms. Kulick, Ms. McDaniel, Ms. Ross,
Mrs. Teefy, Mrs. Verdade and Mrs. Ziolkowski

Voting No: None

Abstaining: None

Motion approved

Terri Nowotny
Terri Nowotny, Business Administrator/Board Secretary

OAL DKT. NO. EDU 5877-12
 AGENCY DKT. NO. 102-4/12

M.V. on behalf of minor children, M.L.
 and I.L.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE
 BOROUGH OF MOUNTAIN SIDE,
 UNION COUNTY,

RESPONDENT.

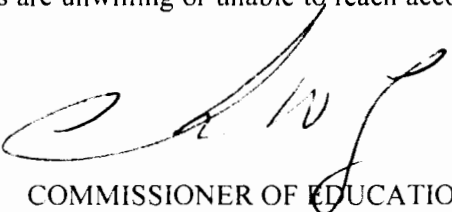
COMMISSIONER OF EDUCATION

DECISION

Examination of the record of this matter, the Initial Decision and the "Stipulation of Settlement" (Agreement), revealed neither a copy of a Board resolution evidencing respondent's approval of the Agreement nor, in the alternative, the signature on the Agreement of respondent's attorney – who is the Boards' duly authorized representative in litigation.

Consequently, the Commissioner cannot approve the within settlement and hereby remands this matter to the OAL for revision of the Agreement to either be executed by respondent's attorney or to include as an exhibit a Board resolution approving the settlement and authorizing a representative to execute the Agreement. If the parties are unwilling or unable to reach accord on such a revised agreement, the matter shall proceed to hearing.

IT IS SO ORDERED.*


 COMMISSIONER OF EDUCATION

Date of Decision: 9/21/12

Date of Mailing: 9/21/12

* This decision may be appealed to the Superior Court, Appellate Division pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05877-12

AGENCY DKT. NO. 102-4/12

M.V. on behalf of minor children,

M.L. and I.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

BOROUGH OF MOUNTAINSIDE,

UNION COUNTY,

Respondent.

James N. Butler, Jr., Esq. for petitioner

Paula Clark, Esq. for respondent, (Machado Law Group, LLC, attorneys)

Record Closed: August 1, 2012

Decided: August 2, 2012

BEFORE **IRENE JONES ALJ:**

On May 3, 2012, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1

to -15 and N.J.S.A. 52:14F1 to -13. A settlement conference was held on August 1, 2012, and during that time the parties agreed to settle the matter.

A Stipulation of Settlement indicating the terms of the settlement was signed by the parties and is attached hereto.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 2, 2012



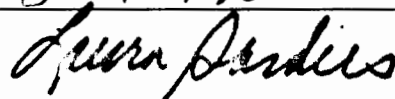
DATE

IRENE JONES ALJ

Date Received at Agency:

Date Mailed to Parties:

AUG - 7 2012

8-7-12


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

Attachment

AUGUST 1, 2012

M.V. o/b/o I.L. and M.L.

Petitioner

v.

Mountainside School District,
Respondent

STIPULATION
OF
SETTLEMENT

1. The parties agree to settle the above matter as follows:

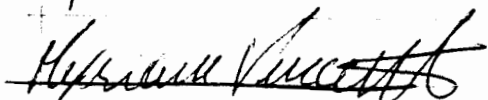
Petitioner agrees not to enroll

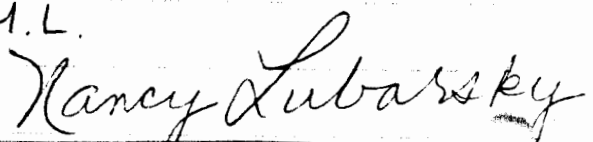
- a) The minor children, I.L. and M.L., agree not to enroll in the Mountainside School District for the 2012-2013 school year.

- b) M.V. o/b/o I.L. and M.L. will pay to the Mountainside School District, ^{Petitioner,} ~~Respondent,~~ \$2,500.00 in retroactive tuition for the 2011-2012 school year within 45 days of the Mountainside Board of Education meeting approving the settlement.

- b1) The payment will be sent to Mountainside Board of Education
1497 Woodacres Dr.
Mountainside, NJ 07092
attn: Dr. Lubarsky
- c) This settlement agreement resolves all disputes between the parties.

Myriam Vincent o/b/o I.L. and M.L.


Petitioner


Aug. 1, 2012 Dr. Nancy Lubarsky
Chief School Administrator

#384-12

DEBBIE LYNN FITZGERALD;
KIMBERLY SCOTT; MARGARET WATKINS
AND SUSAN GRIMM,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE
ASBURY PARK SCHOOL DISTRICT,
MONMOUTH COUNTY,

RESPONDENT

AND

JANETTE MOEN; CATHLEEN CLOSHOSEY;
KRISTINA FIORE AND DANA AURICHIO,

INTERVENORS

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners in these consolidated cases – all tenured teachers holding instructional certificates with endorsements in Elementary Education – asserted that the respondent Board’s action in terminating their employment on June 30, 2010, in a reduction in force (RIF), violated their tenure and seniority rights. Petitioners contended that their standard elementary endorsements are valid for grades nursery through eight and therefore entitle them to teach nursery school. As such, they claimed tenure and/or seniority rights over personnel who were retained by the district in pre-kindergarten teaching positions. The Board contended that, pursuant to *N.J.A.C. 6A:9-9.1(a)(3)* and *N.J.A.C. 6A:9-11.1(h)*, petitioners were not qualified for a pre-school position. All petitioners except for Margaret Watkins filed motions for summary decision, and the Board filed a cross motion.

The ALJ found, *inter alia*, that: a pre-school through third grade (P-3) endorsement was created by the Department of Education in 2001 in the context of *Abbott v. Burke*, 163 *N.J.* 95, 108 (2000); pursuant to *N.J.A.C. 6A:9-9.1(a)(3)*, a teacher with an elementary endorsement issued before March 2008 (as were those held by the petitioners) must demonstrate appropriate content knowledge for the subject taught; pursuant to *N.J.A.C. 6A:9-11.1(h)*, a teacher with an elementary endorsement, without reference to when it was issued, may teach preschool if he or she has “the equivalent of two academic years of full-time experience teaching three and four year-olds”; none of the petitioners possess the P-3 endorsement, nor did they submit any evidence to establish their qualification as a pre-school teacher based on the experiential requirement; the Board’s decision not to place the “riffed” petitioners in any of the pre-school positions held by non-tenured or less senior employees was therefore not arbitrary, capricious or unreasonable. Accordingly, the ALJ granted summary decision to the Board and dismissed the petitions.

Upon independent review, the Commissioner concurred with the ALJ’s determination to dismiss the petitioners’ appeal, and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 21, 2012

OAL DKT. NOS. EDU 9198-10, EDU 9204-10, EDU 9225-10 & EDU 9227-10
AGENCY DKT. NOS. 162-7/10, 176-7/10, 178-7/10 & 179-7/10
(CONSOLIDATED)

DEBBIE LYNN FITZGERALD;	:	
KIMBERLY SCOTT; MARGARET WATKINS	:	
AND SUSAN GRIMM,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
ASBURY PARK SCHOOL DISTRICT,	:	
MONMOUTH COUNTY,	:	
	:	
RESPONDENT	:	
	:	
AND	:	
	:	
JANETTE MOEN; CATHLEEN CLOSHOSEY;	:	
KRISTINA FIORE AND DANA AURICHIO,	:	
	:	
INTERVENORS	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners Grimm and Fitzgerald requested and were granted extensions of time within which to file exceptions, and concomitant extensions were granted to the Board and the Intervenors for reply exceptions.¹ Such exceptions – filed in accordance with the adjusted timelines – were fully considered by the Commissioner in reaching his determination herein.

As a threshold matter, the Board objects to the consideration of the exceptions filed by petitioner Watkins – who, pursuant to her petition of appeal, like the other petitioners in

¹ Grant of these exception extensions necessitated that the Commissioner seek an extension of time within which to issue his decision in this matter.

this matter, holds an elementary endorsement on an instructional certificate – as it charges these are procedurally improper in several respects and prejudicial to both the Board and the intervenors. Because any details whatsoever with respect to this petitioner were totally omitted from the Administrative Law Judge's (ALJ) Initial Decision and in light of the Board's highly unusual request for exclusion of consideration of her exceptions, the Board's objections in this regard are being presented in their entirety:

It is undisputed that Petitioner Watkins did not file a motion for summary decision, nor did she oppose the summary decision cross-motions in this matter. In fact she specifically refused to file any documents relative to the same. As the procedural history of this matter plainly shows, Petitioners Fitzgerald and Grimm filed motions for summary decision in accordance with Judge Masin's letter order, in which Petitioner Scott joined. Thereafter, on March 22, 2012, the Board filed its opposition and a cross-motion for summary decision, in which the Intervenor[s] joined with supplementation. Petitioners Fitzgerald, Grimm and Scott each filed replies to the Board's cross-motion. At no point did Petitioner Watkins file a motion, opposition, or a reply. Rather, by letter dated February 21, 2012 to Judge Masin, Petitioner Watkins' counsel specifically refused to file a motion, stating "I will not file a Motion for Summary Decision on behalf of Petitioner Margaret Watkins," and instead, "reserved the right to file a response to any Summary Decision motions..." Ms. Watkins' counsel was again reminded on March 5, 2012 of the ability to reply to the Board's position, and again reserved the same right on March 7, 2012 in a letter to Judge Masin.

Despite twice reserving a right to respond, at no point in the three months between Petitioner Watkins' receipt of the Board's cross-motion...and the issuance of Judge Masin's initial decision...did Ms. Watkins file even one shred of paper in defense of her claims. The Board's cross-motion for dismissal was willingly and deliberately unopposed. Ms. Watkins cannot now be heard to complain in any fashion that summary decision was granted against her because her counsel "anticipated that an evidentiary hearing would be scheduled" and decided not to oppose the Board's motion. Quite simply, Ms. Watkins made a procedural gamble and lost. She determined to sit on the sidelines while the other parties' motions were heard, assuming that they would all be denied and that a hearing would be scheduled. Obviously, the opposite occurred. Now, in what can only be described as a second chance, Ms. Watkins seeks to file opposition to the Board's motion – armed with the full knowledge of how the motion was decided and the opportunity to tailor her "opposition/response" to the same. Given this background and deliberate (in)action by Petitioner Watkins, it is wholly unfair and prejudicial to the Board and Intervenor[s] for her exceptions ...to be considered.

Furthermore, Ms. Watkins has shown complete disregard for *N.J.A.C. 1:1-18.4(c)* and its prohibition against presenting evidence through exceptions that was not submitted below. As noted, Ms. Watkins intentionally did not participate in the motion process below, and presented no defense to the Board's motion whatsoever. Now, as part of her exceptions, she seeks to submit evidence in the form of uncertified attachments to oppose the Board's motion and demonstrate why the ALJ was allegedly incorrect. Even assuming that the documents presented were relevant, there is no reason why they could not have been presented below. Petitioner was not prevented from submitting any documents or affidavits in her defense. Such after the fact gamesmanship is exactly what *N.J.A.C. 1:1-18.4(c)* was intended to prevent...(Board's Reply Exceptions at 3-5)

Under these circumstances – which as to their historical recitation are confirmed by the record in this matter – petitioner Watkins' exceptions here are improper and will not be considered.

The remaining petitioners' exceptions, in pertinent part, merely recast and reiterate their arguments advanced below, specifically 1) petitioners Fitzgerald and Grimm argue that they are qualified to teach pre-K because their endorsements authorized them to do so as of the date they were obtained (both prior to 2001) and once granted the scope of such endorsements cannot be limited by subsequent regulations; and 2) A review by the Board of petitioners' transcripts, educational degrees and past lower elementary grade teaching experience should have made it abundantly obvious to them that petitioners had the necessary "content knowledge" to teach young children in the district, particularly since the skills to teach pre-K are less rigorous than those required to teach the lower elementary grades. As such, they maintain that every certified elementary teacher, by definition, has the "appropriate content knowledge" to teach pre-K.

Upon full review and consideration of the instant record, the Commissioner concurs with the ALJ's determination that petitioners' appeals are appropriately dismissed. In so determining, the Commissioner is in full accord with the ALJ that there are two separate issues with respect to petitioners' claims here. The first of these is whether they hold the correct

certification and endorsement to allow them to teach pre-K. The second issue, which is only relevant if the first issue is decided in petitioners' favor, is whether any or all of them have tenure or seniority rights superior to those of personnel who were retained in the district. The ALJ correctly recognized that should petitioners prevail on the first issue here, resolution of their potential tenure and/or seniority rights *vis-a-vis* each other and the intervenors would necessitate an evidentiary hearing. In that the Commissioner agrees with the ALJ that petitioners have failed to demonstrate that they were qualified to teach pre-K, he finds and concludes that summary decision is properly granted to the Board and the Intervenors.

As recognized in the ALJ's decision, although *N.J.A.C.* 6:11-6.1, amended, effective February 20, 1990 – the provision in effect when petitioners Fitzgerald and Grimm acquired their elementary endorsement – authorized teaching of grades nursery through eight with an elementary endorsement, this situation was altered in 2001 when the State Board – in accordance with the dictates of *Abbott v. Burke*, 163 *N.J.* 95 – determined that specialized knowledge and experience in preschool education was required in order to provide high quality preschool education to the children of the state. With the enactment of *N.J.A.C.* 6A:9-9.2(b)(4) establishing a Pre-K through grade 3 endorsement (authorizing its holders to teach preschool through grade 3 in public schools and to teach public school students in approved settings providing early childhood education), an elementary endorsement, by itself, was no longer sufficient to qualify its holder to teach pre-K. However, recognizing a need to balance the requirement for refined qualifications with a need to accommodate current endorsement holders affected by these new rules, two additional regulatory provisions effectively offered a “grandfathering” opportunity to certain of these individuals. Specifically, *N.J.A.C.* 6A:9-11.1(h) which specifies:

A teacher holding a standard elementary school endorsement with the equivalent of two academic years of full-time experience teaching three and four-year olds under the certificate may teach children in preschool in a public school or Department of Human Services facility. The teaching experience must be in a position that would require the Preschool through Grade 3 endorsement. It shall be the responsibility of the public school district and Department of Human Services facility to maintain a copy of documentation that supports the preschool teaching experience for each teacher affected by this subsection.

and *N.J.A.C.* 6A:9-9.1(a)(3) which, in pertinent part, reads:

Teachers with elementary school endorsements that are valid in grades nursery through eight issued no later than March 1, 2008 may teach in grades nursery through eight in any employing school district. *These teachers must demonstrate to the school district that they have content knowledge appropriate to the subject(s) taught.* (emphasis added)²

Consequently, as of 2001, the Code clearly states that preschool may only be taught by:

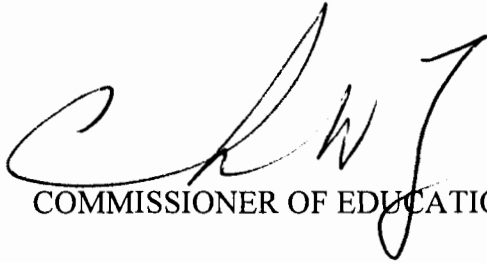
- 1) a teacher holding a preschool through grade 3 endorsement *or*
- 2) a teacher holding an elementary endorsement who either
 - (a) has two full years of experience teaching three and four year olds or
 - (b) is able to demonstrate appropriate content knowledge to teach preschool.

It is undisputed that the instant petitioners did not hold a preschool through grade 3 endorsement. The Commissioner is also in full agreement with the ALJ that the record here contains no evidence that any of the petitioners satisfied the experience requirement of *N.J.A.C.* 6A:9-11.1(h) or the required affirmative demonstration to the Board sufficient to persuade it of their “content knowledge” required by *N.J.A.C.* 6A:9-9.1(a)(3). As such, as none of the petitioners qualified for the available pre-K positions, the Board determination not to place any of them in one of these positions cannot be termed arbitrary, capricious or unreasonable.

² To the extent petitioners may be challenging the validity of either or both of these rules, the Commissioner of Education lacks the jurisdictional authority to entertain such a challenge. Rather, challenges of this nature are under the jurisdictional purview of the Superior Court.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and the instant consolidated petitions of appeal are hereby dismissed.

IT IS SO ORDERED.³



COMMISSIONER OF EDUCATION

Date of Decision: 9/21/12

Date of Mailing: 9/21/12

³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 09198-10, EDU
9204-10, EDU 09225-10 & EDU
09227-10

AGENCY DKT. NOS. 179-7/10, 178-
7/10, 176-7/10 & 162-7/10

CONSOLIDATED CASES

**DEBBIE LYNN FITZGERALD; KIMBERLY
SCOTT; MARGARET WATKINS & SUSAN
GRIMM,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE ASBURY
PARK SCHOOL DISTRICT, MONMOUTH
COUNTY,**

Respondent,

and

**JANETTE MOEN; CATHLEEN CLOSHOSEY;
KRISTINA FIORE & DANA AURICHIO,**

Intervenors.

Alfred F. Maurice, Esq., for petitioner Fitzgerald (Springstead & Maurice,
attorneys)¹

¹ The appearances listed reflect the attorneys of record at the time of this decision. Several parties were represented by other attorneys in the course of the case, and some of the briefs were filed by those counsel. In some cases, the discovery process identified conflicts that required substitution of other counsel.

Louis P. Bucceri, Esq., for petitioner Grimm (Bucceri & Pincus, attorneys)

Marcie L. Mackolin, Esq., for petitioner Scott (Chamlin, Rosen, Uliano & Witherington, attorneys)

Stephen B. Hunter, Esq., for petitioner Watkins (Detzky & Hunter, attorneys)

William P. Hannan, Esq., for intervenors (Oxfeld Cohen, attorneys)

Michael J. Gross, Esq. for respondent (Kenny, Gross, Kovats & Parton, attorneys; **Daniel R. Roberts**, Esq., on the brief)

Record Closed: May 30, 2012

Decided: June 25, 2012

BEFORE **JEFF S. MASIN**, ALJ:

In this contested case, several teachers who had been employed by the Asbury Park Board of Education contend that the Board violated the tenure and seniority rights accorded to them by N.J.S.A. 18A:6-10 et seq., N.J.A.C. 6A:32-5.1 and N.J.S.A. 18A:28-5, when they were the subjects of a Reduction In Force (RIF) that occurred on June 30, 2010. They filed Petitions challenging the Board's action, and the Commissioner of Education transferred their claims to the Office of Administrative Law, pursuant to N.J.S.A. 52:14B-1 to -30 and N.J.S.A. 52:14F-1 to -2. More specifically, the four petitioners claim that the Board terminated them while at the same time retaining persons who had either no tenure or less seniority than the petitioners. The positions in which these retained persons were kept were pre-kindergarten (pre-K) positions which the petitioners contend they were each qualified to fill by virtue of their certifications and endorsements, and as such, they had the priority for these retained positions ahead of those non-tenured or less-senior personnel retained by the Board. As the decision in these cases might affect the rights of other teachers to the positions that they held, they were invited to intervene and did so. Some of the parties have stipulated to certain facts and petitioners Fitzgerald, Grimm and Scott have moved for summary decision, pursuant to N.J.A.C. 1:1-12.5. Ms. Watkins has not so moved, but it appears that her legal position as to her standing to assert a tenure and seniority claim arises from the same arguments. The Board has cross-moved for summary decision. Intervenors have also filed in support of the Board's position.

There are two issues that are critical to the determination of the petitioner's contentions. One is whether they hold the correct certification and endorsement that enables them to teach pre-K. The second is only relevant if the first criteria is satisfied. If so, then the question is whether any or all of the petitioners have tenure or seniority rights ahead of any of the retained personnel. It is apparent that if the answer to the first question is resolved in favor of the petitioners, and they have a potential right to a position, there are issues of fact as to the exact seniority of some of the petitioners and/or intervenors that would necessitate an evidentiary hearing.

It has been stipulated that Ms. Fitzgerald, Ms. Grimm and Ms. Scott hold elementary endorsements on an instructional certificate. Grimm obtained her certificate and endorsement in July, 1992, Fitzgerald in July, 1999 and Scott in 2004. Fitzgerald commenced employment with the Board on September 1, 2001 and was continuously employed on a full-time basis until her lay off due to the RIF. Grimm commenced employment with the Board on February 28, 2003 and was continuously employed until the RIF. Grimm taught kindergarten from February 2003 until June 2003 and then first grade from September 1, 2003 until June 30, 2010. Fitzgerald taught second grade from September 1, 2002 until June 30, 2003 and from September 1, 2003 through June 30, 2010, she taught fourth grade Inclusion. Scott commenced her employment with the Board in February 2003 as a first grade teacher and has also taught third and fifth grades and elementary technology.

The petitioners contend that they hold standard elementary endorsements that entitle them to teach nursery school. As such, and as they contend that they have seniority greater than that of any of retained personnel, they are therefore entitled to the positions held by these persons who were not Riffed. N.J.A.C. 6:11-6.1, amended, effective February 20, 1990, provided that

- (a) Each teaching endorsement is required for the corresponding teaching assignment. Each endorsement is valid for all levels, except that the elementary endorsement is valid for grades nursery through eight.

As each of the petitioners holds an elementary endorsement, they are therefore eligible to teach pre-K. No other endorsement or certification is necessary to teach pre-K, which is included in the "nursery" category. A pre-K endorsement was first created in 2001, after a DOE recommendation in 2000. N.J.A.C. 6A:9-9.2(b)(4) (nursery school endorsement "4. Preschool through grade three: This endorsement authorizes the holder to: i. Teach preschool through grade three in public schools and to teach public school students in approved settings providing early childhood education;"). Since there is nothing in any legislation or regulation that divested those already authorized between 1990 and 2001 and holding a standard elementary endorsement from teaching pre-K, or pre-K through grade three, the petitioners have the necessary endorsement and authority to teach pre-K.

The Board contends that N.J.A.C. 6A:9-9.1(a)(3) and N.J.A.C. 6A:9-11.1 (h) apply and that these demonstrate that the petitioners were not qualified for the preschool position. N.J.A.C. 6A:9-9.1(a)(3) reads:

- (a) Each teaching endorsement is required for the corresponding teaching assignment.

...
3. Teachers with elementary school endorsements that are valid in grades nursery through eight issued no later than March 1, 2008 may teach in grades nursery through eight in any employing school district. These teachers must demonstrate to the school district that they have content knowledge appropriate to the subject(s) taught. All elementary school teachers certified to teach in grades kindergarten through five after January 20, 2004 and hired to teach in grades six through eight must hold either the elementary school with subject matter specialization or the subject matter endorsement.

N.J.A.C. 6A:9-11.1(h)

- (h) A teacher holding a standard elementary school endorsement with the equivalent of two academic years of full-time experience teaching three and four-year-olds under the certificate may teach children in preschool in a public

school or Department of Human Services facility. The teaching experience must be in a position that would require the Preschool through Grade 3 endorsement. It shall be the responsibility of the public school district and Department of Human Services facility to maintain a copy of documentation that supports the preschool teaching experience for each teacher affected by this subsection.

The first regulation says that a teacher with an elementary school endorsement issued before March 1, 2008 (as were those held by the petitioners) must demonstrate "content knowledge appropriate to the subject(s) taught." The second says that a teacher with the elementary school endorsement, without reference to when such endorsement was issued, may teach preschool if she has "the equivalent of two academic years of full-time experience teaching three and four-year olds." The Board contends that even if it may be that N.J.A.C. 6A:9-9.1(a)(3), clearly the less restrictive of the two regulations (appropriate content knowledge with no time reference vs. equivalent of two years) applies, these petitioners have never provided the evidence to demonstrate that they have that appropriate content knowledge.

Petitioners contend that if either or both of these regulations is understood to limit or restrict the right of the petitioners, as holders prior to 2001 of a standard elementary school endorsement that permitted them to teach N-8, such regulation is invalid as applied to them. This is especially true where the subsequently adopted regulations do not explicitly denote any intention to divest rights previously granted. And, N.J.A.C. 6A:9-9.1(a)(5) states that "Teachers holding endorsements that are no longer issued as of January 20, 2004 may continue to teach in the subject areas in which the teacher was authorized to teach under the former rules." The Board counters that the rule-making authority of the State Board of Education is quite broad, and surely allows alteration or repeal of rules where necessary to carry out the school laws of the State. But that truism does not necessarily mean that a Board action that changes the regulatory landscape for the future inevitably also divests prior authorization for those already so permitted, in the absence of a directive to that effect either stated, or perhaps implicit, in the newly announced regulatory scheme. As such, the recognized broad authority of the Board does not by itself answer that question posed here.

The intervenors point out that an understanding of the changes in endorsements that have been made with regard to the pre-school category can only be reached in the context of the Abbott v. Burke litigation. A portion of the ongoing Abbott discussion has been about the role of preschool in addressing the needs of students. Addressing concerns raised in the Supreme Court as to the need for qualified teachers in the preschools, the DOE created the P-3 endorsement, which carved out that segment of the educational experience from the previous N-8 endorsement. Abbott v. Burke, 163 N.J. 95, 108 (2000). But the DOE was not unmindful of the need to address the teachers already holding endorsements that gave them the ability to teach nursery school, but which endorsements were not specifically geared to the early stage of education. Thus, as the following comment from the Court in Abbott VII shows, the “grandfather” concept was utilized to balance the need for refined qualification with the need to accommodate already serving teachers.

Finally, we note that N.J.A.C. 6:11-5.2(f) “grandfathers” certified elementary school teachers with two years preschool experience by waiving the requirement of Abbott VI that they obtain an instructional certificate with a P-3 endorsement in order to be hired as teachers in Abbott preschool programs. We find grandfather provision to be a reasonable response to the establishment of new certification requirements that would otherwise negatively affect experienced, certified teachers. We are confident the exemption will not compromise the education of any preschool children. The DOE, which historically grandfathers all certificate holders affected by new requirements, strictly limited N.J.A.C. 6:11-5.2(f) to those teachers with the training and experience it judged fully adequate to the task.

[Abbott v. Burke, 170 N.J. 537, 555-556 (2002)].

It is important to note here that the Court’s endorsement of the DOE’s use of grandfathering was, at least in this instance, stated along with a recognition that, at least in this particular instance, the grandfathered right came with limitations. In the context of its comments in these Abbott cases, it seems clear enough that the Court felt that the limitation was a wise means of accommodating the potential impact of the new regulation with the reality of a pool of existing teachers who, of course, did not have the

new endorsement and might not have the experience that was believed necessary in order to provide the appropriate level of instruction to preschool children. Indeed, the DOE specifically addressed this grandfather provision and its roots and assumptions in this response to a comment received regarding the proposed amendment to N.J.A.C. 6A:9-11.1(g).

18. COMMENT: The commenter recommended that the proposed amendment at N.J.A.C. 6A:9-11.1(g) that grandfathers experienced elementary school teachers to teach in preschool settings should include a training and knowledge requirement. (5)

RESPONSE: The language at N.J.A.C. 6A:9-11.1(g) to grandfather elementary school teachers with experience teaching in preschool settings is an amendment that was introduced as a result of the Abbott v. Burke Supreme Court decision. The basis of the grandfathering was the belief that the teaching experience had provided the teacher with the appropriate training and knowledge. However, the Department has encouraged teachers and school districts to augment the knowledge and skills through on-going professional development in the rules at N.J.A.C. 6A:10A, Standards-Driven Instruction and Literacy in Abbott School Districts.

[37 N.J.R. 1060(a), April 4, 2005].

Thus, the picture that emerges is one in which the on-going discussion of the refinement, reform and re-conceptualization of the needs of the educational system have provoked changes in regulatory requirements. The need to upgrade the training, concentration and proficiency of teachers of the youngest element of the student body had involved some re-direction of the endorsements. There is of course no problem with such a change. But as it impacts those already holding endorsements, the regulatory changes have sought to accommodate them, without at the same time limiting a substantial element of the change needed. While not every teacher who lacks the P-3 endorsement will benefit from the "experience" exception, some will, and in a necessarily changing world of educational policy, driven at least substantially by

constitutional imperatives as defined by the Supreme Court, the accommodation is reasonable. Those who do not meet the experiential requirement to teach P-3 still retain their endorsement to teach higher grades. As such, the change in the regulations does not strip the holders of the endorsements of all rights to teach. Thus, cases that involve any such totally preclusive rearrangements of the regulatory landscape are inapplicable.

The Commissioner of Education will not interfere with determinations of local boards acting within their legal authority unless their actions are arbitrary and capricious. Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 294 (App. Div. 1960). Here the local board determined that RIF was necessary, and that decision is not challenged. In deciding who was to be riffed, the Board determined that these petitioners did not possess the P-3 endorsement. That critical fact is not in dispute. As the lack of such endorsement is the elemental legally relevant question with regard to the ability of the petitioners to claim the positions they seek without further demonstration of their qualifications for the position, a right they assert they have and which they claim entitles them to summary decision, and the absence of which the Board contends immediately defeats the petitioners' claims, summary decision can serve as the vehicle for the resolution of this challenge to the propriety of the Board's action. If any of the petitioners believed that they met the experiential requirement to allow them to teach preschool despite their not holding the P-3 endorsement, they could have advised the board that they had the required experience and submitted the information to establish their qualification. There is no evidence that they did so. If they misjudged their legal right to the positions or the basis upon which they might claim the position despite their not holding the P-3 endorsement, and as a result failed to attempt to secure a position by presenting their experience, that is not the board's fault. Thus, the decision of the board not to place any of the riffed petitioners in any of the available positions cannot be characterized as arbitrary. **Summary decision is therefore properly denied to the petitioners and granted to the Board and Intervenors. The petitions are therefore DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 25, 2012
DATE

Date Received at Agency:

Date Mailed to Parties:

Jeff S. Masin
JEFF S. MASIN, ALJ
June 25, 2012
June 25, 2012

#386-12

M.W., on behalf of minor child, C.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF HADDONFIELD,	:	
CAMDEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner sought an order barring the respondent Board from enforcing – and directing respondent to revise – its Policy 5132, governing off-campus alcohol and drug use. Commonly known as “24/7”, the policy contains a provision that enables the Board to deny participation in extracurricular activities based on a student’s use of drugs or alcohol away from school grounds. Petitioner contended that Policy 5132 is illegal and unenforceable as it is *ultra vires* – it exceeds the authority given school districts to impose consequences for behavior away from school grounds pursuant to *N.J.A.C. 6A:16-7.1* and *N.J.A.C. 6A:16-7.6*. The Board argued that these regulations do not apply to Policy 5132 because it is not part of a code of conduct, and that suspending or limiting a student’s ability to participate in extracurricular activities does not equate to a disciplinary action because such participation is a privilege, not a right.

The ALJ found, *inter alia*, that: Policy 5132 is a code of conduct policy within the contemplation of *N.J.A.C. 6A:16-7.1*; exclusion from extracurricular activities – whether imposed as a consequence for conduct occurring on or off of school grounds – is a form of discipline; *N.J.A.C. 6A:16-7.6* applies to the imposition of discipline for behavior occurring away from school grounds in the context of Policy 5132; and, despite limiting the proscribed conduct to that involving drugs and/or alcohol, Policy 5132 – by refusing to measure the conduct against the requirements of *N.J.A.C. 6A:16-7.6* – fails to ensure that the required nexus between the student’s conduct and the orderly administration of the school is present before the policy is triggered. The ALJ concluded that Policy 5132 is *ultra vires* because it does not adequately ensure that the dictates of *N.J.A.C. 6A:16-7.6(a)* will be met in addressing off-campus conduct. Accordingly, the ALJ ordered that respondent revise Policy 5132 to meet the requirements of *N.J.A.C. 6A:16-7.6*.

Upon consideration and review, the Assistant Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A. 18A:4-34* - concurred with the ALJ’s findings and conclusions in determining that Policy 5132 gives the Board authority beyond the scope of the governing regulatory provisions, and is therefore *ultra vires* and unlawful. Accordingly, the Assistant Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, and directed the Board to revise its policy to bring it into compliance with the requirements of *N.J.A.C. 6A:16-7.6*.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 24, 2012

OAL DKT. NO. EDU 0594-11
AGENCY DKT. NO. 710-12/10

M.W., on behalf of minor child, C.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF HADDONFIELD,	:	
CAMDEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner and the Board of Education. This case involves the interpretation of Board Policy 5132, which contains a provision that enables the Board to deny participation in extracurricular activities based on a student's use of drugs and alcohol away from school grounds.

The petitioner did not take exception to the Administrative Law Judge's (ALJ) Initial Decision, but instead urged the Commissioner to issue a final decision adopting the Initial Decision for the reasons expressed therein.

The Board takes exception to the ALJ's determination that Policy 5132 is *ultra vires* and violates the applicable regulatory provisions. The Board does not argue that Policy 5132 incorporates the requirements contained in *N.J.A.C.* 6A:16-7.6, but instead maintains that the ALJ erred in finding that Policy 5132 is a discipline code of conduct policy, which must comply with *N.J.A.C.* 6A:16-7.6. The Board asserts that the revocation of a student's ability to participate in extracurricular activities is not discipline because such participation is a privilege, not a right, and thus *N.J.A.C.* 6A:16-7.6 does not apply to Policy 5132. The Board argues that

the stringent dual nexus test of *N.J.A.C.* 6A:16-7.6(a) dealing with off campus activity is only applicable to the denial of the right to attend school and receive core educational services.

The Board also argues that the Initial Decision and the ALJ's reliance on *G.D.M. and T.A.M., on behalf of minor child, B.M.M. v. Board of Education of the Ramapo Indian Hills Regional High School District*, 2012 *N.J. Super.* LEXIS 127 (App. Div. July 24, 2012), where the court found that the suspension from extracurricular activities is a form of discipline, conflicts with the holding in *R.R. v. Shore Regional High School District*, 109 *N.J. Super.* 337 (Ch. Div. 1970). The court in *R.R.*, *supra*, created the language that would eventually become *N.J.A.C.* 6A:16-7.6(a)(1) and (2). The Board contends that the holding in *R.R.*, *supra*, and the nexus requirements in *N.J.A.C.* 6A:16-7.6(a) only pertain to a school's right to impose discipline on a student for conduct away from school, i.e. the expulsion or suspension from school, and does not apply to a school's authority to suspend participation in extracurricular activities. In its exceptions, the Board noted that the Appellate Division acknowledged in *Ramapo*, *supra*, that the language of *N.J.A.C.* 6A:16-7.6 was derived from *R.R.*, *supra*, but then completely disregarded the essence of the holding.

The Board further maintains that the Initial Decision and its reliance on *Ramapo*, *supra*, conflicts with *Joye v. Hunterdon Central Regional High School Board of Education*, 176 *N.J.* 568 (2003). The Board argues that in *Joye*, *supra*, the Court upheld a drug policy that conditioned participation in extracurricular activities and student parking based on the results of random drug testing conducted by the Board. The Board argues that the policy in that case was not subjected to the dual nexus requirement of *N.J.A.C.* 6A:16-7.6, and as such Policy 5132 should not have to incorporate the dual nexus requirement of *N.J.A.C.* 6A:16-7.6.

Additionally, the Board argues that the Initial Decision and its reliance on *Ramapo, supra*, conflict with the strong legislative policies that put local public school districts on the front lines in battling student substance abuse. The Board cites to various statutory provisions and case law to support its assertion that combating substance abuse among students is a paramount concern for local boards of education. Finally, the Board states that the Commissioner is not bound by the decision in *G.D.M. and T.A.M., on behalf of minor child, B.M.M. v. Board of Education of the Ramapo Indian Hills Regional High School District*, Commissioner Decision No. 383-10, decided September 13, 2010, because an administrative agency is not bound to its own precedents.

After consideration and review, the Assistant Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34 - is in accord with the ALJ's determination – for the reasons thoroughly expressed in the Initial Decision – that Policy 5132 is *ultra vires* and unlawful because it gives the Board the authority to suspend a student from extracurricular activities for conduct that occurs away from school grounds without requiring the Board to conduct the two-prong analysis mandated by *N.J.A.C.* 6A:16-7.6. The Assistant Commissioner also agrees with the ALJ's determination that the exclusion from extracurricular activities is a form of discipline.

In its exceptions, the Board suggests that the revocation of a student's ability to participate in extracurricular activities is not a form of discipline because such participation is a privilege, not a right, and thus *N.J.A.C.* 6A:16-7.6 does not apply to Policy 5132. The Board's argument, however, is not supported by any case law or applicable statutory or regulatory provisions, and is simply an attempt to circumvent the limitations on the authority of the Board imposed by *N.J.A.C.* 6A:16-7.6. In *Ramapo, supra*, the Appellate Division addressed a similar

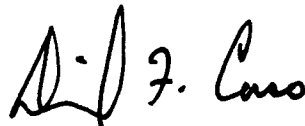
argument advanced by the Ramapo Board of Education in connection with its policy that enabled it to suspend students from extracurricular activities for off-school-grounds conduct without conducting the requirements contained in *N.J.A.C.* 6A:16-7.6(a). The court found that, “[t]he Board’s attempt to mask this outcome by characterizing participation in extracurricular activities as a ‘privilege’ is unavailing.” *Ramapo, supra*, LEXIS 127 at 23. The Appellate Division went on to say that it was evident that the Board attempted to “use the control it has over students’ participation in extracurricular activities as a form of discipline to enforce its code of conduct.” *Id.* at 24. The Board’s suggestion in its exceptions that the *Ramapo, supra*, decision has effectively reversed years of precedent by ruling that participation in extracurricular activities is now a right is completely inconsistent with the express language of the decision, and it is clear that the court did not overturn the long-standing principle that participation in extracurricular activities is a privilege, and not a right. Rather, the court affirmed the Commissioner’s decision which concluded that although participation in extracurricular activities is a privilege, and not a right, it does not negate the fact that a board’s decision to revoke a student’s ability to participate amounts to a form of discipline. See, *G.D.M. and T.A.M., on behalf of minor child, B.M.M. v. Board of Education of the Ramapo Indian Hills Regional High School District*, Commissioner Decision No. 383-10, decided September 13, 2010.

The arguments advanced by the Board in its exceptions also overlook the fact that Policy 5132 imposes consequences for off-school-grounds conduct, and that the regulatory provisions expressly treat off-school-grounds conduct differently than conduct that occurs on school grounds. Moreover, the cases the Board uses to advance its arguments are distinguishable from the case at bar. In *Joy, supra*, the Court upheld a suspension from extracurricular activities based on a positive result from a random drug test conducted at the school. That case did not

involve discipline for conduct that took place off-school grounds, and there is also no provision in Policy 5132 that incorporates random drug testing. Additionally, the decision in *R.R.*, *supra*, did not limit discipline to the expulsion or suspension of a student as the Board contends. Notably, when *N.J.A.C.* 6A:16-7.6(a)2 was adopted it clearly created an express distinction between a board of education's authority to impose any consequences for conduct that occurs off-school grounds as opposed to conduct that occurs on school grounds or at school functions.¹ Therefore, the Assistant Commissioner finds that Policy 5132 must comply with the requirements relating to discipline for conduct away from school grounds that is outlined in *N.J.A.C.* 6A:16-7.6.

Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein. The Board is directed to revise its policy to bring it into compliance with the requirements of *N.J.A.C.* 6A:16-7.6.

IT IS SO ORDERED.²



ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9/24/12
Date of Mailing: 9/25/12

¹ In comparing *R.R.*, *supra*, to the policy in *Ramapo*, *supra*, the Appellate Division stated,

[a]lthough the court in *R.R.* did not discuss the school district's authority to suspend a student's participation in extracurricular activities, we presume that the scope of the disciplinary sanction would include a suspension from extracurricular activities. Regardless of the scope of the holding in *R.R.*, the State Board of Education was free to adopt the *R.R.* court's two-pronged test to determine the validity of any consequences imposed for non-school-related conduct occurring away from school grounds. *Ramapo*, *supra*, LEXIS 127 at 27-28.

² This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, c. 36.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 00594-11

AGENCY DKT. NO. 710-12/10

M.W. o/b/o C.W.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF HADDONFIELD,
CAMDEN COUNTY.**

Respondents.

Matthew S. Wolf, Esq., for petitioner (Pappas & Wolf, LLC, attorneys)

Kelly M. Adler, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: April 4, 2012

Decided: August 9, 2012

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

M.W. ("petitioner") seeks an order barring the Haddonfield Board of Education ("respondent") from enforcing and directing respondent to revise its policy governing off-campus alcohol and drug use.

PROCEDURAL HISTORY

On January 3, 2011, the matter was filed with the Office of Administrative Law as a contested case. A Motion for Summary Decision, pursuant to N.J.A.C. 1:1-12.5, was filed by the petitioner along with the petition. On December 15, 2011 summary decision was denied. On April 4, 2012, the matter was heard in the OAL (Trenton) and the record closed on that date. Orders were entered in this matter to allow for an extension of time in which to file the initial decision. The briefs, arguments and exhibits submitted for the motions for summary decision have also been incorporated into the record of these proceedings.

STATEMENT OF FACTS

Petitioner is the father of C.W., a minor female student residing in the Borough of Haddonfield and attending Haddonfield Memorial High School. The Board is a Type II public school board of education organized under Title 18A of the New Jersey Statutes.

In November 2006, respondent adopted Policy Number 5132 regarding the use of drugs and/or alcohol by middle and high school students off school property and not involving a school-sponsored activity. This policy, commonly referred to as "24/7," purports to augment the Board's In-School/School Activity Drug and Alcohol Policy by focusing on the broader role the Haddonfield School District plays in combating student alcohol and drug use.

Prior to and as a condition of participating in sports, or other extracurricular activities, students and parents are required to agree to the terms of Policy 5132. Agreement is secured in the form of a signed permission form, wherein a student states:

I understand conduct regulations prohibit the use of tobacco in any form, drinking, possessing or providing alcoholic beverages and/or use, possession, or providing illegal drugs including anabolic steroids, at any time. The violation of these regulations will be dealt according to the Haddonfield

Board of Education Drug and Alcohol Policies
(consequences of 24/7 Drug and Alcohol Policy Concerning
Student Conduct at Non-School Related Events enclosed).

The parents sign the form to indicate that they have read and understand the policies at issue. The policy was amended in December 2007 to add dual avenues of consequences for violations of Policy 5132 in consideration of the underlying nature of the extracurricular activity, specifically whether in the course of the activity a student could be seen as publicly representing the district. Students who represent the district in public face a stronger sanction.

On June 6, 2009, C.W. and her mother signed a Student Activities Permission Form relevant to petitioner's participation in field hockey for the Fall 2009 season and again submitted a Student Activities Permission Form for her participation in the Winter 2009-2010 track season. In December, 2009, C.W. was cited for an infraction of Policy 5132 which was determined to be governed by the "Guidelines for Students Who Participate in Extracurricular Activities Which Do Not Publicly Represent the District." The consequences for her first offense were:

- a) Student and parent attending a mandatory meeting with a school administrator (Athletic Director) and coach or activity sponsor;
- b) Student encouraged to participate in drug/alcohol counseling session;
- c) Continued participation in all practices; and
- d) 10 hours of community service.

On or about December 22, 2009, petitioner filed a Verified Complaint and an Order to Show Cause with the Superior Court of New Jersey challenging the application of Policy 5132 to C. W., alleging that Policy 5132 is *ultra vires* because it exceeds the authority granted to school boards under Title 18A of the New Jersey statutes. The Honorable Mary Eve Colalillo, J.S.C. denied the Petitioners' emergent relief application and dismissed the matter as a result of jurisdictional issues on January 26, 2010, indicating that the matter should proceed before the Commissioner of Education as a controversy and dispute arising under the school laws pursuant to N.J.S.A. 18A:6-9.

Petitioner subsequently filed pleadings before the Commissioner of Education, who transferred the matter to the Office of Administrative Law ("OAL"). The Administrative Law Judge ("ALJ") assigned to the matter, the Honorable John R. Futey, denied petitioner's request for emergent relief. Before the Commissioner of Education ruled on the emergent relief matter petitioner's petition was withdrawn and an appeal of Judge Colalillo's decision was filed. That appeal was decided, in November, 2011, affirming Judge Colalillo's deferral of primary jurisdiction to the Commissioner of Education, and remanding the matter for entry of an order retaining jurisdiction.

Petitioners once again submitted a Permission Form for the 2010 field hockey season but refused to submit a permission form or otherwise consent to be bound by the Policy 5132 for the 2010-2011 winter track season. C.W. submitted a modified permission form, which was unacceptable to the Board. As such, respondent did not allow C.W. to participate in the winter track season, and petitioner brought the herein matter.

The preceding statements are not in dispute and are hereby **FOUND** as **FACT**.

Testimony of M.W.

M.W. resides in Haddonfield, NJ with his two children: Daughter C.W., 17 years-old and the subject of this matter, and son J.W. who is 15 and a freshman. In 2010 CW was going to join winter track. At time of the hearing C.W. was concluding her senior year. She attended all 4 years of high school at Haddonfield. She also attended middle school in Haddonfield. The 24/7 policy went into effect during her 7th grade school year.

M.W. feels that Policy 5132 is illegal and unenforceable, and that his position is supported by G.D.M. and T.A.M. o/b/o B.M.M. v. Board of Education of Ramapo Indian Hills Regional High School District, OAL DKT. No. EDU 1157-09, Agency Dkt. No. 225-9/09 (2010). He believes that this policy seeks to enforce discipline for conduct outside

of the school, and that nothing in the policy ensures that the offending conduct impacts school safety before imposing discipline.

M.W. notes that he did submit a signed permission form for C.W. to run winter track. However in the place where it was to be signed by the student he inserted the paragraph "I do not agree to be bound by the 24/7 which is illegal under the Ramapo case." Under the portion where the parent signature is to go he inserted "neither my daughter nor her parents agree to be bound by the 24/7 policy which is illegal and unenforceable under the Ramapo Indian Hills case per Commissioner of Education." The permission slip notes that violations will be dealt with in accordance with the 24/7 policy. The form was submitted as amended, and C.W. was not permitted to participate in winter track due to the altering of the permission slip.

Testimony of Michael Wilson

Michael Wilson is the principal at Haddonfield high school. The school has 965 students in grades 9 through 12. Mr. Wilson recalls attending meetings when Policy 5132 was being discussed. He was an elementary school principal at the time. He is familiar with and responsible for implementation of this policy at Haddonfield High School. Policy 5132 regulates the conduct of students off-campus. A different policy applies for on-campus or school events. Policy 5132 is in effect 24 hours a day 7 days a week.

Wilson described how violations of the policy are triggered. He states that the Policy is invoked only upon his receipt of official notification to him that a charge has been filed by the police against a student. He noted that there is a misperception as to what constitutes an "Official Police Report" and pointed to the specific definition of the term contained in and for the purposes of Policy 5132. This report is a confidential report that is directed by the police specifically to Mr. Wilson upon his request. He understands the difference between an official police report and a "notice of charge" which for purposes of Policy 5132 are one and the same.

Even though the policy gives the impression that Policy 5132 could be imposed against a student who has merely been reported to have engaged in prohibited conduct, the specific nature of the report being issued, in compliance with the legal requirements and limits of N.J.S.A. 2A:4A-60 ensures that only students who are charged with an offense are sanctioned. While the police make the determination to file charges against a student, they do not make a determination that the charges or conduct are related to school safety. Principal Wilson makes that determination, although he testified that he believes that any charge of a violation of drug or alcohol laws relate to school/student safety.

The statute provides that upon request a principal is only allowed to receive the name of an offending student, the offense he is charged with and the date of disposition. Wilson stated that the Police have required that any request be specific, as to name or incident and that generic requests for any incidents involving any student are not sufficient.

Wilson noted that the policy does not wait for disposition before being implemented. Even though there is a presumption of innocence Policy 5132 is still imposed immediately. Wilson did note that the school has allowed students to appeal, and that after consideration of the circumstances sometimes this results in the parties awaiting disposition before imposing a sanction under Policy 5132.

Wilson noted that if the charges are dropped the policy does not apply. He stated that Policy 5132 is not considered a disciplinary policy; rather it is designed to work with the family to help students make good choices.

Principal Wilson did note that although students do not tend to self-report sometimes a parent may report on their child. Even in these cases, imposition of a sanction is only imposed upon students who have been charged because upon receiving the information from the parent Wilson would then request the official report of that incident from the police and would only act pursuant to Policy 5132 once that report is received.

Wilson believes that this policy has actually had a positive effect on student morale. Prior to its implementation a casual air existed among students. There existed a sense that drinking was a right. Since implementation infractions and drinking incidents are down amongst the student body. He believes the policy forces age-appropriate behavior. Students are now making more age-appropriate decisions. Wilson recalled two past tragedies – two alcohol-related student deaths - that impacted the school. The first occurred prior to his becoming principal and the second incident occurred within his first two weeks on the job.

Wilson stated his belief that exclusion from extracurricular activities for on-campus behavior constitutes discipline but that for off campus violations of Policy 5132 the sanction is not considered discipline; the difference being that under a Policy 5132 violation the student is still part of the team. When asked Wilson testified that not all off-campus drinking “materially and substantially interferes with the requirements of discipline.”

FINDINGS OF FACT

Summary decision was denied primarily because there was an open question of material fact primarily revolving around the circumstances by which a violation of Policy 5132 will be triggered. Principal Wilson testified extensively at hearing as to how he receives information and takes action pursuant to the Policy.

Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it “hangs together” with other evidence. Carbo v. United States, 314 F. 2d 718 (9th Cir. 1963). Additionally, the witness’ interest in the outcome, motive or bias should be considered.

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Given the forgoing, I found Principal Wilson to be a credible witness. His testimony was thorough and detailed and was consistent with, supported by and bridged the gap between the language of Policy 5132 and N.J.S.A. 2A:4A-60. Specifically, Wilson's testimony that he requests reports consistent with N.J.S.A. 2A:4A-60, along with the Policy's specific reference to that statute in its definition of "Official Police Report," strongly support the Board's contention that Policy 5132 is only invoked when charges have been filed. This is further supported by Wilson's testimony that even when a parent self-reports on their own child, he still takes the step of requesting a report pursuant to N.J.S.A. 2A:4A-60.

Accordingly, I **FIND** that Policy 5132 is only triggered upon the receipt by the principal, at his request, of an "Official Police Report" as defined in the policy, and provided in accordance with N.J.S.A. 2A:4A-60. I further **FIND** that as N.J.S.A. 2A:4A-60 only permits the disclosure of the charged juvenile student's name, the offense charged, and the disposition or adjudication of the charge, Policy 5132 is only applied to students who have been charged with an offense.

CONCLUSIONS OF LAW

School Board policies are entitled to a presumption of correctness, and will not be upset by the courts unless there is an affirmative showing that such decision is arbitrary, capricious or unreasonable. Thomas v. Bd. of Educ. of Morris Twp., 89 N.J. Super. 327, 332 (App. Div. 1965), affirmed, 46 N.J. 581 (1966). In general, a board of education's actions are entitled to a presumption of lawfulness and good faith. Where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. Schuster v. Ed. of Educ. Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962)).

Petitioner argues that Policy 5132 is unlawful because it is ultra vires; it exceeds the authority given school districts to impose consequences for behavior away from

school grounds pursuant to N.J.A.C. 6A:16-7.1 and N.J.A.C. 6A:16-7.6. Petitioner relies on G.D.M. and T.A.M. o/b/o B.M.M. v. Board of Education of Ramapo Indian Hills Regional High School District, OAL DKT No. EDU 1157-09, Agency Dkt. No 225-9/09 (2010) wherein the Commissioner of Education held a similar policy to be ultra vires. Petitioner asserts that no constitutional claims are being pursued, and that he is only challenging Policy 532 on grounds that it is ultra vires.

N.J.A.C. 6A: 16-7.1(a) provides that,

Each district board of education shall develop, adopt and implement a code of conduct which establishes standards, policies and procedures for positive student development and student behavioral expectations on school grounds, including on school buses or at school sponsored functions, and as appropriate, for conduct away from school grounds, in accordance with N.J.A.C. 6A:16-7.2 through 7.5, 7.8 and 7.9.

Additionally, N.J.A.C. 6A:16-7.1(e) states that, "[a] district board of education may deny participation in extracurricular activities, school functions, sports or graduation exercises as disciplinary sanctions, where such measures are designed to maintain the order and integrity of the school environment."

Meanwhile, N.J.A.C. 6A: 16-7.6, empowers a board to "impose a consequence on a student for conduct away from school grounds . . . that is consistent with the district board of education's code of student conduct". N.J.A.C. 6A: 16-7.6(a) further provides that such consequence may only be imposed if:

1. it is reasonably necessary for the student's physical or emotional safety, security and well-being or for reasons relating to the safety, security and well-being of other students, staff or school grounds pursuant to N.J.S.A. 18A:25-2 and 18A:37-2; and
2. the conduct which is the subject of the proposed consequence materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.

The Board argues that these regulatory provisions do not apply to Policy 5132, because it is not a part of the Code of Conduct, and that suspending or limiting a student's ability to participate in extracurricular activities is not the imposition of discipline. They argue that "discipline" is generally understood to mean an exclusion from the education process, to which a student has a constitutional right, primarily through the suspension or expulsion process. They assert that a limit upon the opportunity to participate in extracurricular activities is not a disciplinary action because such participation is a privilege, not a right. The Board further contends that even if Policy 5132 is deemed to be a code of conduct policy, N.J.A.C. 6A:16-7.6 does not apply, and the only standard to be met is that the imposition of the sanction is "designed to maintain the order and integrity of the school environment."

Pursuant to an appeal of the Commissioner's Decision cited by petitioner, the Superior Court of New Jersey, Appellate Division, recently concluded that "the plain language of the regulations amply support the Commissioner's interpretation of N.J.A.C. 6A:16-7.6." In upholding the Commissioner's determination that the policy at issue was unlawful and should be revised so as to comply with the requirements with N.J.A.C. 6A:16-7.6, the court held that regulation's two-pronged test, rooted in the analysis applied in R.R. v. Board of Education of the Shore Regional High School District, 109 N.J. Super. 337 (Ch. Div. 1970) to be appropriately applied in determining the "validity of any consequences for non-school-related conduct occurring away from school grounds." G.D.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist., 2012 N.J. Super. LEXIS 127 (App.Div. July 24, 2012).

Accordingly, I **CONCLUDE** that Policy 5132 is a code of conduct policy within the contemplation of N.J.A.C. 6A:16-7.1. I further **CONCLUDE** that exclusion from extracurricular activities whether imposed as a consequence for conduct occurring on or off school grounds is a form of discipline. I further **CONCLUDE** that N.J.A.C. 6A:16-7.6 does apply to the imposition of discipline for behavior occurring away from school grounds in the context of Policy 5132.

Policy 5132 is triggered, primarily, indeed almost exclusively, according to the testimony of Principal Wilson, when an official police report is received by the school listing students “involved in any illegal drug/alcohol related activities.” (P-1, page 6). The consequence of the policy will be applied immediately “without relation to the criminal or juvenile proceedings or its outcome (id).” Although petitioner argues the vagueness of the phrase “official police report,” the phrase is defined explicitly within the Policy as follows:

Official Police Report: As provided in N.J.S.A. 2A:4A-60, law enforcement is permitted to inform a school principal of certain incidents involving a student. For purposes of this policy, the following will trigger a violation: (a) a juvenile reported and/or charged by law enforcement with an offense covered by this Policy; (b) adjudication or disposition of a covered charge; (c) a student taken into custody for an offense covered by this policy. (P-1, page 7)

N.J.S.A. 2A:4A-60(c)3 provides that:

At the time of charge, adjudication or disposition, information as to the identity of a juvenile charged with an offense, the offense charged, the adjudication and disposition shall, upon request, be disclosed to...[o]n a confidential basis, the principal of the school where the juvenile is enrolled for use by the principal and such members of the staff and faculty of the school as the principal deems appropriate for maintaining order, safety or discipline in the school or to planning programs relevant to the juvenile's educational and social development, provided that no record of such information shall be maintained except as authorized by regulation of the Department of Education.

Offenses covered by Policy 5132 apply to “the illegal uses of any alcohol or drugs proscribed by New Jersey Law.” (P-1, page 2)

It is clear therefore that when the principal requests, as described by Principal Wilson, and receives a report from the Police which identifies a student as charged with an offense which applies to the illegal uses of any alcohol or drugs proscribed by New Jersey law, Policy 5132 is to be invoked and its consequences imposed immediately.

What is not as clear, is what if any steps are taken to comply with the dictates of N.J.A.C. 6A:16-7.6, which govern the imposition of discipline for behavior occurring off school grounds. As stated earlier, the regulation provides that such discipline may only be imposed when it is necessary for the safety, security and well-being of the students, staff or school or when the offending conduct materially and substantially interferes with school discipline.

In G.D.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist., 2012 N.J. Super. LEXIS 127 (App.Div. July 24, 2012), the Superior Court of New Jersey, Appellate Division, invalidated the policy at issue because it did not appropriately insure compliance with N.J.A.C. 6A:16-7.6. A distinction between the Ramapo case and the current matter may exist in that in Ramapo, the policy at issue was triggered for any alleged violation by a student of "the New Jersey Code of Criminal Justice, and/or applicable municipal codes or ordinance provisions." The Court in Ramapo noted that in implicating the entire criminal code the policy did not meet the "requirement that there be a nexus between the student's conduct and the orderly administration of the school." Ramapo, at 29, 30.

In the current matter however, the policy is specifically limited to "illegal uses of any alcohol or drugs as proscribed by New Jersey Law (P-1, page 2)." This certainly narrows the scope and focus of the behaviors which are subject to Policy 5132. Principal Wilson testified that he believed that any time a student is charged in a matter involving violation of alcohol or drug laws that the safety of the student and/or the school is implicated, and he may well be right, which would satisfy the first prong of N.J.A.C. 6A:16-7.6(a). As noted in Policy 5132 "The use of drugs and alcohol by underage students is both an illegal and an extremely dangerous behavior (P-1, page 2)." History is tragically rife with examples of what can and all too often does occur when alcohol and drugs are introduced into the equation with underage students.

Principal Wilson concedes, however, that not every incident involving students and drinking off campus constitutes conduct “materially and substantially interferes with the requirements of appropriate discipline in the operation of the school,” as is required by the second prong of the nexus required by N.J.A.C. 6A:16-7.6(a) before imposing a consequence upon a student for conduct occurring away from school grounds. He is right. It is too easy to come up with hypothetical fact patterns which would not “materially and substantially interfere with the requirements of appropriate discipline,” and yet would trigger a violation of Policy 5132, most notably involving the exemption for a designated driver which is only applicable when a driver is “actually operating a motor vehicle (P-1, page 2).” It is true that Policy 5132 does allow for a student to present any evidence on his or her behalf before the principal renders a final decision, and a principal may well apply a common-sense rule of reason to the situation. However, no mechanism exists which will require the principal to consider the requirements of N.J.A.C. 6A:16-7.6(a).

The Court in Ramapo noted that the policy in question was harmed by the lack of inclusion of a drug testing requirement and its failure to “limit the conduct that would trigger administrative action to alcohol or drug-related activity.” Ramapo, at 29. Policy 5132 does not contain a drug testing requirement, though it does limit the conduct which would trigger administrative action to alcohol or drug-related activity. However, the plain language of the policy plainly states that it “pertains to **any student involvement** [emphasis added] with drugs and/or alcohol that occurs off school property and not at any school sponsored event.” Nowhere does the policy state that the Board will comply with the dictates of N.J.A.C. 6A:16-7.6, nor does it contain language which mirrors those requirements.ⁱ To the contrary the policy claims jurisdiction over any and all such activity regardless of context and the Board argues that the limitation of the regulation do not apply. Accordingly, I **CONCLUDE** that despite limiting the proscribed conduct to that involving drugs and/or alcohol, Policy 5132 by refusing to measure the conduct

ⁱ It is noted that in G.D.M. and T.A.M. o/b/o B.M.M. v. Board of Education of Ramapo Indian Hills Regional High School District, OAL DKT No. EDU 13033-10, Agency Dkt. No 638-11/10 (2011), a subsequent matter to that cited above, the Commissioner held that the Board’s revising the policy to include language equivalent to the text of N.J.A.C. 6A:16-7.6 was sufficient to overcome the earlier determination that the policy was ultra vires.

against the requirements of N.J.A.C. 6A:16-7.6 still fails to ensure that before Policy 5132 is triggered there will be present the required "nexus between the student's conduct and the orderly administration of the school." Ramapo, at 29, 30.

There is no doubt that there are many instances of off-campus-behavior that will meet the requirements of N.J.A.C. 6A:16-7.6(a) and will support the suspension of a student from participation in extracurricular activities, or the other consequences delineated by Policy 5132. However, without performing even the most basic check to determine that the conduct in question meets the requirements of N.J.A.C. 6A:16-7.6(a), the potential exists that the Board will exceed the authority delegated to it for the purpose of addressing off-campus conduct, where necessary. Accordingly, I **CONCLUDE** that Policy 5132 is ultra vires in that it does not adequately ensure that the dictates of N.J.A.C. 6A:16-7.6(a) will be met in addressing off-campus conduct..

DECISION AND ORDER

It is hereby **ORDERED** that respondent revise Policy 5132 to meet the requirements prescribed by N.J.A.C. 6A:-16-7.6.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 9, 2012

DATE

Date Received at Agency:

Date Mailed to Parties:

mamf



ELIA A. PELIOS, ALJ

8/10/12

8/10/12

APPENDIX

WITNESSES

For petitioner:

M.W.

Michael Wilson

For respondent:

Michael Wilson

EXHIBITS

For Petitioner:

P-1 Haddonfield Board of Education Policy 5132

P-2 Haddonfield Public Schools Student Activities Permission Form

P-3 Email Correspondence

For Respondent:

None



State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHRISTOPHER D. CERF
Commissioner

September 26, 2012

Sheldon H. Pincus, Esq.
Bucceri & Pincus
300 Broadacres Drive
Suite 210
Bloomfield, N.J. 07003-3153

Joanne L. Butler, Esq.
Schenck Price Smith & King, LLP
220 Park Avenue
P.O. Box 991
Florham Park, N.J. 07932

Re: *In the Matter of the Tenure Hearing of Wayne Calandriello, School District of the Township of South Orange-Maplewood, Essex County. Agency Dkt. No. 321-10/11.*

Dear Counsel,

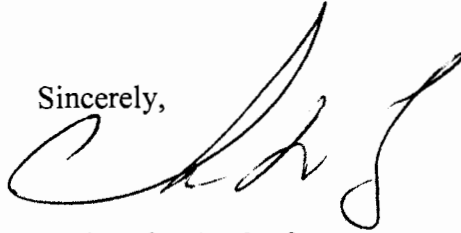
I have reviewed the materials filed in connection with respondent, Wayne Calandriello's Motion for Clarification of the July 30, 2012 final decision in the above-captioned matter. Pursuant to the July 30, 2012 decision, the respondent lost his increment for one year "and the 120 days salary withheld pursuant to *N.J.S.A. 18A:6-14*, following the certification of tenure charges plus an additional four months suspension without pay." The respondent is now seeking clarification as to when the additional four months suspension begins to run.

In his papers, the respondent argues that the additional four months suspension begins to run as soon as the July 30, 2012 decision was issued because final administrative decisions become effective on the date they are issued or mailed to the parties. The respondent also argues that the July 30, 2012 decision did not state that the suspension should begin at the beginning of the 2012-2013 school year. On the other hand, the Board contends that the additional four months suspension imposed by the July 30, 2012 decision begins to run at the start of the 2012-2013 school year as a result of the fact that the decision was issued during the summer, and the respondent is a ten-month employee. The Board points out that ten-month employees on paid suspension cease to receive compensation during the summer months, and resume compensation at the commencement of the next school year.

The July 30, 2012 decision expressly stated that the additional four-month suspension was without pay. Certainly, if the respondent is not being paid during the summer months, a suspension during that time would not amount to a suspension without pay. Accordingly, the respondent's additional four-month suspension without pay shall commence at the beginning of the 2012-2013 school year.

IT IS SO ORDERED.*

Sincerely,

A handwritten signature in black ink, appearing to read 'Cerf', with a large, stylized flourish extending from the end.

Christopher D. Cerf
Commissioner

c: County Superintendent
State Law Library

CDC/MKD/JKH

ISSUED 9/26/12
FAXED & MAILED 9/27/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*).

VIRGINIA BUSH,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE WARREN	:	DECISION
COUNTY VOCATIONAL SCHOOL DISTRICT,	:	
WARREN COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured secretary formerly employed by the Board – sought back pay and emoluments following a 2009 Commissioner decision which found that her tenure rights had been violated when she was terminated without just cause in late 2007, and ordered her reinstatement “to a secretarial position” with back pay and emoluments, less mitigation. Concurrent with the 2009 Commissioner decision, the Board offered petitioner the only secretarial position then vacant in the district – *i.e.* secretary to the child study team (“CST secretary”) – at the same salary she had previously made. The Board also advised petitioner that since she had taken no steps to mitigate her damages by seeking employment and/or applying for unemployment compensation after her 2007 termination, it would not disburse any back pay or benefits. Petitioner did not accept the position she was offered, and subsequently filed the instant petition, wherein she sought resolution of the issue of back pay and emoluments. The OAL issued an Initial Decision in this matter on August 5, 2010, finding that the Board owed back pay and emoluments for the period from December 15, 2007 to April 27, 2009, but no back pay from that point forward because petitioner should have accepted the CST secretary position that the Board offered her on April 28, 2009. The Commissioner issued a decision in the matter on February 9, 2011, which concluded that petitioner forfeited her tenure rights when she refused the CST position and remanded the case back to the OAL for fact-finding and recommendations on issues related to the amount of back pay due petitioner for the period from December 15, 2007 to April 27, 2009.

On remand, the ALJ found, *inter alia*, that: petitioner was not required to seek unemployment benefits to mitigate respondent’s damages because – even had she received such benefits – respondent would still have been required to reimburse the unemployment compensation fund since it wrongfully terminated the petitioner; petitioner is entitled to 4% pre-judgment interest pursuant to *N.J.A.C.* 6A:3-1.17; petitioner is not entitled to compensation for her unused sick days; the appropriate percent of salary increase for purposes of determining back salary is 2%, making total back salary due petitioner \$67,840.89. The ALJ concluded that petitioner is due the following specific damages: total back salary plus 4% pre-judgment interest equals \$70,554.52; accrued vacation days plus pre-judgment interest equals \$5,767.84; emoluments, including 4% pre-judgment interest, equals \$2,867.93; no award for unused sick days. Total award to petitioner including 4% pre-judgment interest: \$79,190.29.

The Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision as the final decision in this matter. In so doing, the Commissioner found that petitioner’s exception that took issue with the ALJ’s use of a straight 4% for computation of pre-judgment interest was disingenuous as this amount had been stipulated in the parties’ June 18, 2012 Stipulation of Facts.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 1621-11
(EDU 11596-09 ON REMAND)
AGENCY DKT. NO. 209-8/09

VIRGINIA BUSH,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE WARREN	:	DECISION
COUNTY VOCATIONAL SCHOOL DISTRICT,	:	
WARREN COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions and replies of both petitioner and the Board – filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in making his determination herein.

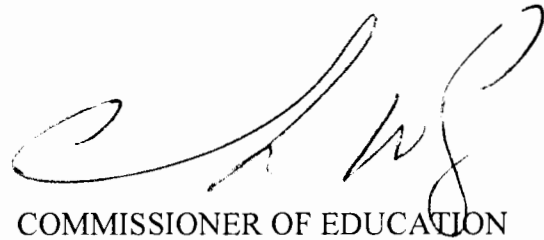
The parties' exceptions essentially replicate their arguments advanced in briefs before the Administrative Law Judge (ALJ) below. In that it is determined that the ALJ fully considered and correctly addressed these in his decision, they will not be revisited here.¹

Upon a reasoned deliberation, the Commissioner concurs with the findings and conclusions of the ALJ – for the reasons comprehensively detailed in his Initial Decision.

¹ It is noted, however, that petitioner's exceptions additionally take issue with the ALJ's use of a straight 4% figure in computing the award of pre-judgment interest to her. The Commissioner finds such argument to be wholly disingenuous in that the parties' Stipulation of Facts (Exhibit J-1) – executed June 18, 2012 – specifies at 8: "The Court will also include in its determination whether or not to award pre-judgment interest in the amount of 4%..." Had petitioner believed that her potential pre-judgment interest differed from this stipulated percentage, it behooved her to decline agreement with this provision of the document. Given the parties' Stipulation of Facts and the additional fact that petitioner's argument was never previously raised below, the Commissioner declines to entertain any argument in this regard at this point in time.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. The Board is hereby directed to pay petitioner an award of \$79,190.29 for the period December 15, 2007 through April 27, 2009 – as delineated in the ALJ's decision at p. 10 – as a consequence of its illegal termination of her employment.

IT IS SO ORDERED.²



COMMISSIONER OF EDUCATION

Date of Decision: 9/27/12

Date of Mailing: 9/27/12

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 01621-11

AGENCY DKT. NO. 209-8/09

ON REMAND

OAL DKT. NO. EDU 11596-09

VIRGINIA BUSH,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
WARREN COUNTY TECHNICAL SCHOOL
DISTRICT, WARREN COUNTY,**

Respondent.

Ty Hyderally, Esq., appearing for petitioner (Hyderally & Associates, attorneys)

Allan P. Dzwilewski, Esq., appearing for respondent (Schwartz, Simon,
Edelstein & Celso, attorneys)

Record Closed: July 25, 2012

Decided: August 13, 2012

BEFORE **JEFFREY A. GERSON, ALJ:**

BACKGROUND AND PROCEDURAL HISTORY

Virginia Bush was a tenured secretary, employed by the Board of Education of the Warren County Technical School District. On or about November 8, 2007, the

Board demanded that Bush sign a contract which violated her tenure status by allowing the Board to fire her without a hearing and with only ten-business-days' notice.

December 1, 2007: Bush was fired because of her refusal to sign the contract. The Board paid her salary until December 14, 2007, and her benefits until April 1, 2008.

February 26, 2008: Bush filed with the Commissioner of Education a request for a declaratory ruling that her tenure rights had been violated, and also sought an order of reinstatement.

March 19, 2008: The Board abolished Bush's old position.

April 23, 2009: An Initial Decision was issued by Judge James Geraghty, ALJ finding that Bush's termination was unlawful. Judge Geraghty also found that Bush did not have to be reinstated into the same exact position.

On or about April 28, 2009: Bush was offered the position of Child Study Team Secretary, a position which paid the same amount as her previous position. The job offer was not accepted, but the offer was extended again on June 3, 2009, June 22, 2009, and July 27, 2009. Id. at 3.

May 27, 2009: The Commissioner issued a Final Decision that held that Bush had been improperly terminated. The Commissioner also ordered the reinstatement of Bush "to a secretarial position," and awarded back pay and emoluments less mitigation.

September 8, 2009: Bush filed a new petition seeking back pay and emoluments.

August 5, 2010: The undersigned found that the Board owed back pay and emoluments for the period between December 15, 2007, and April 27, 2009. (Bush v. Warren County Technical School District, EDU 11569-09, Initial Decision (October 1, 2010) at 8, <http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0> However,

no back pay after April 28, 2009, because Bush should have accepted the CST Secretary position that the Board offered her.

February 9, 2011: The Commissioner ruled that Bush's failure to accept the CST Secretary position terminated her tenure rights, and ordered a fact-finding hearing to determine the appropriate back pay award for the period from December 15, 2007 (for salary) and April 1, 2008 (for benefits) through April 27, 2009. The Commissioner also ruled that the ALJ has the discretion to determine whether 4% pre-judgment interest should be added to the award.

June 18, 2012: A fact-finding hearing was held at the Office of Administrative Law.

The following facts were stipulated:

1. The issue on Remand before the Court is the amount of back pay for salary and benefits due Petitioner for the period between December 15, 2007, and April 27, 2009, less any applicable mitigation (Acting Commissioner of Education decision dated February 9, 2011, at p. *6).
2. Salary for the above relevant period would have been \$67,840.89, assuming a 2% increment for the 2008-2009 year or \$69,860.27, assuming an 8% increment for the 2008-2009 year.
3. Alternative medical premiums were \$2,703.24.
4. Out-of-pocket medical expenses were \$54.38.
5. Petitioner had accumulated 29 vacation days. Payment for said days would be \$5,546, assuming a 2% increment for the 2008-2009 year, or \$5,872.23, assuming an 8% increment for the 2009-2010 year.
6. Petitioner had earned and accumulated 192 sick days.

7. The issue before the Court is the Board's claim for an offset in mitigation totaling \$40,120, which is calculated as follows:

For the period 12/15 to 12/31/2007 – 2 weeks @ \$536/wk or \$1,072;

For the period 1/1/2008 through 12/31/2008 – 52 weeks @ \$560/wk or \$29,120; and

For the period 1/1/2009 through April 27, 2009 – 17 weeks @ \$584/wk or \$9,928.

Petitioner disputes the claim that unemployment compensation, even if received by Petitioner, would be in mitigation of the amounts set forth in paragraphs 2 through 6 above. Petitioner further disputes that Petitioner would have received the maximum amount of benefits, for the full period listed above. Thus, the calculation set forth in paragraph 7 is solely to complete the record on remand and the Court will render an Initial Decision on the legal issue of the applicability of unemployment compensation and mitigation to this matter.

8. The Court will also include in its determination whether or not to award pre-judgment interest in the amount of 4%. (Acting Commissioner of Education Decision dated February 8, 2011, at p. *5).

LEGAL DISCUSSION

1. **Bush was not required to seek unemployment benefits for the purpose of mitigating Warren County's damages, because even if she had received such benefits, Warren County would still have been required to reimburse the unemployment compensation fund upon a finding of wrongful termination.**

New Jersey public policy dictates that an employer who wrongfully terminates an employee is not entitled to an offset of the damages it owes because the employee receives a "collateral source" of income, such as unemployment benefits. See Sporn v. Celebrity, 129 N.J. Super. 449, 453 (Ch. Div. 1974). When dealing with private employers, as was the case in Sporn, the wrongfully terminated employee is actually

entitled to a windfall (to receive back pay and unemployment benefits). See Id. at 460.¹ A wrongfully terminated employee is not entitled to double recovery, when terminated by a public employer because the employee should not recover twice from the taxpayers, who fund both the public employer and the unemployment compensation fund. See Ujhely v. Bd. of Educ. of the City of Linden, Agency Dkt. No. 266-7/84, Final Agency Decision at 1342-1343. Whether private or public, no reduction in the amount an offender must pay is allowed if an employer wrongfully terminates an employee. See Willis v. Dyer, 163 N.J. Super. 152, 165 (1976). A public employer must either pay damages directly to the employee, or reimburse the unemployment compensation fund if the employee has received such benefits. Ibid. Accordingly, Bush could not have mitigated or otherwise reduced the damages the Board was required to pay out because even if she had received unemployment benefits, the Board would have been required to reimburse the unemployment compensation fund. See Ibid.

Unemployment benefits are considered a "collateral source" of income. See Sporn, supra, 129 N.J. Super. at 453. "Receipt of benefits from a source collateral to the defendant, while lessening the effect of the financial losses of plaintiff, will not diminish damages otherwise recoverable from the wrongdoer in tort cases." Ibid. This is known as the "collateral source rule." Ibid. New Jersey's public policy reason for making unemployment compensation available to the general public is to provide economic security to employees who may lose their jobs through no fault of their own. See Id. at 459. Accordingly, the money set aside for the unemployment compensation fund must be used for this sole purpose. Ibid.

An employee's receipt of unemployment benefits has no effect whatsoever upon the total damages an employer owes when it wrongfully terminates. See Id. at 460. The court stated that "In any event the tortfeasor must discharge his obligation in full; the problem of oversatisfaction in such circumstances concerns only the parties to the contract and perhaps also the State itself." Ibid.

¹ Perhaps no such statute was in place at the time, but now, N.J.A.C. 12:17-10.1 permits the State to recoup its unemployment funds from a private employee who has been awarded back-pay and reinstated.

The Board contends that Sporn dealt with a private employer, and that the duty to mitigate damages by seeking unemployment compensation does exist when dealing with public employers. However, the cases cited by respondent, Ujhely and Willis, do not support this contention. The Commissioner ruled in Ujhely that since the employee received unemployment compensation, the amount he received in unemployment compensation would be deducted from the back pay owed to him by his employer. See Ujhely, supra, Final Decision at 1343. In that decision, if the Commissioner did not reduce the employer's back pay award by the unemployment benefits received, then the employee would have been paid twice by the taxpayers: once from his public employer, and again from the unemployment compensation fund. Ibid. The Commissioner's decision in Ujhely was based on the policy consideration that an employee should not receive a windfall (double recovery) from the public fund. Ibid. This is different from saying that the employee had a duty to seek unemployment benefits, or that doing so would relieve the employer of its responsibility to pay for its own wrongdoing. The employer is never relieved of its responsibility to pay out the money it owes to its employee, even when unemployment benefits have been paid to the employee. Willis, supra, 163 N.J. Super. at 165. The only difference is whether the employer pays the money it owes directly to the employee, or if the employer reimburses the unemployment compensation fund for the money it paid to the employee. Ibid.

The fact that Bush never applied for unemployment benefits does not relieve the Board of its responsibility to pay her the total amount it owes her in back-pay. If she had received unemployment benefits, then the Board's total award to Bush would have been less the amount Bush received in unemployment benefits, but the Board would still have owed the difference to the unemployment compensation fund.

2. Bush is entitled to pre-judgment interest pursuant to N.J.A.C. 6A:3-1.17, because Warren County's unilateral demand of Bush to relinquish her tenure status, and subsequent dismissal of Bush for her refusal to comply, do not conform to any of the proper grounds for dismissal of a tenured employee under

N.J.S.A. 18A:6-10. Accordingly, these actions can be viewed as deliberate violation of the statute, or an act of bad faith.

Under N.J.A.C. 6A:3-1.17(c)(1), the Commissioner may award pre-judgment interest if the petitioner is entitled to a monetary award and can establish that the "denial of the monetary claim" was done in "bad faith" or in "violation" of any statute or rule. The tenure statute at issue is N.J.S.A. 18A:6-10, which provides the following reasons as grounds for dismissal of tenured employees: "inefficiency, incapacity, unbecoming conduct, or other just cause." Also, N.J.S.A. 18A:28-9 allows for reduction in workforce due to economic necessity, as well as for other efficiency considerations. However, none of these reasons were relied upon when Warren County unilaterally tried to compel Bush to relinquish her tenure rights, which were protected by law. Warren County's termination of Ms. Bush can either be viewed as a violation of § 18A:6-10, or it can simply be viewed as an exercise of bad faith. There is no plausible scenario, based on the facts in the record, in which Warren County could have thought it had the right to make such a demand of a tenured employee, and then fire her upon refusal to comply. Since Petitioner has both sought pre-judgment interest and established that Warren County either violated a statute, or at the very least, acted in bad faith, it is within the discretion of the Court to award pre-judgment interest pursuant to N.J.A.C. 6A:3-1.17(d).

Warren County has violated a statute or acted in bad faith in the instant case, despite respondent's contention to the contrary. Respondent uses two cases to support its position. Basset v. Board of Education of Borough of Oakland, Bergen County, 223 N.J. Super. 136 (App. Div. 1988) can be distinguished because in that case, the tenured teacher's position was legitimately eliminated while she happened to be out on maternity leave, and a pre-negotiated contract contained clauses establishing pay rates for both "hourly teachers" as well as "part-time teachers." Id. at 139-140. When she came back from maternity leave, she was offered work on a part-time basis. Id. at 141. The school paid Basset at the hourly rate instead of the part-time rate. Ibid. The judge ruled that the teacher should have been paid at the part-time rate, not the hourly rate. Id. at 142. No evidence was offered to show that this violation of contract

was done in bad faith, and without explicit mention by the court in this regard, it seems that the school could have reasonably misinterpreted the terms of the contract in the manner that they did. See Id. at 144.

No such misinterpretation could have occurred in the instant case. No just cause was given for Bush's removal. She was coerced into signing an agreement that would have stripped her of her tenure (a legally protected status), and was fired solely for failing to do so. Warren County could not have plausibly interpreted Ms. Bush's tenure rights in such a way that they could make the mistake of firing her in the manner that they did. Accordingly, Warren County's actions can easily be construed to be in violation of the tenure statute, or at the very least, an exercise of bad faith.

Furthermore, In re Distribution of Liquid Assets Upon Dissolution of the Union County Regional High School Dist. No. 1, A-0211-04T5 (App. Div. Oct. 11 2005), <http://lawlibrary.rutgers.edu/new-jersey-courts-search-page.html>, the second case relied on by respondent, sheds no light on the instant case.²

Bush is entitled to receive 4% pre-judgment interest at the discretion of the Commissioner. See N.J.A.C. 6a:3-1.17(d); see also R. 4:42-11(a)(ii) and Publisher's Note (stating the appropriate percentage rate by year). Furthermore, the Commissioner ordered on remand for this Court to determine whether or not 4% pre-judgment interest was appropriate. Bush, supra, Final Decision at *5. Based on the foregoing considerations, 4% pre-judgment interest is appropriate.

3. Bush is not entitled to compensation from her unused sick days, because the policy clearly states that only retirees are eligible to receive them.

Warren County's policy regarding compensation for unused sick days states the following:

² The case describes the dissolution of a school district and the distribution of its assets among all of the municipalities in the district. No evidence was offered to show that any party involved deliberately failed to make payments or comply with any court orders. The factual complex of the case is nothing like the instant case, where respondent's unilateral demand of a tenured employee to relinquish her tenure protections is clearly an act of bad faith.

To qualify for the benefits of this section, Personnel must submit written notification to the Chief School Administrator of the Warrant County Vocational-Technical School, on or before February 1st of their intent to retire the following year. This paragraph pertains to retirement and should not be considered severance pay, therefore, this benefit shall only be paid when the employee submits proof of filing to either vest or begin collecting retirement benefits.

[(Ex. 19, Letter Br. in Support of Pet'r (June 17, 2012).)]

Bush nevertheless contends that she is entitled to compensation for her unused sick days because she was "illegally terminated." (See Letter Br. in Support of Pet'r at IV (June 17, 2012).) A conclusion that Bush was illegally terminated would logically infer that she had been deprived of her right to receive the benefits by engaging in the retirement process. (See Ibid.) Presumably, this would have entitled Bush to retain her unused sick days and the right to convert them to cash after she was initially reinstated. However, Bush was terminated a second time when she refused to be reinstated into a similar position, and the Commissioner held that the second termination was valid. Bush, supra, Final Decision at *5, Remanded, (February 9, 2011). Therefore, she has not been deprived of her right to retire and collect her sick-day benefits. She has been legitimately terminated and cannot be compensated for her unused sick days because the policy explicitly states that its terms and conditions only apply to retirees and should not be considered "severance pay." (See Ex. 19, Letter Brief in Support of Pet'r (June 17, 2012).) She could only have retained this right if her second termination was also illegal or otherwise invalid.

4. The percentage of salary increase has already been stipulated, and there is no reason to re-calculate the figure agreed to by the parties. The more appropriate increase is the 2% figure, since it is more consistent with Ms. Bush's recent pay raises.

CONCLUSION AND ORDER

For the foregoing reasons, I **CONCLUDE** that Ms. Bush is entitled to 4% pre-judgment interest. She is also entitled to back pay for the entire period during which she was illegally terminated. The June 18 Stipulation provides figures for total back-salary and accrued vacation days based on both a 2% or 8% salary increase for the 2008-2009 year. The award will be calculated assuming a 2% increase, since it is the more appropriate figure based on the pay raises Bush has most recently received. Finally, Bush is not entitled to compensation for her unused sick-days, since the policy clearly states that unused sick days may only be converted to cash by retirees, and is not to be considered "severance pay."

Following is a list of specific damages claimed by Bush, and a brief explanation of the calculation of each value.

Back Salary: Assuming a 2% increase for the 2008-2009 year, as stipulated, total back salary equals \$67,840.89. **Total back salary plus 4% pre-judgment interest equals \$70,554.52.**

Accrued vacation days: Assuming a 2% increase for the 2008-2009 year, as stipulated, payment for Bush's 29 vacation days is \$5,546.00. **Total accrued vacation days plus 4% pre-judgment interest equals \$5,767.84.**

Emoluments: Both parties agree that the proper figure is \$2,757.62, including out-of-pocket medical expenses. **Total emoluments plus 4% pre-judgment interest equals \$2,867.93.**

Sick Days: There is no award for unused sick days, since they may only be converted to cash by retirees.

Total award including 4% pre-judgment interest: \$79,190.29. It is so ORDERED.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 13, 2012



DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency:

8/13/12

Date Mailed to Parties:

8/14/12

sej

#390-12

OAL DKT. NO. EDU 7032-12
 AGENCY DKT. NO. 114-4/12

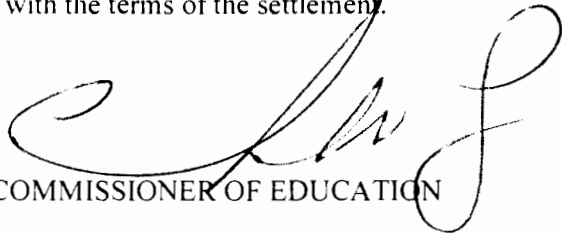
C.S.B. on behalf of minor children T.B.,	:	
W.B. and T.B.,	:	
	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF EWING,	:	
MERCER COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter, the proposed "Settlement and Release" (Agreement) and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

The Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following observation. Sections 3, 4, 9 and 10 of the Agreement reference actions that may have already taken place, and have therefore preceded consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have either successfully implemented the settlement terms, or have agreed upon mutually satisfactory alternate dates for the effectuation of same. Assuming the foregoing, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

Date of Decision: 9/27/12
 Date of Mailing: 9/27/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7032-12

AGENCY DKT. NO. 114-4/12

**C.S.B., on behalf of minor children,
T.B., W.B., and T.B.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF EWING, MERCER COUNTY,**

Respondent.

Ralph Gerstein, Esq., for petitioners

Joseph L. Roselle, Esq., for respondent (Schenck, Price, Smith & King,
attorneys)

Record Closed: August 6, 2012

Decided: August 14, 2012

BEFORE **JOSEPH LAVERY**, ALJ t/a:

This matter was transmitted to the Office of Administrative Law on May 22, 2012, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A prehearing conference was held on June 5, 2012, and the matter was scheduled for hearing on June 27, 2012. The hearing date of June 27, 2012, was adjourned at the request of petitioners' attorney who had been recdently

retained and the matter was rescheduled for hearing on August 8, 2012. Prior to the August 8, 2012, hearing date, counsel requested an adjournment because the matter had been settled pending Board approval. On August 6, 2012, an executed Settlement Agreement and Board Resolution were received, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. Petitioner has voluntarily agreed to the settlement agreement as evidenced by her signature.
2. The settlement agreement fully disposes of all issues in controversy and is consistent with the law.

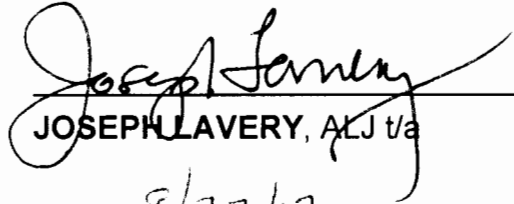
I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and N.J.A.C. 6A:3-5.6 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 14, 2012

DATE


JOSEPH LAVERY, ALJ t/a

Date Received at Agency:

8/23/12

Date Mailed to Parties:

8/14/12

mph

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for the
Ewing Board of Education

C.S.B. o/b/o T.B., W.B. and T.B.,

Petitioners,

v.

EWING BOARD OF EDUCATION,

Respondents.

BEFORE THE COMMISSIONER
OF EDUCATION

OFFICE OF ADMINISTRATIVE LAW

OAL Docket No.: EDU-7032-12S

Agency Ref. No.: 114-4/12

SETTLEMENT AND RELEASE

This Stipulation of Settlement and Release ("Agreement") is made by and between
Petitioner, Carolyn S. Brown, and the Respondent, Ewing Board of Education ("Board").

RECITALS

WHEREAS, in or about March of 2012, Respondent Ewing Board of Education held that, based on the results of a residency investigation, minor students T.B., W.B. and T.B. were not domiciled in the Ewing School District ("District") and thus not entitled to a free, public education in the District and passed a resolution ordering the removal of the students from the District; and

WHEREAS, Petitioner thereafter commenced an administrative action to challenge the Board's residency determination with regard to the above-referenced students.; and

WHEREAS, this administrative action is captioned C.S.B. o/b/o T.B., W.B. and T.B. v. Ewing Board of Education, and is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 7032-12S, Agency Dkt.

No. 114-4/12 ("the Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, in order to avoid the expense, inconvenience, distractions and inherent uncertainties associated with continuation of this dispute, and the fees and expenses that inevitably would result therefrom, the Parties, by this Agreement, herein agree to adopt a full and final settlement of any and all claims, lawsuits, complaints, and/or disputes between Petitioners and Respondent in connection with any and all damages and losses arising from the Litigation; and

WHEREAS, by this Agreement, Petitioner will voluntarily dismiss the Litigation with prejudice, without costs to any party as against the other;

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. The Parties mutually agree that, during the pendency of the residency investigation, which began on or about December 5, 2011 through June 30, 2012, T.B., W.B. and T.B. were found not to be domiciled in Ewing, but rather, in Trenton, New Jersey.
2. Petitioners shall pay the Board the sum of Six Thousand Dollars (\$6,000.00), representing back tuition due and owing for the period of the students' ineligible attendance in the District during the 2011-2012 school year and which shall constitute a full and final settlement of the claim for back tuition asserted against Petitioners by Respondent Board of Education in the Litigation.
3. The amount of \$6,000.00 is to be paid as follows: Within fifteen (15) days following the adoption by the Board of Education of a resolution accepting this Agreement, but in

no case prior to the receipt of a fully executed copy of this Agreement, Petitioners shall make the initial payment in the amount of Three Hundred, Thirty Three Dollars (\$333.00), in the form of a check made payable to the "Ewing Board of Education," hand-delivered or mailed to the office of Brian Falkowski, School Business Administrator/Board Secretary, at the District Administration office, 2099 Pennington Road, Ewing, New Jersey 08618. The remaining amount of \$5,667.00 shall be paid in seventeen (17) equal monthly installments of Three Hundred Thirty Three Dollars and Thirty-Five Cents (\$333.35) each, until the full amount has been satisfied. Nothing herein shall prevent Petitioner from paying a greater amount than the monthly payment amount, provided that at least the minimum payment of \$333.35 is received monthly.

4. Each payment of \$333.35 is due on the first (1st) day of each Month at the office of the School Business Administrator at the above address, beginning in the month follow that in which the initial payment was made. Payments received by the School Business Administrator after the 5th of the month shall incur a late fee of \$5.00. Any payment and a breach of this Agreement. Petitioner will receive receipts for each payment from the School Business Administrator.
5. Petitioner, in consideration of this Stipulation of Settlement and Release, and in full, final, and complete settlement of the matter, hereby agree to a withdrawal and/or dismissal, with prejudice, of their Petition of Appeal in this matter.
6. Petitioner further understands and agrees that, if they fail to make a payment in accordance with the agreed-upon payment plan, the entire remaining unpaid amount shall immediately become due and owing, payable in a single lump sum.

7. Petitioner further agrees to indemnify Respondent for any and all costs, including court costs and attorneys fees, associated with any action instituted by Respondent to enforce the terms of this Agreement should Petitioner breach the Agreement and/or fail to adhere to the agreed-upon payment plan.
8. The terms of this Agreement shall in no way constitute acceptance or assent by the Board that T.B., W.B. or T.B., nor any other child of Petitioner is automatically entitled to a free public education in the District at any point in the future, and the Parties understand and agree that Respondent reserves the right to investigate the students' and/or Petitioner's residency status in the District at any time, in order to determine whether or not Petitioner and/or her child(ren) and grandchild(ren) remain domiciled in the District.
9. Petitioner represents that she intends to move in the Superior Court for an order of legal guardianship of students T.B., W.B. and T.B. This Agreement is contingent upon Petitioner having made a good faith effort to obtain legal guardianship over the students. Petitioner agrees to file such action in the Superior Court prior to September 1, 2012, *i.e.*, the beginning of the 2012-2013 school year. The failure of Petitioner to apply for and obtain legal guardianship of the students at issue shall constitute a breach of this Agreement and render same null and void. The District reserves all rights in the event that Petitioner fails to apply for or obtain legal guardianship, including the continuation of this action or future actions for disenrollment of the students at issue.
10. The students will be enrolled in the District for the 2012-2013 school year in accordance with the terms of N.J.S.A. 18A:38-1, *et seq.*, provided: (1) Petitioner obtains

legal guardianship over the students, as set forth herein; and (2) both Petitioner and the students reside and remain domiciled in Ewing Township.

11. This Agreement is subject to approval by the Ewing Board of Education. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

12. In exchange for the above consideration, Respondent Ewing Board of Education agrees to release Petitioner from any and all claims, cross-claims, counterclaims, demands, liabilities, damages, indebtedness, costs, attorneys' fees, actions or obligations of any nature, which solely arise out of or are related in any way to this Litigation, through the date of this Agreement.

13. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

14. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

15. Petitioner hereby represents that she is freely entering into this Agreement, that she was advised of her right to obtain counsel of her choosing and has conferred with her attorney regarding this Agreement, and that she has read and fully understand the contents and effects of this Agreement.

16. This Settlement may be subject to the approval of the Office of Administrative Law and the Commissioner of Education. In the event that such approval is necessary, the terms of this Agreement shall not be binding until said approvals are received.

17. This Agreement shall be binding upon all parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors,

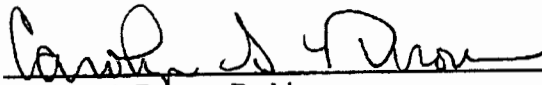
predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, shareholders, members, employees, agents and assigns.

18. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than those set forth herein. This Agreement supersedes all previous arrangements or understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioners and Respondent.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, consisting of six pages, effective on the day and year first above written.

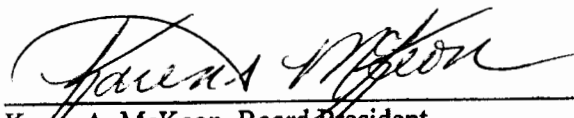
FOR PETITIONERS

Date: 7/30/2012


Carolyn S. Brown, Petitioner

**FOR RESPONDENT,
EWING BOARD OF EDUCATION**

Date: 7/30/12


Karen A. McKeon, Board President

2012-10-5 D 2:39
EWING TOWNSHIP BOARD OF EDUCATION

District Administrative Offices
2099 Pennington Road
Ewing, NJ 08618

(609) 538-9800, ext. 1302—(609) 538-0041 (fax)

CERTIFIED BOARD RESOLUTION

I, Brian S. Falkowski, Board Secretary of the Ewing Township Board of Education, hereby certify that this is a true copy of the Resolution adopted at a regularly scheduled Board meeting on July 30, 2012.

Following is the Board vote on this Resolution

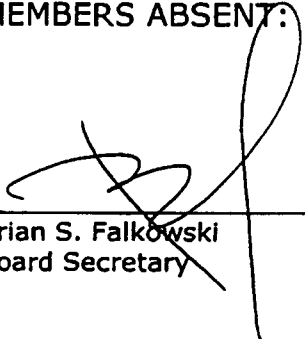
On motion by Mr. White, seconded by Dr. Palmer, the Board approved this Resolution by the following roll call vote:

YEAS: Mr. Bradley, Mr. Mack, Mr. Ewell, Mr. White,
Dr. Palmer and Mrs. McKeon

NAYS: None

ABSTENTION: None

MEMBERS ABSENT: Mrs. Staub, Mr. Benedetti, Ms. Benedetti



Brian S. Falkowski
Board Secretary

SEAL

The Ewing Public Schools

Providing a Foundation for Life

RESOLVED, that the Board approves the settlement in the matter captioned C.S.B. o/b/o T.B., W.B. and T.B. v. Ewing Board of Education, OAL Dkt. No. EDU 7032-12S, in accordance with the terms and conditions therein; and

BE IT FURTHER RESOLVED, that the Board President is authorized to sign the agreement on behalf of the Board.

#391-12

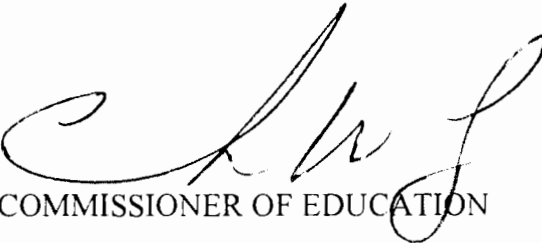
OAL DKT. NO. EDU 481-12
AGENCY DKT. NO. 368-12/11

F.R., on behalf of minor child, J.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
WATCHUNG HILLS REGIONAL HIGH	:	
SCHOOL DISTRICT, SOMERSET COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed. According to the Agreement, the settlement payment is due within fifteen (15) days. This date has preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of the settlement payment. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

Date of Decision: 9/27/12
Date of Mailing: 9/27/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 481-12

AGENCY DKT. NO. 368-12/11

FRANK RUSSO,

Petitioner,

v.

**WATCHUNG HILLS REGIONAL
HIGH SCHOOL DISTRICT BOARD
OF EDUCATION,**

Respondent.

Frank Russo, petitioner. pro se

Joanne L. Butler, Esq., for respondent (Schenck, Price, Smith, & King, LLP,
attorneys)

Record Closed: August 13, 2012

Decided: August 14, 2012

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 11, 2012, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement and Board Resolution indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

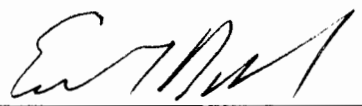
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

8-15-12
DATE

Date Received at Agency:

Date Mailed to Parties:

/cb


EDWARD J. DELANOY, JR., ALJ

8/23/12
8/16/12

SCHENCK, PRICE, SMITH & KING, LLP

220 Park Avenue

P.O. Box 991

Florham Park, New Jersey 07932

(973) 539-1000

Attorneys for Respondent

Watchung Hills Regional High School District Board of Education

F.R., on behalf of minor child, J.R.,

Petitioner,

v.

Watchung Hills Regional High School District
Board of Education,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

Agency Ref. No. 368-12/11

OAL Docket No. EDU 00481-2012S

SETTLEMENT AGREEMENT

This matter having come before the Court on the petition filed by Petitioner, Frank Russo, and the Counterclaim of Respondent, Watchung Hills Regional High School District Board of Education ("Board"), and the parties having agreed to resolve this dispute without resort to hearing, herein state:

WHEREAS, Respondent had determined that, based on the results of a residency investigation, minor student J.R. was not domiciled in the Watchung Hills Regional High School District Board of Education School District ("District") and thus not entitled to a free, public education in the District; and

WHEREAS, Petitioner disagreed with said determination and commenced an administrative action to challenge the Board's domicile determination with regard to J.R.; and

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. Petitioner shall pay the Board the sum of Three Thousand Dollars (\$3,000.00), ~~representing partial reimbursement of back tuition.~~ *YB*
2. The \$3,000.00 is to be paid within fifteen (15) days via certified or cashier's check, made payable to the "Watchung Hills Regional High School District Board of Education," hand-delivered or mailed to the office of Timothy Stys, School Business Administrator, Watchung Hills Regional High School District, 108 Stirling Road, Warren, New Jersey 07059
3. This Agreement shall not constitute any admission of wrongdoing or liability by any party.
4. The parties hereby waive and release any and all claims against each other for anything which has taken place through the effective date of this Agreement.
5. Petitioner hereby represents that he is freely entering into this Agreement, that he was advised of his right to obtain counsel of his choosing and has knowingly waived that requirement, and that he has read and fully understands the contents and effects of this Agreement.
6. This Agreement constitutes the entire understanding of the parties with respect to the subject matter of this controversy, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than those set forth herein. This supersedes all previous arrangements or understandings, whether written or oral.

7. This Agreement is being preliminarily executed by the Superintendent of Schools, Dr. Frances Stromsland, who represents that she will recommend approval of the Settlement to the Board of Education, which approval is required in order for this Settlement to be effective, at the Board's next meeting scheduled for ~~July 16, 2012.~~ July 24, 2012.

8. This Settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education.

9. This Agreement may be executed in original counterparts.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement:

PETITIONER

Date: _____

FRANK RUSSO

Date: _____

Witness

RESPONDENT

WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

Date: _____

Frances C. Stromsland, Ed.D.
DR. FRANCES STROMSLAND, Superintendent
Preliminary Approval

Date: _____

Robert Horowitz
ROBERT HOROWITZ, Board President

7. This Agreement is being preliminarily executed by the Superintendent of Schools, Dr. Frances Stromsland, who represents that she will recommend approval of the Settlement to the Board of Education, which approval is required in order for this Settlement to be effective, at the Board's next meeting scheduled for July 16, 2012.
8. This Settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education.
9. This Agreement may be executed in original counterparts.

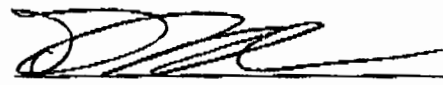
IN WITNESS WHEREOF, the parties hereto have executed this Agreement:

PETITIONER

Date: 6-25-2012


FRANK RUSSO

Date: 6-25-2012


Witness David Mallow, Esq. an
attorney admitted to practice
in New Jersey

RESPONDENT

WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

Date: _____

DR. FRANCES STROMSLAND, Superintendent
Preliminary Approval

Date: _____

ROBERT HOROWITZ, Board President



Watchung Hills

Regional High School District

Long Hill & Warren Township & Watchung Borough
108 Stirling Road ~ Warren ~ New Jersey 07059-5799

Dr. Frances C. Stromsland
Superintendent
908-647-4800 ext. 4890
Fax: 908-647-4852

Timothy M. Stys, PA
Business Administrator/Board Secretary
908-647-4800 ext. 4850

D-16 Settlement Agreement

On motion of Mr. Binder, seconded by Ms. DeMizio and approved on roll call vote, the Board of Education approved the following resolution:

<u>Board Member</u>	<u>Yes</u>	<u>No</u>	<u>Abstentions</u>
Mr. Binder	X		
Mr. Collins	X		
Ms. DeMizio	X		
Mr. Falzarano	X		
Mrs. Fechtner	X		
Mr. Grossnickle	X		
Mr. Horowitz	X		

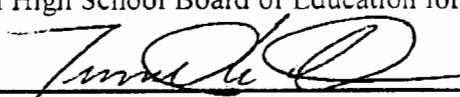
WHEREAS, Parent F.R. filed an appeal of a District residency determination regarding his minor child, J.R., with the Commissioner of Education, which appeal was transmitted to the Office of Administrative Law for hearing, bearing docket numbers OAL Dkt. No. EDU 00481-2012S and Agency Ref. No. 368-12-11; and

WHEREAS, the District Administration and F.R. have determined to resolve the action without resort to hearing, and the Administration recommends such resolution to the Board in accordance with the terms of the Agreement presented for approval, which terms include payment by Parent F.R. to the Board in the amount of Three Thousand Dollars (\$3,000);

NOW, THEREFORE, BE IT RESOLVED, that the Board of Education agrees to resolve the controversy in accordance with such terms; and

BE IT FURTHER RESOLVED THAT all action required to effectuate the settlement is authorized.

I, Timothy Stys certify that this is a true and certified copy of the Board minutes for the Watchung Regional High School Board of Education for the regular meeting held on July 24, 2012.


Timothy M. Stys, Business Administrator/Board Secretary

#392-12E

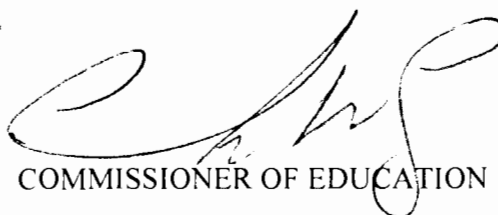
OAL DKT. NO. EDU 10908-12
AGENCY DKT. NO. 225-8/12

THOMAS SULLIVAN,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	
V.	:	DECISION ON
BOARD OF EDUCATION OF THE	:	APPLICATION FOR EMERGENT RELIEF
PENNS GROVE-CARNEYS POINT	:	
REGIONAL SCHOOL DISTRICT,	:	
SALEM COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 9/27/12

Date of Mailing: 9/27/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF

OAL DKT. NO. EDU 10908-12

AGENCY DKT. NO. 225-8/12

THOMAS SULLIVAN,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
PENNS GROVE-CARNEYS POINT
REGIONAL SCHOOL DISTRICT,
SALEM COUNTY,**

Respondent.

Jacqueline M. Vigilante, Esq., for petitioner (The Vigilante Law Firm, attorneys)

Mark G. Toscano, Esq., for respondent (Comegno law Group, attorneys)

BEFORE **BRUCE M. GORMAN, ALJ:**

STATEMENT OF THE CASE

Petitioner seeks emergent relief restoring him to his position as a Director of Special School at the Penns Grove-Carneys Point Regional School District.

PROCEDURAL HISTORY

The petitioner filed an application for emergent relief with the Commissioner of Education. On August 15, 2012, this matter was transmitted to the Office of Administrative Law (OAL) for a hearing on the requested emergent relief. On August 29, 2012, the case was heard at the Office of Administrative Law and the record closed on that date.

STATEMENT OF FACTS

This matter comes before this tribunal on petitioner's application for emergent relief. The relevant facts are as follows.

On January 3, 2012, the Board of Education of the Pennsville Grove-Carneys Point Regional School District (Board) appointed petitioner Interim Director of Special Services. On May 7, 2012, petitioner was appointed to the permanent position of Director of Special Services.

During the summer of 2012, several district employees reported that petitioner had engaged in unacceptable behavior. The alleged misconduct consisted of, inter alia, falling asleep during working hours; borrowing money from district employees, and directing subordinates to drive him off premises to strange locations out of the district. As a penalty for his conduct, the superintendent, Dr. Joseph A. Massare imposed an oral reprimand upon the petitioner.

On July 16, 2012, Dr. Massare reported his determination to the Board of Education. The Board of Education rejected Dr. Massare's action and terminated petitioner's employment. Petitioner's termination was subsequently reported in the local newspapers.

Prior to the July 16, 2012, meeting, petitioner was provided a Rice notice. At the meeting, petitioner requested an adjournment in order to obtain counsel. That request was denied.

Petitioner argues that he will suffer irreparable harm if the district is not enjoined and restrained from terminating his contract. He asserts that the termination and subsequent publication of the termination through the media have sullied his reputation and rendered him unemployable. Petitioner asserts that his legal right to prevail is settled. Specifically, he contends that the Board violated the provisions of N.J.S.A. 18A:27-4.1(a), which states, in pertinent part:

a. A board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons.

Petitioner argues that the Board acted contrary to the recommendation of the superintendent and therefore its action is void as a matter of law. Finally, the petitioner argues that because he has effectively been rendered unemployable, he will suffer significant hardship if emergent relief is not granted, while the Board will suffer no harm.

The Board counters that petitioner will not suffer irreparable harm. The Board argues that petitioner has other remedies available, including reinstatement and back pay, should he prevail in the case in chief, as well as the possibility of a civil suit against the Board. The Board further disputes petitioner's reading of N.J.S.A. 18A:27-4.1(a), arguing that the second sentence of the statute grants the Board the right to reject the superintendents action. Finally, the Board argues that the school will suffer substantial hardship if petitioner is returned to his position. Petitioner supervises significant aspects of the school, including the child study team. The child study team members have submitted affidavits complaining about petitioner's conduct. They have made it clear that they cannot work with petitioner.

CONCLUSIONS OF LAW

Petitioner carries the burden in seeking emergent. The standard is set forth in Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). See also, N.J.A.C.¹ 1:6A-12.1(e). Crowe requires a showing of **each** of the four specific criteria:

1. The relief must not be granted except when necessary to prevent irreparable harm, or harm for which there is no adequate legal remedy;
2. Relief should not be granted when the legal right underlying the applicant's claim is unsettled;
3. The applicant for relief must make a preliminary showing of a reasonable probability of ultimate success on the merits; and
4. The relative hardship to the parties in granting or denying relief must be considered. Crowe at 32-34.

This application was brought on an emergent basis and, as a consequence, no testimony was taken. It is impossible to reach a factual determination herein based only upon the affidavits submitted and the oral argument of counsel. Clearly, significant issues of fact remain to be adjudicated at a plenary hearing.

With that caveat, I reach the following conclusions.

I **CONCLUDE** that petitioner will not suffer irreparable harm. Petitioner seeks reinstatement to his position as Director of Special Services. That is a remedy which is available to him at the conclusion of a plenary hearing. Similarly, any loss of pay can be remedied through an award of back pay following such a hearing. Petitioner argues

¹ N.J.A.C. 1:6A-12.1(e) embodies the New Jersey emergent special education criteria. The movant must establish 1. The applicant has a reasonable probability of ultimately prevailing on the merits; 2. Either serious physical harm will result to the student if the relief is not granted, or the student's education program will be terminated or interrupted; and 3. The relief requested is narrowly defined to prevent the specific harm from occurring and will not cause unreasonable expense and substantial inconvenience.

that his reputation has been sullied, and can only be restored if he is reinstated to his position. His analysis is flawed. Petitioner's reputation can only be rehabilitated if he prevails following a full hearing of all the facts. Unless and until that hearing occurs, it is impossible to restore his reputation.

Accordingly, petitioner has failed to demonstrate the irreparable harm necessary for the granting of emergent relief.

I **CONCLUDE** that petitioner has not established that the law is settled and emergent relief must be granted in his favor. N.J.S.A. 18A:27-4.1(a) contains ambiguities which can only be unraveled after a full briefing of its meaning following a plenary hearing to establish the facts which it controls. The statute clearly states that the Board can terminate an employee only upon the superintendent's recommendation. It then states that such approval cannot be withheld for arbitrary and capricious reasons. The latter sentence suggests that the Board can override the superintendent. If that construction can be substantiated through applicable precedent, then the petitioner is reduced to an action seeking to prove that the board in an arbitrary and capricious manner. In either event, at this juncture petitioner has failed to demonstrate that the legal right underlying his claim is settled.

I **CONCLUDE** that petitioner has failed to make a preliminary showing of a reasonable probability of ultimate success on the merits. If the allegations contained in the affidavits submitted by the Board are credibly adduced at a plenary hearing, then the Board may well have had good cause to terminate petitioner. Those allegations may prove false, but only a plenary hearing can facilitate a determination of what is and what is not true.

I **CONCLUDE** that the relative hardship to the parties stands in equipoise. Certainly, petitioner will suffer financially during the period of time he is unemployed. But at the same time, the children for whom he is ultimately responsible must have a stable Director of Special Services at the helm. Accordingly, I **FIND** no imbalance in the relative hardship to the respective parties.

For all the reasons set forth above, the petitioner's application for emergent relief must be **DENIED**.

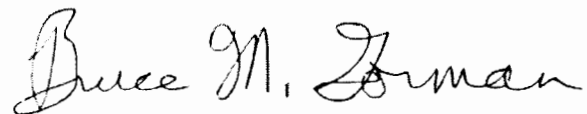
DECISION AND ORDER

I **ORDER** that petitioner's application for emergent relief be **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

August 29, 2012

DATE



BRUCE M. GORMAN, ALJ

sd

393-12

IN THE MATTER OF THE TENURE :
OF VANESSA HART, SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF :
IRVINGTON, ESSEX COUNTY. : DECISION
_____ :

SYNOPSIS

Petitioning Board filed tenure charges of excessive absenteeism and insubordination against respondent, a tenured secretary, and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the allegations – which respondent has chosen not to deny – may be deemed admitted and are sufficient to warrant termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner and dismissed the respondent from her tenured secretarial position in petitioner's school district.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

IN THE MATTER OF THE TENURE	:	
OF VANESSA HART, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	
IRVINGTON, ESSEX COUNTY.	:	DECISION
_____	:	

For Petitioner, Ronald C. Hunt, Esq.

No appearance by or on behalf of Respondent, Vanessa Hart.

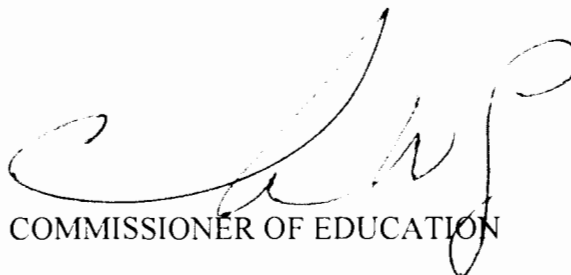
This matter was opened before the Commissioner of Education on August 24, 2012 by way of certified tenure charges against respondent, a secretary in petitioner's district. Petitioner seeks respondent's removal for excessive absenteeism and insubordination.

By notice dated August 27, 2012, the Bureau of Controversies and Disputes (the Bureau) directed respondent to file an answer to the petition. The notice was sent to 402 Main Street, Unit 311, Metuchen, NJ – purportedly the last known address for respondent – via certified and regular mail. The certified mail receipt was signed and returned to the Bureau and the notice which was sent by regular mail was not.

The communication from the Bureau clearly provided respondent with notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are filed shall have 15 days from receipt of the petition to file an answer. The Bureau has received neither an answer to the certified charges from the respondent nor from any attorney purporting to represent respondent.

The Commissioner concludes that the allegations – which respondent has chosen not to deny – may be deemed admitted, pursuant to *N.J.A.C.* 6A:3-5.4(h), and are sufficient to warrant removal of respondent from her tenured position as a secretary.

IT IS THEREFORE ORDERED that summary decision shall be granted to the petitioner, and that respondent is dismissed from her tenured position in the district's employ as of the date of the within decision.¹



COMMISSIONER OF EDUCATION

Date of Decision: 9/27/12

Date of Mailing: 9/27/12

¹ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 3* (*N.J.S.A. 18A:6-9.1*).

ERICK D. VILLAGRA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought reversal of the final decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying his request for a waiver of the Eight Semester Rule – which limits a student’s eligibility for high school athletics to eight consecutive semesters following his or her entrance into the 9th grade – to allow Erick Villagra (Villagra) to participate in sports during his senior year at Bernards High School (Bernards). Villagra played junior varsity soccer as a freshman and varsity soccer as a sophomore, prior to his family’s decision in June 2010 to send their son to Paraguay to attend school for financial and other personal reasons. Petitioner did not adjust well in Paraguay, and returned to the U.S. in July 2011. Subsequently, petitioner had to repeat his junior year at Bernards because he did not earn enough credits during the year he spent in Paraguay; petitioner played varsity soccer for Bernards during that year. He did not participate in sports during his year in Paraguay. In April 2012, Bernards High School filed an Eligibility Waiver Request with the NJSIAA requesting a waiver of the strict application of the Eight Semester Rule to enable Villagra to compete in soccer during his senior year. The request was denied, as NJSIAA found that petitioner’s case does not meet the test of “truly extraordinary circumstances” that would warrant a waiver of the Eight Semester Rule. Petitioner subsequently appealed the decision to the NJSIAA’s Eligibility Appeals Committee.

The Eligibility Appeals Committee (EAC) determined that it could not grant a waiver of the Eight Semester Rule because, *inter alia*: the family’s decision to send petitioner to school in Paraguay was voluntary; petitioner did not maintain the required academic standards during his time in Paraguay; petitioner is an excellent soccer player on a highly competitive team; and allowing petitioner to play soccer during his fifth year of high school would upset the competitive balance between schools and displace another Bernards student who only had eight semesters of eligibility.

The Commissioner upheld the NJSIAA’s decision and dismissed the petition, finding that petitioner did not meet his burden so as to entitle him to prevail on appeal. In so deciding, the Commissioner – who may not substitute his judgment for that of the NJSIAA on appeal – noted that the NJSIAA’s decision to deny the request for waiver was not arbitrary, capricious or unreasonable.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

AGENCY DKT. NO. 190-7/12

ERICK D. VILLAGRA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE INTERSCHOLASTIC	:	DECISION
ATHLETIC ASSOCIATION,	:	
	:	
RESPONDENT.	:	
	:	

For Petitioner, Erick D. Villagra, *Pro Se*

For Respondent, Steven. P. Goodell, Esq. (Herbert, Van Ness, Cayci & Goodell, P.C.)

This case involves an appeal of a decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying the request of petitioner, Erick Villagra, for a waiver of the Eight Semester Rule to allow him to participate in soccer during his senior year at Bernards High School.

Athletic competition in New Jersey's public schools is overseen by the respondent, NJSIAA, a voluntary, non-profit organization which promulgates the rules and regulations governing high school athletics. *See, B.C. v. Cumberland Reg. Sch. Dist.*, 220 *N.J. Super.* 214, 234 (App. Div. 1987). Article V, Section J of NJSIAA's Bylaws, Rules and Regulations restricts a student's eligibility to play sports to four years. Specifically, the provision – known as the Eight Semester Rule – provides that “[n]o student shall be eligible for high school athletics after the expiration of eight consecutive semesters following his or her entrance into the 9th grade. A student becomes ineligible for high school athletics when the class in which he/she was originally enrolled has graduated.” The NJSIAA Guidelines set forth the reasons for the Eight Semester Rule in the NJSIAA Handbook:

This rule is intended to prohibit “red shirting,” and is also aimed at preventing athletically gifted pupils who are not meeting academic standards from replacing other students who are maintaining their academic standards but who might not have the same athletic prowess. The rule is also aimed at maintaining a uniform progression among all member schools within a four-year cycle and equalizing competition within these schools.

In appropriate cases, the NJSIAA may grant a waiver of the eligibility rules if the overall objectives of the association and its member schools will not be undermined. The Eight Semester Rule can be waived when a student proves that he or she cannot comply with the rule due to circumstances beyond his or her control. Waivers of the eligibility rules, however, are not granted where a student has repeated an academic semester or year of secondary school for academic reasons. Additionally, the “waiver will take into account the size, agility and skills of the student and the degree to which these issues will fundamentally alter the competition.” (NJSIAA Handbook, p. 49).

The material facts in this case do not appear to be in dispute. Petitioner is a student at Bernards High School and he will begin his senior year in September 2012. In September 2008, petitioner began his freshman year at Bernards High School (Bernards) and played soccer as a freshman and a sophomore. Following his sophomore year, his parents made the decision –in June 2010 – to send him to Paraguay to attend school because his parents were having financial difficulties and had recently learned that their fifth child would be born with Down’s syndrome. Petitioner’s parents made the decision to send the petitioner and his sister to finish high school and to attend college in Paraguay because the cost of living and the cost of college is far less expensive than in the United States. Petitioner did not adjust well in Paraguay and, as a result, returned to the United States in July of 2011. Petitioner did not earn enough credits during the year he spent in Paraguay and therefore had to repeat his junior year at Bernards. Petitioner played junior varsity soccer as a freshman at Bernards and varsity soccer as a sophomore and junior at Bernards. Petitioner did not play any sports in Paraguay.

Based on the fact that petitioner has already had four years of athletic eligibility, on April 11, 2012 an Eligibility Waiver Request was filed by Bernards High School with the NJSIAA requesting a waiver from the strict application of the Eight Semester Rule so that the petitioner can participate in soccer during his senior year. On April 12, 2012 the NJSIAA Eligibility Committee voted 9-0 to deny the waiver request. The Eligibility Committee determined that petitioner is ineligible to participate in interscholastic athletics during his senior year because his case has not met the test of “truly extraordinary circumstances” warranting a waiver of the Eight Semester Rule.

Thereafter, the petitioner appealed the decision of the Eligibility Committee to the Eligibility Appeals Committee (EAC). Following a hearing on May 9, 2012 – at which sworn testimony was taken from the petitioner, his father and his aunt – the EAC concluded that it could not grant a waiver of the Eight Semester Rule. The EAC found that although the family made its decision in what they thought was the best interest of the petitioner, the family’s decision to send petitioner to Paraguay to school was a voluntary decision. The EAC was also concerned that the petitioner did not maintain the required academic standards during his time in Paraguay, noting that “waivers cannot be granted when they are based on a student’s failure to meet required academic standards.” (Eligibility Appeal Committee decision letter dated March 15, 2012). Additionally, the EAC determined that petitioner was an excellent soccer player on a highly-competitive team and that allowing him to participate in soccer during his fifth year of high school would upset the competitive balance between schools and would displace another Bernards High School student who only had eight semesters of eligibility.

On appeal, the petitioner argues that the NJSIAA should have granted the waiver request because his parents’ decision to send him to Paraguay for his junior year was a circumstance beyond his control that supports a waiver of the Eight Semester Rule. The petitioner stresses that he was a minor at the time his parents made the decision to send him to

Paraguay and that he did not agree with the move. The petitioner also maintains that his grades were poor because he could not concentrate in school due to being homesick and having a difficult time adjusting to the new culture and environment. Finally, the petitioner contends that he did not participate in any sports while he was in Paraguay, and therefore he meets the eligibility rules.

In reply, the NJSIAA asserts that it provided the petitioner with elaborate due process, noting that this case was heard by two NJSIAA committees, both of which unanimously denied the request for a waiver of the Eight Semester Rule. The NJSIAA stresses that the Eight Semester Rule is designed to ensure that all students have an equal opportunity to play high school sports, and limits that opportunity to four years. Here, petitioner is seeking an opportunity to play soccer in his fifth year of high school. The NJSIAA emphasizes that despite the fact that the family's decision to send petitioner to Paraguay was undoubtedly made for good reasons, the decision was entirely voluntary. The NJSIAA further maintains that the petitioner did not maintain the required academic standards during his time in Paraguay and waivers are not granted when a student has to repeat a grade due to academic difficulties. Additionally, allowing the petitioner a fifth year of eligibility would be unfair to other schools because he has had an extra year to grow and mature; he is an excellent soccer player; and he was a starter on a team that won a State Championship. Finally, if petitioner was able to play soccer during his fifth year of high school it would be unfair to other students at Bernards High School because he would be taking playing time away from another student who only has four years of eligibility. Therefore, the NJSIAA argues that it did not apply its rules arbitrarily and capriciously to the petitioner, and as such the Commissioner should affirm the decision of the EAC.

Upon careful review and consideration, the Commissioner determines to uphold the decision of the NJSIAA and dismiss petitioner's appeal. As explained above, the NJSIAA is a voluntary association of public and nonpublic schools, organized pursuant to *N.J.S.A. 18A:11-*

3, to oversee athletics for its member schools in accordance with a constitution, bylaws, rules and regulations approved by the Commissioner of Education and adopted annually by member schools, for which they become school policy enforceable by the NJSIAA.

It is well-established that the Commissioner's scope of review in matters involving NJSIAA decisions, including determinations made by the Eligibility Appeals Committee, is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a)(2); *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Nor may the Commissioner substitute his own judgment for that of the NJSIAA, where due process has been provided and where there is sufficient credible evidence in the record as a whole to serve as a basis for the decision reached by the NJSIAA. *N.J.A.C.* 6A:3-7.5(a)(1); *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259.

Additionally, the New Jersey courts have spoken as to the narrow scope of "arbitrary, capricious, or unreasonable" in the context of challenges such as this one:

In the law, "arbitrary" and "capricious" means having no rational basis. *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.*** (citations omitted) *Bayshore Sew. Co. v. Dep't of Env't. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

Petitioners seeking to overturn decisions of the NJSIAA therefore bear a heavy burden and, considering the record of this matter in light of the prescribed standard of review, the

Commissioner cannot find that petitioner herein has met his burden so as to entitle him to prevail on appeal.

More specifically, the Commissioner cannot find that the NJSIAA applied its rules in a patently arbitrary or unreasonable manner, in light of its duty to ensure fairness and integrity in athletic competition statewide. It is undisputed that the petitioner had to repeat his junior year when he returned to the United States because he did not maintain the required academic standards during his time in Paraguay. The NJSIAA waiver provisions advise that waivers are not granted when a student has to repeat a grade due to academic difficulties. Further, the EAC's determination that the competitive balance between schools would be impacted if petitioner was afforded an opportunity to play soccer during his fifth year of high school was not arbitrary and capricious in light of the fact that the petitioner is an excellent soccer player at a school with an exceptional soccer team.

Accordingly – the Commissioner having found that petitioner was afforded the due process to which he was entitled and that the NJSIAA's decision denying the request for waiver was neither arbitrary nor unreasonable – the NJSIAA's decision is upheld and the petition of appeal dismissed.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 9/27/12

Date of Mailing: 9/27/12

* Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.

395-12

OAL DKT. NO. EDU 4671-11
 AGENCY DKT. NO. 63-3/11

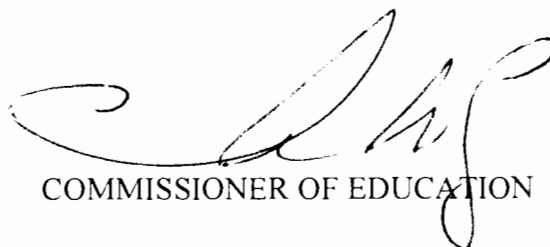
FRANCES K. FINKELSTEIN,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	
	:	DECISION
STATE-OPERATED SCHOOL	:	
DISTRICT OF THE CITY OF	:	
PATERSON, PASSAIC COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter, the proposed Stipulation of Settlement and Release (Stipulation) and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon such review, the Commissioner approves the terms set forth in the Stipulation and adopts the Initial Decision as the final decision in this case with one *proviso*. That is, the parties are reminded that the Commissioner of Education does not have jurisdiction to award attorney fees or enforce the payment of same.

With that understanding, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 9/27/12

Date of Mailing: 9/27/12

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04671-11

AGENCY DKT. NO. 63-3/11

FRANCES K. FINKELSTEIN,

Petitioner,

v.

**STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON, PASSAIC
COUNTY,**

Respondent.

Paul E. Griggs, Esq., for petitioner (Lindabury, McCormick, Estabrook &
Cooper, attorneys)

Paul H. Green, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: August 10, 2012

Decided: August 13, 2012

BEFORE **MARGARET M. MONACO, ALJ:**

On or about March 18, 2011, petitioner Frances K. Finkelstein filed a Petition of Appeal with the Commissioner of Education contesting the termination of her employment by respondent State-Operated School District of the City of Paterson (the Board). The

Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on April 26, 2011, for determination as a contested case. Following the adjournment of the hearing at the parties' joint request, counsel informed the undersigned by letter dated May 29, 2012, that the matter had been amicably resolved. Subsequently, under letter dated August 9, 2012, counsel for respondent submitted the attached Settlement Agreement and Release indicating the terms of agreement between the parties.

Having reviewed the record and the terms of the settlement I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that settlement should be approved. Accordingly, I approve the settlement **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 13, 2012
DATE

Date Received at Agency:

Date Mailed to Parties:

jb

Margaret M. Monaco
MARGARET M. MONACO, ALJ

8-15-12
AUG 15 2012

Lucretia Perkins
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SCHENCK, PRICE, SMITH & KING, LLP

220 Park Avenue

P.O. Box 991

Florham Park, New Jersey 07932

(973) 539-1000

Attorneys for Respondent

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FRANCES K. FINKELSTEIN,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF
THE CITY OF PATERSON, PASSAIC
COUNTY,

Respondent.

BEFORE THE
COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

Agency Dkt. No.: 63-3/11

OAL DKT. NO. EDU 4671-11

**STIPULATION OF SETTLEMENT
AND RELEASE**

The parties in the above-captioned matter hereby agree to settle this controversy upon the following terms and conditions:

1. Within 20 days following its receipt of approval of this settlement agreement by the Commissioner of Education, the Respondent (hereinafter "District") will pay to Petitioner (hereinafter "Finkelstein") the sum of One Hundred Sixty-Five Thousand Dollars (\$165,000). This payment will be without withholding of taxes or other contributions. The District will issue to Finkelstein a Form 1099 MISC with Box 3 checked. Finkelstein shall be solely responsible for any taxes due as a result of the payment.

2. Within 20 days following receipt of the Commissioner of Education's approval of this Settlement, provided Finkelstein's attorney has submitted to the District's attorney a certification of services by such time demonstrating fees incurred for legal services in this matter equaling or exceeding \$8,000, the District shall pay to Finkelstein's attorneys, Lindabury, McCormick, Estabrook and Cooper, P.C., 53 Cardinal Drive, P.O. Box 2369, Westfield, NJ 07091 the sum of Eight Thousand Dollars (\$8,000) in full and final satisfaction of all legal fees incurred by Finkelstein in this matter.

3. In consideration of the foregoing payments, Finkelstein heret
UNCONDITIONALLY RELEASES AND FOREVER DISCHARGES the District, its trustees,
officers, employees, agents, attorneys, successors, heirs, executors and assigns (all of whom are
hereinafter collectively referred to as the "Releasees") from all claims, liabilities, demands and
causes of action, whether known or unknown, fixed or contingent, that she may have or claim
to have against the District for any reason as of the date of execution of the Agreement,
including, but not limited to:

(i) Any and all claims asserted or which could have been asserted in this action;

(ii) Any and all claims, charges or complaints asserted, or which could have been
asserted, concerning any aspect of Finkelstein's employment with the District, any agreement
concerning such employment or her separation from such employment, including, but not
limited to, any and all claims of wrongful discharge, breach of contract or violation of tenure
rights; any and all claims for equitable estoppel; any and all claims for employee benefits; and
any and all claims of discrimination on any basis, including, but not limited to, any and all
claims under: Title VII of the Civil Rights Act of 1964, as amended; the Americans with
Disabilities Act; the Age Discrimination in Employment Act of 1967, as amended; the Civil
Rights Act of 1966, 42 U.S.C. §1981; the Older Worker Benefit Protection Act; the Worker
Adjustment and Retraining Notification Act; the Family and Medical Leave Act of 1993; the
New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection
Act; the New Jersey Constitution; and any other federal or State statute covering the
employment relationship, under the common law or in equity or arising under any agreement,
understanding or promise, written or oral, formal or informal, between Finkelstein and the
District or its representatives;

(iii) Any and all claims for back pay, reinstatement, vacation pay, liquidated,
compensatory and punitive damages, and attorneys' fees, disbursements and costs, which
Finkelstein or her legal representatives, heirs, executors, administrators, successors, and assigns
ever had, now have, or hereafter can, shall, or may have against the Releasees by reason of any

matter, cause, or thing whatsoever from the beginning of the world to the day of the date of Finkelstein's execution of this Stipulation of Settlement and Release.

4. This Agreement shall not in any way be construed as an admission by either party of any liability, or of any unlawful or improper acts whatsoever against the other party or any other person.

5. Nothing in this Agreement shall be construed as conferring any benefit upon any person, group or association not a direct signatory hereto. Further, this Agreement shall not be deemed to establish any "past practice" or other precedent requiring the District to or restricting it from providing any benefit to any person, group or association other than Finkelstein.

6. The parties acknowledge that each has been represented by legal counsel of his or its own choosing, that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein. Finkelstein acknowledges that she has been offered at least twenty-one (21) days to consider this Agreement before signing it, and that she may revoke her execution of this Agreement at any time during the seven (7) days immediately following the date of execution of this Agreement. Revocation must be made by delivering written notice of revocation to the office of the State District Superintendent. In the event of revocation, this document shall be null and void and the within controversy shall continue in due course.

7. This Agreement shall be subject to and construed under the laws of the State of New Jersey.

8. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by a written instrument executed by the parties.

9. This Agreement may be signed in separate counterparts, each of which shall be deemed an original. This Agreement shall be incorporated into an Initial Decision to be issued by the Hon. Margaret Monaco, ALJ. This Agreement shall not be fully enforceable and effective until approved by the Commissioner of Education of New Jersey.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the
dates set forth below.

STATE OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON, PASSAIC COUNTY

By Don W. Evans
Donnie W. Evans, Ed.D.
State District Superintendent

Witness:

Maria Canilla

Dated: 8/1/12

FRANCES K. FINKELSTEIN:

Frances K. Finkelstein
Frances K. Finkelstein, MBA, CPA

Witness:

Jeanne Marie Hamill

Dated: July 25, 2012

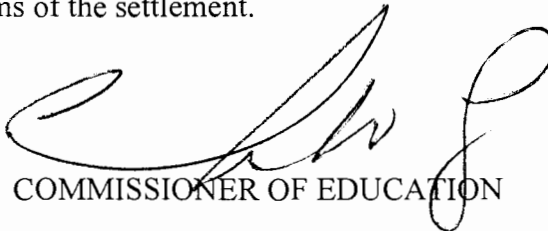
OAL DKT. NO. EDU 7626-12
 AGENCY DKT. NO. 97-4/12

IN THE MATTER OF THE TENURE :
 HEARING OF KARIN LATHAM, : COMMISSIONER OF EDUCATION
 SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
 OF DELRAN, BURLINGTON COUNTY. :

The record of this matter, the parties' proposed Settlement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon careful review of the record, the Commissioner concurs with the Administrative Law Judge that, under the circumstances of this matter, the proposed settlement is consistent with established standards governing the settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board of Education, April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6.

According to the Agreement, respondent consented to resign on August 9, 2012. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement. In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented certain settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of those provisions. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

Date of Decision: 9/27/12

Date of Mailing: 9/27/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7626-12

AGENCY DKT. NO. 97-4/12

**IN THE MATTER OF THE TENURE
HEARING OF KARIN LATHAM, SCHOOL
DISTRICT OF THE TOWNSHIP OF DELRAN,
BURLINGTON COUNTY.**

Roger A. Barbour, Esq., for petitioner (Barbour & Associates, attorneys)

Cristal Holmes-Bowie, Esq., for petitioner (Michael A. Armstrong & Associates,
LLC, attorneys)

Record Closed: August 9, 2012

Decided: August 10, 2012

BEFORE **SUSAN M. SCAROLA, ALJ**:

The School District of the Township of Delran, petitioner, brings tenure charges against the respondent Karin Latham, a school secretary, for conduct unbecoming a secretary and insubordination as defined in N.J.S.A. 18A:6-10. This matter was transmitted to the Office of Administrative Law on June 6, 2012, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On August 2, 2012, the parties advised that they had negotiated a proposed settlement. An executed Mutual Release and Settlement Agreement indicating the

terms of the settlement is attached. A copy of the Resolution of the Board of Education dated August 7, 2012, adopting the settlement and implementing its terms, is also attached.

I have reviewed the terms of the settlement, and conferred with counsel on August 9, 2012. Counsel for the petitioner indicated that the district determined that permitting the respondent to resign in good standing was an appropriate resolution of this matter. The respondent is a secretary who had no certificates or licensing requirements. She had been hospitalized on several occasions during her employment and suffered from major depression as well as a number of other significant medical problems, both physical and mental. She continues under treatment. The district had spent considerable time and effort to bring this matter forward, and determined that the certain resolution of resignation was preferable to litigation and an uncertain outcome. The district also recognized that the medical problems may have played a part in the basis for the charges. The respondent preferred to resign in good standing so that in the event her health improves, she will be able to pursue gainful employment elsewhere.

Accordingly, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the parties' signatures on the Mutual Release and Settlement Agreement.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

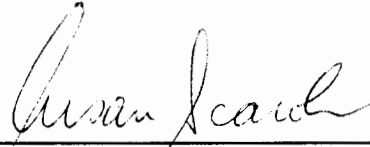
I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and N.J.A.C. 6A:3-5.6 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 10, 2012

DATE



SUSAN M. SCAROLA, ALJ

Date Received at Agency:

Date Mailed to Parties:

8/13/12

mph

Roger A. Barbour, Esquire
BARBOUR AND ASSOCIATES, LLC
10 North Chestnut Avenue
Maple Shade, New Jersey 08052
(856) 779-0888 Voice
(856) 779-0005 Facsimile
Attorneys Delran Township Board of Education

2012 JUN -9 P 1:31

IN THE MATTER OF THE TENURE
CHARGES AGAINST KARIN
LATHAM, SCHOOL DISTRICT OF
THE TOWNSHIP OF DELRAN,
BURLINGTON COUNTY

**SETTLEMENT AGREEMENT
WAIVER AND RELEASE**

OAL Docket: EDU 07626-2012 S
Agency Ref.: 97-4/12

Whereas, the Petitioner Delran Township School District, (hereafter "Delran") is a body corporate and politic, with in the State of New Jersey, and operates a Board of Education consistent with the laws of the State of New Jersey; and

Whereas, Respondent Karin Latham is a tenured employee within the Delran School District; and

Whereas, the parties having realized the cost and time associated with protracted litigation, having therefore come to an understanding, agreement, and settlement of all claims and issues with regard to the above matter; and

Whereas, the parties desiring to avoid the necessity of having to resort to further litigation, and

WHEREAS THE PARTIES DESIRE TO MEMORIALIZE THE TERMS OF SAID AGREEMENT, SETTLEMENT, AND RELEASE:

NOW, WHEREFORE, based on the foregoing premises this document shall serve as a mutual agreement, settlement, waiver, release, and withdrawal of all claims, it is memorialized as follows:

- I. The parties agree that this document shall serve as a mutual Release, whereby the parties agree to release and discharge any and all claims that they have or may have against the other, up to and including the signing of this document, and arising from or involving the instant matters.

2. The parties agree that this settlement, waiver and release resolves all matters that are or could have been in disputed between them, arising from or involving the instant matters.
3. Karin Latham agrees to resign from her position with the Delran Township School District on August 9, 2012 upon signing this settlement agreement.
4. Delran Township School District agrees to withdraw the tenure charges against Karin Latham on August 9, 2012 upon the signing this agreement.
5. Delran Township School District will not actively challenge Karin Latham's unemployment claim if she should make one.
6. Karin Latham will have the right to continue with benefits as any other resigning employee from Delran Township School District.
7. If any portions of this agreement are void as a matter of law, then all other agreements remain enforced and in effect.
8. Any changes or amendments to this Settlement Agreement must be made in writing with the consent of all parties involved.

FOR RESPONDENT

By: Karin Latham
Karin Latham

Dated: 8/1/12, 2012

FOR THE DELRAN TOWNSHIP BOARD OF EDUCATION

By: Dr. Patricia Camp
Dr. Patricia Camp,
Superintendent of Schools

Dated: 3/6, 2012

By: Dr. Christopher Russo
Dr. Christopher Russo,
Business Administrator/Secretary

Dated: 8/6/12, 2012

Roger A. Barbour, Esquire
BARBOUR & BARBOUR, P.A.
P.O. Box 345
10 North Chestnut Avenue
Maple Shade, New Jersey 08052
(856) 779-0888 Voice
(856) 779-0005 Facsimile
Attorneys for Delran Township Board of Education

IN THE MATTER OF THE TENURE
CHARGES AGAINST KARIN
LATHAM, A TENURED TEACHER
IN THE DELRAN TOWNSHIP
SCHOOL DISTRICT.

BEFORE THE COMMISSIONER
OF EDUCATION

County Superintendent of Schools

TENURE CHARGES

AGENCY DOCKET NO.:

CERTIFICATION OF CHRISTOPHER J. RUSSO, BOARD SECRETARY

1. My name is Christopher J. Russo, and I am the Board Secretary and Business Administrator for the Delran Township Board of Education. As such, I am thoroughly familiar with all of the facts and the history of this matter, as well as all of the allegations and charges lodged against Karin Latham. (hereafter "Latham.").
2. Latham is a tenured employee, who is employed with the Delran Township School District.
3. Latham has acted in such a way, and has conducted her behavior in such a manner, as to constitute conduct which is unbecoming a professional, conduct which constitutes immorality, conduct which demonstrates unfitness for service, and conduct which amounts to insubordination, all while in the performance of her duties of employment with the District and the Board.
4. On or about February 7, 2011, Latham called the School Administration to report that she would be unable to attend work that day, because she had been the victim of

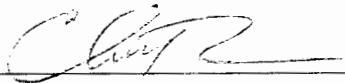
a violent attack. (See e-mail correspondence to and from building principal John Fricke, attached hereto as **Exhibit A**).

5. By way of letter dated February 17, 2011, while serving as Interim Superintendent of Schools, I sent a letter to Latham, requesting that she document the report that she had made to school officials on February 7, 2011. (See my correspondence of February 17, 2011 to Latham, attached hereto as **Exhibit B**).
6. By way of letter dated March 1, 2011, while serving as Interim Superintendent of Schools, I sent another letter to Latham, again requesting that she properly document the report that she had made to school officials on February 7, 2011. (See my correspondence of March 1, 2011 to Latham, attached hereto as **Exhibit C**).
7. To this date, Latham has not provided the District with documentation to properly verify the report she made to school officials on February 7, 2011.
8. In addition, on multiple occasions, while working for the District, Latham was inappropriately using the District computers to engage in personal business and shopping on-line. (See computer screen print-outs detailing the various web-sites that Latham visited while on District time, and the subject nature and content of the web-pages that Latham was viewing, attached hereto as **Exhibit D**).
9. The actions and conduct of Latham constitutes conduct which is unbecoming a professional, conduct which constitutes immorality, conduct which demonstrates unfitness for service, and conduct which amounts to insubordination, all while in the performance of her duties of employment with the District and the Board.
10. Delran Board Policy 4140 specifically provides that the Board may terminate the employment of an employee for immorality, unfitness for service, insubordination, or other good cause. (See Delran Board Policy 4140, attached hereto as **Exhibit E**).

11. I have reviewed the above statements made by me. I am aware that if any of the above statements made by me are willfully false, I am subject to punishment.

DELRAN TOWNSHIP BOARD OF EDUCATION

DATED 7/7/11



Christopher J. Russo, Ed.D RSBA/BS
Board Secretary And Business Administrator

- A Motion was made to Table the following co-curricular stipends for the 2011-2012 school year:

BOARD ACTION: Motion: Zierler
Second: McHugh
Poll Vote: All Ayes

- C. *It is recommended that the Board of Education approve the employment of Phillip Palumbo as Teacher of Art at the Delran High School at an annual base salary of \$51,380 (BA, Step 2) effective September 1, 2012.*

BOARD ACTION: Motion: Zierler
Second: Hammitt
Poll Vote: All Ayes

- D. *It is recommended that the Board of Education approve the employment of Ashley Clark as Teacher of 4th Grade at the Delran Intermediate School (filling a leave of absence position for Mary Jo Hutchinson) at an annual base salary of \$51,180 (BA, Step 1) to be prorated, beginning September 4, 2012 and ending November 21, 2012.*

BOARD ACTION: Motion: Zierler
Second: Crawford
Poll Vote: All Ayes

- E. *It is recommended that the Board of Education approve Deborah Rambo, 10-month clerk at the Delran High School, to work in the Assistant Principal's office beginning August 1, 2012 and ending August 31, 2012 at a per diem rate of \$119.00.*

BOARD ACTION: Motion: Zierler
Second: McHugh
Poll Vote: All Ayes

- * F. *It is recommended that the Board of Education accept the terms of the agreement with KL in reference to EDU:07626-2012 S.*

BOARD ACTION: Motion: Zierler
Second: Hammitt
Poll Vote: All Ayes

- * G. *It is recommended that the Board of Education approve the resignation of Karin Latham, Secretary at the Delran High School, effective August 9, 2012.*

BOARD ACTION: Motion: Zierler
Second: Hammitt
Poll Vote: All Ayes

- H. *It is recommended that the Board of Education approve the resignation of Sean Mead, Instructional Aide at the Delran Middle School, effective September 3, 2012.*

BOARD ACTION: Motion: Zierler
Second: Rafanello
Poll Vote: All Ayes

- I. *It is recommended that the Board of Education approve the resignation of Lori Donnelly, Classroom Management Aide at the Millbridge Elementary School, effective August 2, 2012.*

True and certified copy of the
Delran Board of Education meeting
minutes of August 6, 2012.

Christopher J. Russo, Ed.D.
Board Secretary

Christopher Russo

#397-12

OAL DKT. NO EDU 6179-12
 AGENCY DKT. NO. 113-4/12

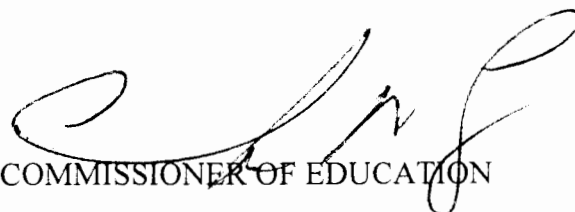
IN THE MATTER OF THE TENURE :
 HEARING OF JOHN TRACEY, :
 SCHOOL DISTRICT OF THE TOWNSHIP : COMMISSIONER OF EDUCATION
 OF MOUNT OLIVE, MORRIS COUNTY. :
 _____ : DECISION

The record of this matter, the parties' Settlement Agreement and Release, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C. 1:1-19.1*.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. This file shall be forwarded to the State Board of Examiners for action as that body may deem appropriate.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

Date of Decision: 9/27/12
 Date of Mailing: 9/28/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 06179-12N

AGENCY DOCKET NO. 113-4/12

**IN THE MATTER OF THE TENURE HEARING OF JOHN
TRACEY, SCHOOL DISTRICT OF THE TOWNSHIP OF
MOUNT OLIVE, MORRIS COUNTY**

Marc H. Zitomer, Esq. on behalf of Mount Olive Twp. Board of Education

Shannon M. Ryan, Esq., on behalf of John Tracey

Record Closed: July 27, 2012

Decided: August 15, 2012

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 10, 2012, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was scheduled and conducted on June 1, 2012. Hearings were scheduled for August 3, 7, September 5 & 6, 2012. Prior to the August 3, 2012 hearing the parties submitted a copy of the executed Settlement Agreement, as well as a certified extract of the Board's meeting minutes indicating the resolution and record of the Board's vote regarding same, which is attached hereto for reference.

Based upon a review of the record as well as the proposed settlement agreement, and the representation of the parties on the record of this matter, I make the following **FINDINGS**:

1. The Settlement is in the public interest as it conserves the Board's resources and delivers a final result, whereby John Tracey will no longer be associated with the District, rather than the unpredictable outcome of a hearing. Litigation costs associated with a scheduled multiple day hearing have been considered against the monetary terms of the Settlement.
2. If a hearing becomes necessary, the District has identified school personnel who are potential witnesses.
3. Under the proposed settlement, John Tracey has submitted his resignation effective August 31, 2012. John Tracey will be paid his salary from April 24, 2012 through August 31, 2012 including for the months of July and August.
4. Under the best of circumstances, the hearing needs to be conducted and then the administrative law judge would have forty-five days to prepare an initial decision and the Commissioner would have an additional forty-five days for review and issuance of a final decision.
5. If the tenure matter proceeds to hearing, both parties would incur costs of paying their attorneys for a likely lengthy hearing.
6. John Tracey has had the opportunity of counsel in this matter and has represented that he fully understands his rights and implications of this argument and he is aware that the Commissioner of Education may refer this matter to the N.J. State Board of Examiners which may suspend or revoke his certificate.
7. The settlement fully disposes of all issues in controversy.

Based upon the foregoing, I **CONCLUDE** that the terms of settlement are in the public interest.

It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings are hereby concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 15, 2012
DATE

Joann Lasala Candido
JOANN LASALA CANDIDO, ALJ

Date Received at Agency:

August 20, 2012
Leora Bardies

Date Mailed to Parties: August 20, 2012

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SCHENCK
PRICE
SMITH &
KING, LLP

ATTORNEYS AT LAW

~ Founded 1912 ~

Celebrating 100 Years
1912-2012

MARC H. ZITOMER
Email: jlr@spsk.com

220 Park Avenue
PO Box 991
Florham Park, NJ 07932-0991
Telephone: 973-539-1000
Fax: 973-540-7300

www.spsk.com

July 26, 2012

Via Federal Express

Hon. JoAnn L. Candido, ALJ
New Jersey Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: **I/M/O Tenure Hearing of John Tracey and Mount Olive Board of Education**
OAL Dkt. No. EDU 6179-12,
Agency Dkt. No. 113-4/13

RECEIVED
NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
AUG 1 2012 P 3:44

Dear Judge Candido:

This firm represents the Mount Olive Board of Education in the above-referenced matter. The hearing in this matter is currently scheduled to commence on Friday, August 3, 2012. However, the parties have since reached a settlement in this case, subject to Your Honor's approval. At its July 23, 2012 meeting, the Board approved the settlement agreement by a vote of 6-0. Accordingly, it is respectfully requested that the hearing be adjourned and the settlement be entered on the record.

To that end, please find enclosed a copy of the executed Settlement Agreement, as well as a certified extract of the Board's meeting minutes indicating the resolution and record of the Board's vote regarding same. Unless Your Honor directs otherwise, neither party will appear before the Court for hearing on August 3.

Thank you for your attention to this matter. Should Your Honor have any questions or require additional documentation, please do not hesitate to contact me.

Respectfully submitted,
SCHENCK, PRICE, SMITH & KING, LLP



Marc H. Zitomer

Encl.

cc: Dr. Larrie Reynolds, Superintendent
Margaret Conroy, Business Administrator
Lynn Jones, Board Secretary
Shannon Ryan, Esq. (via facsimile w/encl.)

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for the Mount Olive Board of Education

FILED
JUL 27 P 3:44
OFFICE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE TENURE
CHARGES AGAINST JOHN TRACEY,

BY THE MOUNT OLIVE BOARD OF
EDUCATION, MORRIS COUNTY,
NEW JERSEY.

BEFORE NEW JERSEY COMMISSIONER
OF EDUCATION

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No.: EDU 6179-12N

Agency Ref. No. 113-4/12

**SETTLEMENT AGREEMENT AND
RELEASE**

This Agreement and Release ("the Agreement") is entered into and effective this ____ day of 23 July, 2012 ("the Effective Date"), by and between John Tracey and the Mt. Olive Township Board of Education ("Board").

WHEREAS, the Board is a body public and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1; and

WHEREAS, Mr. Tracey is employed by the Board as a tenured teaching staff member; and

WHEREAS, on March 30, 2012, Dr. Larrie Reynolds filed Sworn Tenure Charges of Unbecoming Conduct and/or other Just Cause against Mr. Tracey (Exhibit A) as well as a Sworn Statement of Evidence; and

WHEREAS, following receipt of Mr. Tracey's answer to the charges, the Board certified the charges to the Commissioner of Education on April 23, 2012 and suspended him without pay; and

WHEREAS, on May 10, 2012, the Commissioner deemed the charges sufficient, if true, to warrant dismissal and, therefore, referred the charges to the Office of Administrative Law for a hearing; and

J.T. Initials 4
BOE Pres. Initials [Signature]

WHEREAS, the case has been assigned to the Honorable Joann Lasala Candido, A.L.J.;
and

WHEREAS, the hearing is scheduled to commence on August 3, 2012; and

WHEREAS, the parties have decided to resolve and settle all employment issues between them pursuant to the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and conditions set forth in this Agreement, the Parties agree as follows:

1. Payment by the Board

The Board will pay Mr. Tracey's salary from April 24, 2012 through August 31, 2012, including for the months of July and August. The Board may choose to continue to pay Mr. Tracey in accord with the payroll schedule applicable to all other teaching staff employed by the Board or may choose to make one final payment to Mr. Tracey. If the Board chooses to make one final payment to Mr. Tracey, it shall be made on or before August 31, 2012. The parties acknowledge that Mr. Tracey is not entitled to any further compensation, emoluments of employment or fringe benefit of any kind.

2. Resignation

Mr. Tracey will submit an irrevocable letter of resignation from his employment with the Board effective August 31, 2012 contingent upon the Board and Commissioner's approval of this agreement. A copy of the form of said letter is annexed hereto as Exhibit A. Mr. Tracey agrees not to seek future employment with the Board. From this date until August 31, 2012, upon direct inquiry by any future employers, the Superintendent or his designee will state that Mr. Tracey is employed by the Board. No further information will be provided.

If the Commissioner rejects this Settlement, Mr. Tracey shall refund this payment within 30 days.

3. References

Upon direct inquiry by any future employers, the Superintendent or his designee will provide the dates of Mr. Tracey's employment with the Board, the position he held in the District, and his salary. No further information will be provided. All calls from prospective employers will be directed to the Superintendent or his designee who will only provide the above information.

4. No Admissions

This Agreement is entered into solely for the purpose of resolving disputed claims, and neither the execution, delivery; nor performance of this Agreement, nor Mr. Tracey's resignation, shall constitute or be construed at any time or for any purpose to be an admission of fact or liability by any of the parties; and the parties further agree that neither this Agreement and

J.T. Initials HT
BOE Pres. Initials [Signature]

Release nor Mr. Tracey's resignation shall be used as evidence in any judicial, administrative, or quasi-judicial proceeding, except to enforce the terms of the Agreement.

5. Release by Mr. Tracey

In exchange for the above consideration, Mr. Tracey, and his heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any claims or rights, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns, arising in any way out of his employment with the Board and his separation from employment with the Board including, but not limited to, any claims for attorneys fees, back pay or front pay, any claims for emotional distress or pain and suffering, any claims involving tax liability stemming from this settlement, and any claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retraining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, New Jersey Title 18A, 6 & 6A, any collective negotiations agreement, any common law claim and any other claims for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically, exempted from the release are any claims for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA") and workers compensation claims.

6. Authority

This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

7. Assent to Terms

Mr. Tracey hereby acknowledges that he entered into this Agreement with a full understanding of his rights and that he was fully informed of the implications of this Agreement and that he has reviewed this agreement with his attorney Shannon M. Ryan, Esq. He also enters into the Agreement without duress and of his own free will and volition and acknowledges that he was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and seven (7) days from the execution of this document to revoke this Agreement by delivering written notification to Board Counsel, Marc H. Zltomer, Esq., 220 Park Avenue, Florham Park, New Jersey 07932. It is understood that if this Agreement is revoked, it will not

J.T. Initials in

BOE Pres. Initials

be effective or enforceable, nor will Mr. Tracey's resignation from employment. Mr. Tracey will not be entitled to any of the consideration described herein. The Board will be entitled to proceed, without prejudice, to any rights that it may have.

8. Successors and Assigns

This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

9. Amendment; Severability; No Waiver

This Agreement shall not be amended, changed or modified except in a writing signed by all parties. The provisions of this Agreement are severable. If any term or portion thereof of this Agreement shall be held to be invalid or unenforceable to any extent, the remainder of this Agreement shall not be affected thereby, and each remaining term or portion thereof shall be valid and enforced to the fullest extent permitted by law. Any failure to enforce any provision of this Agreement shall not operate as a waiver of such provision or of any other provision.

10. Confidentiality

Mr. Tracey and the Board understand and agree that this Agreement, its terms, and the matters discussed in negotiating its terms are confidential, to the extent permitted by law. Neither party may directly or indirectly, divulge, discuss, publicize, disclose or in any way communicate the fact of this Agreement or the terms of this Agreement, the discussion or circumstances surrounding the negotiation or execution of this Agreement to anyone except to the New Jersey Department of Education, the State of New Jersey or its agencies or instrumentalities, without the express written authorization by an authorized representatives of the other party, unless compelled to do so pursuant to law. The foregoing confidentiality obligations shall not apply to disclosure by Mr. Tracey to his spouse, union, legal representatives and/or tax advisors, provided Mr. Tracey first instructs them, and secures their agreement, to keep all such information in strict confidence.

11. Unemployment

The Board agrees not to contest Mr. Tracey's claim for unemployment. Mr. Tracey intends to inform unemployment that he resigned with the understanding that the Board was attempting to terminate his employment with the Board. Mr. Tracey understands that the Board will provide accurate information to the Office of Unemployment, including that the Board was attempting to terminate his employment with the Board, and that the Board will affirmatively report that it is not contesting his claim for benefits.

12. State Board of Examiners Reporting Requirement

Mr. Tracey understands that the Commissioner of Education may refer this matter to the N.J. State Board of Examiners which may suspend or revoke his certificate.

J.T. Initials h

BOE Pres. Initials [Signature]

13. Satisfaction of *In re Cardonick*, 1990 S.L.D. 842 (1990)

The parties agree that this matter satisfies the six (6) criteria for settlement set forth in *In re Cardonick*, 1990 S.L.D. 842, 846 (1990) and delineated in N.J.A.C. 6A:3-5.6.

- i. Documentation as to the nature of the charges - See Exhibit A.
- ii. Circumstances justifying settlement - Mr. Tracey will tender his resignation from the District effective August 31, 2012 making the tenure charges moot.
- iii. Consent of both the charged and charging parties - The agreement has been executed by both parties.
- iv. Charged party entered into this agreement with a full understanding of his rights - See Paragraph 7, supra.
- v. Agreement in the public interest - This agreement is in the public interest because Mr. Tracey will resign from the District if this agreement is approved, making the matter moot. Moreover, settlement will save the District a significant amount of time and money. In addition, it will save numerous student witnesses and faculty members the stress of having to testify at trial as well as missed school time. Finally, the State Board of Examiners may proceed against Mr. Tracey's certificate if it deems the charges sufficiently serious to warrant revocation of same.
- vi. Referral to State Board of Examiners - See Paragraph 12, supra.

14. Entire Agreement

This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. Each party acknowledges that neither the other party, nor any agent or attorney of the other party, has made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement. This Agreement is subject to Board Approval.

15. Construction

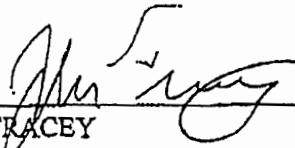
The terms of this Agreement are not to be construed against any one party but are to be construed as if all parties prepared it equally.

16. Law Governing

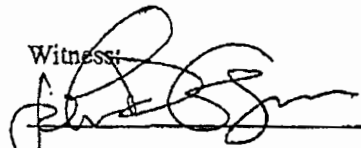
This Agreement is governed by the laws of New Jersey.

J.T. Initials *in*
BOE Pres. Initials *[Signature]*

IN WITNESS WHEREOF, the parties have executed this agreement consisting of six (6) pages as of the effective date.



JOHN TRACEY

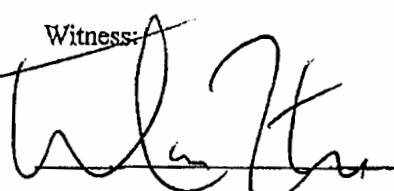
Witness: 

Dated: July 23, 2012
MT. OLIVE BOARD OF EDUCATION

Dated: 7/23/12

By: 

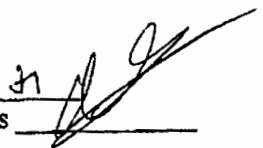
ANTHONY GIORDANO, BD. PRES.

Witness: 

Dated:

Dated: 7/23/12

J.T. Initials jt

BOE Pres. Initials 

**EXTRACT FROM THE MINUTES OF A MEETING OF THE
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE
MORRIS COUNTY, N.J., AS RECORDED IN THE OFFICIAL MINUTE BOOK**

The Board of Education of the Township of Mount Olive in the County of Morris, New Jersey, convened in regular session on Monday, July 23, 2012 at 6:30 p.m. at the Board/Administration Building, 89 Route 46, Budd Lake, NJ 07828.

The following members of the Board of Education were present:

Anthony Giordano, President	Elizabeth Ouimet
Rhonda Lake Cohen	William Robinson
Tim Halbur	Mark Werner

The following members of the Board of Education were absent:

Daniel Amianda
Sheryl Colligan
Kathryn Criscuolo

The following resolution was offered by Mr. Giordano, seconded by Mr. Robinson, and adopted by the Board of Education by the following roll call vote:

TITLE OF RESOLUTION: SETTLEMENT AGREEMENT AND RELEASE

RESOLUTION: Resolved, that the Board of Education hereby approves the Settlement Agreement and Release in the matter captioned Matter of Tenure Charges Against John Tracey, OAL Docket No. EDU 6179-12N in accordance with the terms and conditions therein; and

Be it further resolved that the Board President is hereby authorized to execute the Agreement on behalf of the Board.

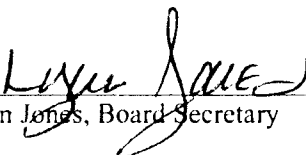
ROLL CALL: AYES: Mrs. Cohen, Mr. Halbur, Mrs. Ouimet, Mr. Robinson, Mr. Werner, and Mr. Giordano.

NOES: None

STATE OF NEW JERSEY }
 } ss
COUNTY OF MORRIS }

I, Lynn Jones, Secretary to the Board of Education of the Township of Mount Olive, in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the Minutes of the meeting of the Board of Education of said district duly called and held on July 23, 2012 has been compared by me with the original Minutes as officially recorded in my office in the Minute Book of said Mount Olive Township Board of Education and is a true, complete copy thereof and of the whole of said original Minutes, so far as the same relates to the subject matter referred to in said Board of Education this 26th day of July 2012.

(Affix Seal)

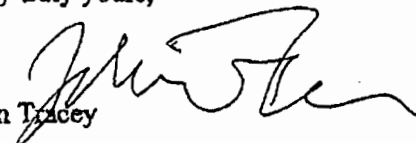

Lynn Jones, Board Secretary

July 20, 2012

Dear Members of the Board and Dr. Reynolds:

I hereby tender my irrevocable letter of resignation from any employment with the Board effective at the close of business on August 31, 2012. This resignation is contingent upon Board and Commissioner of Education approving the corresponding settlement agreement.

Very truly yours,


John Tracey

c: Margaret Conroy, Bus. Admin./Bd. Secretary
Lynn Jones, Bd. Sec.

#398-12

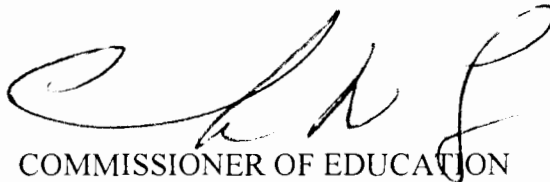
OAL DKT. NO. EDU 7048-11
 AGENCY DKT. NO. 152-6/11

W.C., on behalf of minor child, W.C., Jr.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF EWING,	:	
MERCER COUNTY,	:	
RESPONDENT.	:	
_____	:	

The record of this matter, the parties' proposed Settlement and Release, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

Date of Decision: 9/27/12

Date of Mailing: 9/28/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7048-11

AGENCY DKT. NO. 152-6/11

W.C., O/B/O MINOR CHILD, W.C., JR.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF EWING, MERCER COUNTY,**

Respondent.

W.C., parent of W.C., Jr., petitioner, pro se

Marc H. Zitomer, Esq., for respondent (Schenck, Price, Smith & King, LLP,
attorneys)

Record Closed: August 30, 2012

Decided: September 4, 2012

BEFORE PATRICIA M. KERINS, ALJ:

This matter was transmitted to the Office of Administrative Law on June 20, 2011, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement and Release, along with a Board Resolution indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

9/4/12
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency:

9/5/12

Date Mailed to Parties:

/bal

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for Respondent,
Ewing Plainfield Board of Education

RECEIVED
2012 AUG 30 P 1:03
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

W.C. o/b/o W.C., Jr.,

Petitioner,

v.

EWING TOWNSHIP BOARD OF
EDUCATION

Respondent.

STATE OF NEW JERSEY

BEFORE THE
COMMISSIONER OF EDUCATION

DOCKET NO.: EDU 7048-11
AGENCY DKT. NO.: 152-6/11

SETTLEMENT AND RELEASE

This Stipulation of Settlement and Release ("Agreement") is made by and between Petitioner, Wesley Cordy, Sr., and the Respondent, Ewing Township Board of Education ("Board").

RECITALS

WHEREAS, in or about December of 2010, the Respondent Board found, based on the results of a residency investigation, that minor student W.C. was not domiciled in the Ewing Township School District ("District") and thus not entitled to a free, public education in the District; and

WHEREAS, in or about February of 2011 the Board passed a resolution ordering the removal of the W.C. from the District; and

WHEREAS, Petitioner thereafter commenced an administrative action, with the above-captioned docket information, to challenge the Board's residency determination with regard to W.C.; and

WHEREAS, during the pendency of the above-captioned residency appeal, W.C., has remained a student within the District despite the District's determination that W.C. was domiciled outside of the District and thus ineligible for a free, public education within the District; and

WHEREAS, the District now, by way of this Agreement, determines that W.C. is domiciled within the District and is eligible for attendance within the District.

WHEREAS, by this Agreement, Petitioner will voluntarily dismiss the Litigation with prejudice, without costs to any party as against the other;

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. Petitioner shall pay the Respondent Board the Nine-Hundred Fifty Dollars (\$950.00) in back-tuition to be paid One Hundred Dollar (\$100.00) increments on the Fifteenth Day of each month beginning on September 1, 2012, until that amount is paid fully, with one Fifty Dollar (\$50.00) increment representing the remaining Balance due on June 1, 2013.
2. Petitioner further understands and agrees that, if he fails to make a payment in accordance with the agreed-upon payment plan, the entire remaining unpaid amount shall immediately become due and owing, payable in a single lump sum.

3. Petitioner further agrees to indemnify Respondent for any and all costs, including court costs and attorneys fees, associated with any action instituted by Respondent to enforce the terms of this Agreement should Petitioner fail to adhere to the agreed-upon payment plan. Petitioner also agrees not to contest any wage garnishment action if he fails to make the agreed-up payments.
4. Petitioner, in consideration of this Stipulation of Settlement and Release, and in full, final, and complete settlement of the matter, hereby agrees to withdraw, with prejudice, his Petition of Appeal in this matter.
5. The terms of this Agreement shall in no way constitute acceptance or assent by the Board that W.C. nor any other child of Petitioner's is automatically entitled to a free public education in the District at any point in the future, and the Parties understand and agree that Respondent reserves the right to investigate Petitioner's residency status in the District at any time, in order to determine whether or not Petitioner and/or his children remain domiciled in the District.
6. This Agreement is subject to approval by the Ewing Township Board of Education. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.
7. In exchange for the above consideration, Respondent Ewing Township Board of Education agrees to release Petitioner from any and all claims, cross-claims, counterclaims, demands, liabilities, damages, indebtedness, costs, attorneys' fees, actions or obligations of any nature, which solely arise out of or are related in any way to this Litigation, up to and through the date of this Agreement.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.
9. This Agreement is to be construed in accordance with the laws of the State of New Jersey.
10. Petitioner hereby represents that he is freely entering into this Agreement, that he is acting with the advice of counsel of his choosing, or on his own accord being of legal age and sound mind, and that he has read and fully understands the contents and effects of this Agreement.
11. This Agreement shall be binding upon all parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors, predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, shareholders, members, employees, agents and assigns.
12. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than those set forth herein. This Agreement supersedes all previous arrangements or understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioner and Respondent.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, consisting of six pages, effective on the day and year first above written.

FOR PETITIONER

Date: 8/13/2012

Wesley Cordy Sr.
Wesley Cordy, Sr.

**FOR RESPONDENT,
EWING TOWNSHIP BOARD OF EDUCATION**

Date: 8/27/12

Karen A. McKeon
Karen A. McKeon, Board President

RESOLUTION

Resolved, that the Board of Education hereby approves the Settlement Agreement and Release in the matter captioned W.C. o/b/o W.C., Jr., v. Ewing Township Board of Education, OAL docket number EDU 7048-11, in accordance with the terms and conditions therein;

And Be It Further Resolved, that the Board President is authorized to executive the Agreement on behalf of the Board.

RECEIVED
2012 AUG 30 P 1:03
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

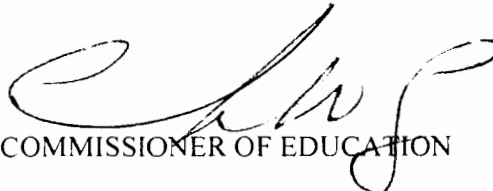
OAL DKT. NO. EDU 5420-12
 AGENCY DKT. NO. 54-3/12

M.B. and L.B., on behalf of minor child, L.B.,	:	
AND K.D. and M.D., on behalf of minor	:	
child, K.D., ¹	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
DAVID BREARLEY MIDDLE – HIGH	:	DECISION
SCHOOL, SUPERINTENDENT OF SCHOOLS	:	
AND BOARD OF EDUCATION OF THE	:	
BOROUGH OF KENILWORTH,	:	
UNION COUNTY,	:	
RESPONDENTS.	:	

The record of this matter, the parties' proposed Settlement and Release Agreement, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

Date of Decision: 9/28/12

Date of Mailing: 9/28/12

¹ It is noted that the Initial Decision was incorrectly captioned as to petitioners. That error has been corrected here.

1000

1000

1000

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05420-12

AGENCY DKT. NO. 54-3/12

**M.B.AND L.B. ON BEHALF OF MINOR CHILD,
L.B. AND K.D. AND M.D., ON BEHALF OF
MINOR CHILD K.D.,**

Petitioner,

v.

**DAVID BREALEY MIDDLE HIGH SCHOOL,
SUPERINTENDENT OF SCHOOLS AND
BOARD OF EDUCATION OF THE BOROUGH
OF KENILWORTH, UNION COUNTY,**

Respondent.

M.B. and L.B. o/b/o L.B. petitioner pro se

K.D. and M.D. o/b/o K.D. petitioner pro se

**Rita F. Barone, Esq., for respondent (Purcell, Mulcahy, O'Neill & Hawkins,
attorneys)**

Record Closed: September 6, 2012

Decided: September 7, 2012

BEFORE IMRE KARASZEGI, JR., ALJ:

On April 24, 2012, the matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement and the Board's resolution.

Having reviewed the record and the settlement terms, I **FIND** as follows:

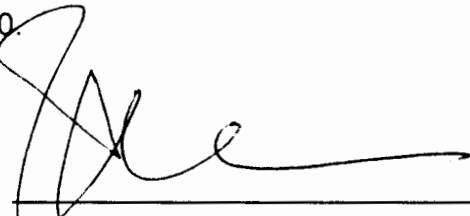
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

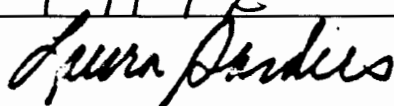
September 7, 2012
DATE


IMRE KARASZEGI, JR., ALJ

Date Received at Agency:

Date Mailed to Parties:
id

SEP 11 2012

9-11-12

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

PURCELL, MULCAHY, O'NEILL & HAWKINS, LLC

One Pluckemin Way

P.O. Box 754

Bedminster, NJ 07921

(908) 658-3800

Attorneys for Respondents, David Brearley Middle High School; Sylvan Hershey; and the Board of Education of the Borough of Kenilworth

Our File: 304-21347-H/RFB

M.B. and L.B. on behalf of minor child, L.B.,
and K.D. and M.D. on behalf of minor child,
K.D.,

Petitioners,

vs.

DAVID BREARLEY MIDDLE-HIGH
SCHOOL; BRIAN LUCIANI, PRINCIPAL;
RENAE BUSH, HIB COUNSELOR;
SYLVAN HERSHEY, SUPERINTENDENT
OF SCHOOLS; and the BOARD OF
EDUCATION OF THE BOROUGH OF
KENILWORTH,

Respondents.

BEFORE THE COMMISSIONER OF
EDUCATION

AGENCY DOCKET NO. 54-3/12
OAL DOCKET NO. EDU

SETTLEMENT AND RELEASE
AGREEMENT

THIS AGREEMENT entered into this day of August 27, 2012 by and between the Kenilworth Board of Education, Brian Luciani, Renae Bush, and Sylvan Hershey ("the Respondents"); and M.B. and L.B. on behalf of minor child, L.B., and K.D. and M.D. on behalf of minor child, K.D ("the Petitioners").

WITNESSETH:

WHEREAS, the parties engaged in settlement negotiations prior to the hearing and as a result of those settlement discussions, the parties have reached an amicable resolution of all the issues set forth in the Petition of Appeal; and

WHEREAS, the Respondents deny that they have individually or collectively violated Petitioners' rights;

NOW, THEREFORE, the parties stipulate and agree as follows:

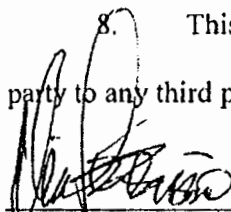
1. All records pertaining to the HIB determination that is the subject of the Petition of Appeal arising out of a Complaint dated October 28, 2011 is hereby expunged from Petitioner L.B and K.D's student record. Written confirmation to the parents of Lauren Bibbo and Kaitline DelPiano from David Brearly Middle High School regarding such expungement will be provided as soon as their records have been expunged;
2. The Respondent, Hershey and Luciani agree to meet with the students involved in the Stay Away Agreement dated December 9, 2011 including Stephen DelPiano by September 30, 2012 to extend same through the 2012-13 school year. This paragraph is contingent upon all the students originally involved and Stephen DelPiano signing this extension of the Stay Away Agreement.
3. In consideration of the Respondent's obligations in this agreement, M.B. and L.B. on behalf of minor child, L.B., and K.D. and M.D. on behalf of minor child, K.D specifically release the Board from any and all claims or causes of action of any kind including but not limited to claims for damages, attorney's fees, expert fees or other expenses, and/or claims under N.J.S.A. 2C:16-1; N.J.S.A. 10:1, et seq.; N.J.S.A. 18A:37-1, et seq.; N.J.S.A. 18A:37-13.1 et seq.; N.J.A.C. 6A:16-1.1 et seq.; N.J.A.C. 16:16-7.1 et seq. N.J.A.C. 6A:16-7.9 or under any regulations or any other State or Federal law, statute, rule or regulation, regardless of the forum for the claims that could have or should have been instituted in this Petition of Appeal; specifically all claims challenging the HIB determination made by Respondents.
4. It is expressly understood that the Board entered into this agreement exclusively to avoid protracted litigation, and that this agreement does not constitute an admission by the Respondents that Petitioners rights were violated in any way.

5. This settlement constitutes the full and complete agreement of the parties and may not be changed or modified without the express written consent of both parties. This agreement is binding upon the parties and their respective heirs, assigns or successors in interest. This agreement shall be governed by and construed in accordance with New Jersey law. This agreement shall be construed as if it were drafted by both parties contemporaneously.

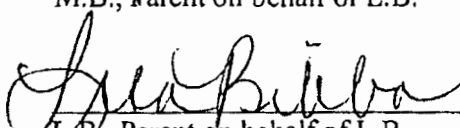
6. This settlement is contingent upon Petitioners withdrawing their Petition of Appeal against the Respondents.

7. This Agreement may be executed in counterparts, and each counterpart shall have the same force and effect as an original and shall constitute an effective, binding agreement on the part of each of the undersigned.

8. This agreement and its terms are confidential and shall not be disclosed by any party to any third parties.



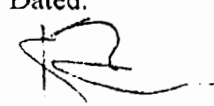
M.B., Parent on behalf of L.B.



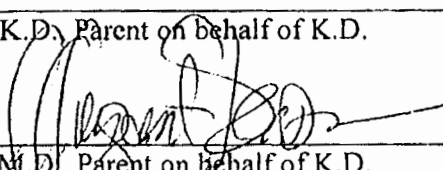
L.B., Parent on behalf of L.B.

8-23-12

Dated:



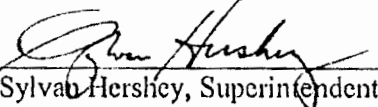
K.D., Parent on behalf of K.D.



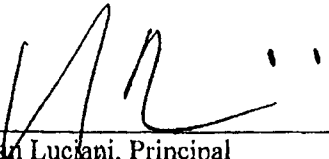
M.D., Parent on behalf of K.D.

8/23/12

Dated:

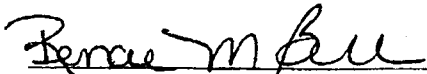

Sylvan Hershey, Superintendent individually and on behalf
of the Kenilworth Board of Education

8/27/2012
Dated:



Brian Luciani, Principal

27. Nov. 12
Dated:



Renae Bush, Supervisor of Guidance and Assessment

8/27/12
Dated:

PURCELL, MULCAHY, O'NEILL & HAWKINS, LLC
COUNSELORS AT LAW

EUGENE M. PURCELL
THOMAS M. MULCAHY
MICHAEL F. O'NEILL *
DAVID M. HAWKINS
SUSAN A. LAWLESS *
MICHAEL J. MCCAFFREY *
ELIZABETH C. FLANAGAN
RITA F. BARONE

VIRGINIA B. MORAN, OF COUNSEL *
ELIZABETH A. O'BRIEN, OF COUNSEL
ROBERT B. HAINES, OF COUNSEL
MARK MATTIA, OF COUNSEL *

ONE PLUCKEMIN WAY
CROSSROADS BUSINESS CENTER
P.O. BOX 754
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ROBERT I. AUFSRESER, LL.M. *
DANIELLE H. BOHLEN
KATHERINE LYONS *
KERRI A. McDOWELL *
DEBORAH ROTHENBERG
ALYSSA K. WEINSTEIN

* CERTIFIED CIVIL TRIAL ATTORNEY
* Also member of NY Bar
* Also member of PA Bar

GRAHAM T. ROSS, OF COUNSEL
HOLLY BAKKE, OF COUNSEL
JOSEPH R. PURCELL, OF COUNSEL

August 28, 2012

Via Facsimile (973) 648-6124 and Regular Mail

The Honorable Imre Karaszegi, Jr., A.L.J.
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

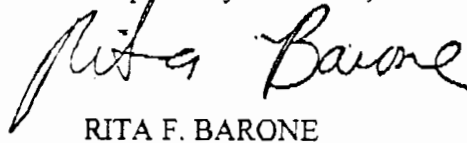
Re: Bibbo and Del Piano v. Luciani, Bush and Kenilworth Board of Education
Docket No. EDU 05420-12
Our File No. (304) 21347-H/RFB

Dear Judge Karaszegi:

Enclosed please find a fully executed copy of the Settlement Agreement and Release in the above captioned matter. The original will follow shortly in the mail. Please advise if Your Honor will be canceling the hearing date scheduled for September 4, 2012 and I will advise all parties.

Thank you for your courtesies.

Respectfully submitted,



RITA F. BARONE

RFB/sf

cc: Michael and Lisa Bibbo (via fax 1-908-272-6361 and regular mail)
Karl and Margaret Del Piano (via regular mail)



State of New Jersey

DEPARTMENT OF EDUCATION

PO Box 500

TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHRISTOPHER D. CERF
Acting Commissioner

October 4, 2012

Andrew Babiak, Esq.
920 West State Street
Trenton, New Jersey 08618

David B. Rubin, Esq.
44 Bridge Street
P.O. Box 4579
Metuchen, New Jersey 08840

Re: Janine Walker Caffrey v. Board of Education of the City of Perth Amboy,
Middlesex County, Agency Dkt. No. 296-9/12.

Dear Counsel,

I have reviewed the materials filed in connection with petitioner Janine Walker Caffrey's (petitioner) motion for emergent relief and request to be immediately reinstated as superintendent of schools. Upon review of the submissions, I find that the Perth Amboy Board of Education's (Board) action on September 22, 2012 – voting to place the petitioner on administrative leave before the Commissioner issued the final decision in the matter of *Janine Walker Caffrey v. Board of Education of the City of Perth Amboy, Middlesex County, Agency Dkt. No.122-5/12, OAL Dkt. No. EDU 07205-12* – was premature, and as such the petitioner shall be immediately reinstated.

Despite the intricate procedural history between the parties, it is undisputed that on May 7, 2012 the Board invoked the Doctrine of Necessity, and the majority of the Board membership voted to put the petitioner on administrative leave. That action is the subject of pending litigation between the parties in the case of *Janine Walker Caffrey v. Board of Education of the City of Perth Amboy, Middlesex County, Agency Dkt. No.122-5/12, OAL Dkt. No. EDU 07205-12*. Although the Administrative Law Judge (ALJ) issued a decision in that matter on September 11, 2012, the final decision has not been issued and as such the underlying issues in dispute remain unresolved. Yet on September 22, 2012, the Board again invoked the Doctrine of Necessity, and again voted to place petitioner on administrative leave.

It is important to recognize that the recommended decision of an ALJ does not have full force and effect when it is issued, as the Commissioner is authorized by law to adopt, modify or reject the Initial Decision. *N.J.S.A. 52:14B-10(c)*. Moreover, the Board's attempt to characterize the September 22, 2012 vote as new action is unpersuasive as it effectively repeated

the action that was taken on May 7, 2012 when the Board invoked the Doctrine of Necessity to place petitioner on administrative leave. Therefore, I find that the Board's action on September 22, 2012 was premature in light of the fact that a final decision has not yet been issued in *Janine Walker Caffrey v. Board of Education of the City of Perth Amboy, Middlesex County, Agency Dkt. No.122-5/12, OAL Dkt. No. EDU 07205-12*.

Accordingly, the petitioner's motion to be immediately reinstated as superintendent of schools is hereby granted. Upon receipt of the Board's answer to the amended petition, the matter will be transmitted to the Office of Administrative Law.¹

IT IS SO ORDERED.²

Sincerely,

A handwritten signature in black ink, appearing to read 'Bari Erlichson', with a long horizontal flourish extending to the right.

Bari Erlichson
Assistant Commissioner³

c: County Superintendent
State Law Library

BE/MH/JKH

Via Facsimile and Regular Delivery

¹ The Amended Petition raised additional issues with respect to the timing of the petitioner's evaluation.

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*).

³ This matter has been delegated to the Assistant Commissioner pursuant to *N.J.S.A. 18A:4-34*.

**State of New Jersey**

DEPARTMENT OF EDUCATION

PO Box 500

TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor**KIM GUADAGNO**
Lt. Governor**CHRISTOPHER D. CERF**
Acting Commissioner

October 5, 2012

Sarah A. Gober, Esq.
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60 Park Place, 16th Floor
Newark, NJ 07102

Dear Counsel:

I have reviewed the papers filed in connection with the Petition for Declaratory Ruling in the matter captioned *Board of Education of the Township of Winfield, Union County v. T.W. and A.W., on behalf of minor children, A.W. and A.W. and Board of Education of the Township of Irvington, Essex County*, Agency Dkt. No. 226-8/12. Therein, petitioner (an approved choice school) seeks a declaration – pursuant to the provisions of *N.J.S.A. 18A:36B-22* and *N.J.S.A. 18A:36B-20*, as well as the statutory and common law obligations of the Board to ensure student safety – that respondent Board of Education of Irvington's decision to provide aid in-lieu-of transportation to respondents T.W. and A.W. for their school choice students, when it is aware that the students are utilizing public transportation to travel to the choice district, constitutes a violation of its duty of care and, further, requiring this Board to find alternate means of transportation for these students. I have determined not to consider this matter as one for declaratory ruling, pursuant to my discretionary authority under *N.J.A.C. 6A:3-2.1(a)*. I find, instead, that this matter – including respondents T.W. and A.W.'s motion to dismiss – should proceed as a Petition of Appeal.

Accordingly, this matter will be transmitted to the Office of Administrative Law for hearing consistent with *N.J.A.C. 6A:3-1.1 et seq.*

Sincerely,

A handwritten signature in black ink, appearing to read "Cerf", written over a horizontal line.

Christopher D. Cerf
Commissioner

CDC/MKD/MH
c: County Superintendent



State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHRISTOPHER D. CERF
Commissioner

October 9, 2012

Edward A. Cridge, Esq.
Mellk O'Neill
10 Nassau Street
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Princeton, NJ 08542

Robert F. Varady, Esq.
LaCorte, Bundy, Varady & Kinsella
989 Bonnel Court
Union, NJ 07083

Dear Counsel:

I have reviewed the submissions filed in connection with the request of the petitioners for Interlocutory Review of the appended September 10, 2012 Order of Administrative Law Judge (ALJ) Richard McGill denying their motion for summary decision in the matter entitled *Arthur Matthews and the Horace Mann Insurance Companies v. Board of Education of the Union County Vocational Technical School, Union County*, OAL Dkt. No. EDU 1666-10, Agency Dkt. No. 9-1/10. Upon my review of the Order and the filings in connection with this interlocutory review request, I have determined to set aside the ALJ's denial of summary decision to petitioners.

Petitioners here are seeking reimbursement for costs and fees expended in the defense and settlement of a civil complaint filed on February 5, 2008 in the Union County Superior Court, Law Division by S.F. – a student at the Union County Vocational Technical School – alleging that petitioner Matthews assaulted her while both were present at school, causing her personal injury.

The ALJ's Order here found that petitioners' claim for reimbursement was not barred by: 1) Res Judicata (at pages 7-10); 2) the Entire Controversy Doctrine (at pages 10-11); 3) the Torts Claims Act (at page 12); *N.J.S.A.* 18A:16-6, even though the monies Matthews seeks to recover were expended by petitioner Horace Mann Insurance Co. (at pages 13-14); and the fact that petitioner Matthews had been accused of assault (at page 14). Notwithstanding these correct determinations, the ALJ denied petitioner's motion for summary decision based on his

perception that there were outstanding genuine issues of material fact. In so determining he stated:

[w]ith respect to the question of whether there is any genuine issue of material fact, the key provision in the Joint Stipulation of Facts from petitioners' perspective is Paragraph 12, which indicates that there was no adjudication of the underlying facts in the civil lawsuit as the matter ended with a settlement. Nonetheless, respondent argues in effect that the scope of the material facts extends beyond the Joint Stipulation of Facts. As respondent points out, it submitted evidential materials in regard to the first set of motions for summary decision indicating that its investigation supported the student's allegations of assault. A written statement by S.F. indicates that Matthews pulled her arm, yanked her out of her seat and then grabbed her neck. Interviews of two other students support this version of the events, but another student directly contradicted this account. It is noteworthy that petitioners have not specifically denied S.F.'s version of the events. Under the circumstances, petitioners have not established that there are no genuine issues of material fact. It follows that petitioners' motion for summary decision must be denied. (ALJ's Order at 6)

The Commissioner finds and concludes that whether the ALJ denied petitioners' summary decision based on a perceived absence of petitioner Matthews' denial of the assault allegations or upon a belief that an adjudication of this issue is required in order for petitioners to establish their entitlement to indemnification, his determination in this regard was incorrect. Initially, materials attached to petitioners' petition of appeal in this matter include petitioner Matthews' Answer to the Civil Complaint filed against him, which unequivocally denied the assault charges against him. Secondly, for the reasons detailed below, petitioners are entitled, *per se*, to reimbursement here. Their entitlement is in no way conditioned on a relitigation which exonerates petitioner Matthews of the allegations against him.

A school employee's entitlement to reimbursement for his legal fees and costs in connection with the defense of a civil matter is specifically controlled by *N.J.S.A.* 18A:16-6, which – in pertinent part – specifies:

Whenever any civil or administrative action or other legal proceeding has been or shall be brought against any person holding any...employment under the jurisdiction of any board of education...for any act or omission arising out of and in the course of the performance of the duties of such...employment...the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom.

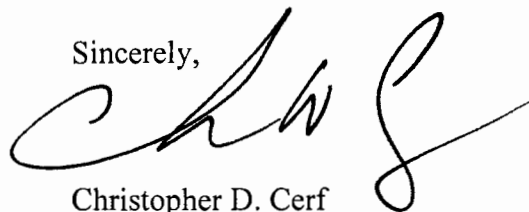
By its very terms, to qualify for the protection afforded under this statute as a consequence of the civil proceeding brought against him, *the conduct triggering the legal action against Mr. Matthews must have 1) arisen out of the performance of the individual's duties, and 2) occurred in the course of performing those duties.* The outcome of the civil litigation addressed by this statute is irrelevant; both successful and unsuccessful litigants are protected as

long as the above two criteria are satisfied. Here, the civil case against Mr. Matthews was settled without admission or adjudication of the alleged facts and there is, therefore, no proof that he engaged in any untoward conduct toward minor child, S.F. The only undisputed conduct existing in this matter is that the alleged events took place at school, during school hours, while Mr. Matthews was engaged in performing his duties as a teacher.¹ Consequently, the alleged behavior on which the civil suit was predicated *arose out of and in the course of the performance of the duties of Mr. Matthews' employment*, (See *Bower v. Board of Education of the City of East Orange*, 149 N.J. 416 (1977)) thereby satisfying the criteria which entitles petitioners to indemnification pursuant to the terms of N.J.S.A. 18A:16-6. Further investigation or subsequent adjudication as to the possible veracity of the underlying charge in additional forums is not contemplated, authorized, or required by this provision. Consequently, as there are no outstanding issues of material fact which would serve to change petitioners' entitlement to indemnification under this statute, I am compelled to grant petitioners' motion for summary decision here.

Notwithstanding the legal inevitability of this result, the Board should be fully aware that if they believe that their own independent investigation supports the student's allegations of assault, there is nothing which would preclude them from filing tenure charges against Mr. Matthews should they so desire.

Accordingly, the September 10, 2012 Order of the ALJ is hereby set aside and summary decision is granted to petitioners. The Board is hereby directed to compensate the petitioners for the reasonable legal fees and costs of defense of the civil suit of S.F. against Mr. Matthews, in accordance with N.J.S.A. 18A:16-6.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. D. Cerf', with a long, sweeping horizontal line extending to the right.

Christopher D. Cerf
Commissioner

CDC/MKD/MH
c: Honorable Richard McGill, ALJ
Deputy Clerk, OAL
Via Facsimile and Regular Mail

¹ It is noted that the parties' Stipulated Facts specify at 3: "The Lawsuit alleged that, on or about February 27, 2006, plaintiff S.F., a student at the Union County Vocational Technical School, was assaulted by Petitioner Matthews, a teacher at the school, while both were present in the School during school hours", and at 12: "There was never any civil or criminal adjudication or admission by Petitioner Matthews, that he assaulted or otherwise harmed S.F. S.F.'s allegations were never submitted to a trier of fact and the case settled without an admission of liability or wrongdoing by Mr. Matthews."



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 01666-10

AGENCY DKT. NO. 9-1/10

**ARTHUR MATTHEWS AND THE HORACE MANN
INSURANCE COMPANY,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE UNION COUNTY
VOCATIONAL TECHNICAL SCHOOL, UNION
COUNTY,**

Respondent.

Edward A. Cridge, Esq., for petitioners (Wills, O'Neill & Mellk, attorneys)

Robert F. Varady, Esq., for respondent (LaCorte, Bundy, Varady & Kinsella,
attorneys)

BEFORE RICHARD McGILL, ALJ:

Arthur Matthews and the Horace Mann Insurance Company ("petitioners") challenge a determination by the Board of Education of the Union County Vocational Technical School ("respondent") to deny their request for reimbursement for the costs and fees expended in the defense and settlement of a civil law suit which alleged that Matthews assaulted a student, F.S., at respondent's as Union County Vocational Technical School. Both parties now move for summary decision.

PROCEDURAL HISTORY

The petition in this matter was filed with the Commissioner of Education on January 15, 2010, invoking the Commissioner's authority to hear and determine controversies arising under the school laws pursuant to N.J.S.A. 18A:6-9. On February 3, 2010, respondent filed an Answer to the petition. The matter was transmitted to the Office of Administrative Law on February 16, 2010, for determination as a contested case.

Prior to the filing of the currently pending cross-motions for summary decision, petitioners filed a motion for summary decision on March 9, 2010. Respondent then filed a motion for summary decision on March 24, 2010, and subsequently responsive papers to petitioners' motion.

Three Orders were issued on August 26, 2010. One Order denied petitioners' motion for summary decision, because there were genuine issues of material fact concerning an incident on or about February 27, 2006. The second Order denied respondent's motion for summary decision, because there were genuine issues of material fact concerning the incident on or about February 27, 2006. The third Order denied respondent's motion to dismiss the petition in this matter as to the Horace Mann Insurance Company.

By letter dated September 1, 2010, petitioners sought interlocutory review of the denial of their motion for summary decision. The request was denied by the Acting Commissioner by letter dated September 13, 2010.

On October 26, 2010, a substitution of attorney was filed for respondent. After a hearing was scheduled and adjourned on two occasions, the parties agreed to submit cross-motions for summary decision based upon stipulated facts.

Petitioners' and respondent's motions for summary decisions were received on November 1, 2011, and October 28, 2011, respectively. Respondent filed responsive

papers on November 14, 2011. Petitioners did not file a response, but they did submit decisions in other cases as precedent by letters dated December 22, 2011, and April 24, 2012. In response to the undersigned's request, the parties submitted supplemental briefs on or about July 24, 2012.

MOTIONS FOR SUMMARY DECISION

A. Legal Standard

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to R. 4:46-2. Summary judgment "is designed to provide a prompt, businesslike and inexpensive method" to dispose of actions which do not present any genuine issue of material fact. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). If the opposing party offers only facts which are immaterial or insubstantial in nature, these circumstances should not defeat a motion for summary judgment. Judson v. Peoples Bank & Trust Co. of Westfield, Id., at 75. Although the pleadings may raise a factual issue, summary judgment procedure pierces the allegations in the pleadings, where the other papers show the absence of any genuine issue of material fact. Ibid. Excessive caution which would undercut the purposes of a motion for summary judgment should be avoided. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 65 (1980).

In determining whether there exists a genuine issue as to a material fact, the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of America, 142 N.J., 520, 523 (1995).

B. Stipulated Facts

The parties submitted a Joint Stipulation of Facts, which provides as follows:

1. During all relevant times hereto, Petitioner Arthur Matthews was employed as a tenured teacher by Respondent.
2. On February 5, 2008, Petitioner Matthews was named as a Defendant in a lawsuit captioned [S.F.] v. Arthur Matthews and Union County Board of Education, filed in the Union County Superior Court, Law Division, Docket No. 0435-08 (hereinafter the "Lawsuit.")
3. The Lawsuit alleged that, on or about February 27, 2006, plaintiff S.F., a student at the Union County Vocational Technical School, was assaulted by Petitioner Matthews, a teacher at the School, while both were present in the School during school hours.
4. By letter of April 8, 2008, Respondent's Insurance Carrier, Zurich, declined to provide Petitioner Matthews with defense coverage in the Lawsuit. Pursuant to an insurance agreement, Petitioner Horace Mann Insurance Company assigned Arnold M. Mellk, Esq., of the law firm of Wills, O'Neill & Mellk to defend Petitioner Matthews, and an Answer was accordingly filed on his behalf.
5. Petitioner Matthews was provided with a defense by Petitioner Horace Mann Insurance Company pursuant to a liability policy under which Petitioner Matthews, as a member of the New Jersey Education Association, constituted an insured.
6. On December 8, 2008, the Hon. Lisa F. Chrystal, J.S.C., granted Summary Judgment in favor of the defendant Union County Board of Education. The Order stated that:

summary judgment be and hereby is entered on behalf of defendants, Union County Vocational Technical School i/p/a Union County Board of Education, and against plaintiff, [S.F.], dismissing the Complaint and any crossclaims against defendants, Union County Vocational Technical School i/p/a Union County Board of Education with prejudice . . .

7. On September 21, 2009, plaintiff and defendant Arthur Matthews settled the Lawsuit for \$10,000.00. Petitioner Matthews did not contribute to this settlement amount, which was paid entirely by Petitioner Horace Mann Insurance Company.
8. Petitioner Matthews did not pay counsel fees to the attorneys representing him in the Lawsuit.
9. On October 16, 2009, a Stipulation of Dismissal with Prejudice was filed with the Court as to Defendant Matthews.
10. By Letter of November 18, 2009, Petitioners requested that Respondent reimburse them for the costs and fees expended in the defense of Petitioners and settlement of the Lawsuit pursuant to N.J.S.A. 18A:16-6.
11. By letter of November 24, 2009, Respondent denied Petitioners' request for reimbursement.
12. There was never any civil or criminal adjudication or admission by Petitioner Matthews, that he assaulted or otherwise harmed S.F. S.F.'s allegations were never submitted to a trier of fact and the case settled without an admission of liability or wrongdoing by Mr. Matthews.
13. All of the costs and fees sought by Petitioners herein were expended by the Horace Mann Insurance Company.

It is noteworthy that the Joint Stipulation of Facts does not include any details as to the incident on or about February 27, 2006, that precipitated the lawsuit.

C. Applicable Statute

The applicable statute is N.J.S.A. 18A:16-6, which reads in pertinent part as follows:

Whenever any civil or administrative action or other legal proceeding has been . . . brought against any person holding . . . employment under the jurisdiction of any board of education, . . . for any act or omission arising out of and in

the course of the performance of the duties of such . . . employment . . ., the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom; . . . [N.J.S.A. 18A:16-6 (emphasis added).]

D. Petitioners' Motion

In order to prevail on a motion for summary decision, petitioners must establish that there is no genuine issue of material fact, that any pertinent act or omission arises out of and in the course of the performance of the duties of Matthews' employment and that respondent's other legal arguments are without merit. Petitioners' previous motion for summary decision was denied, because there were genuine issues of material fact. The only real difference from the previous motion is that the parties have submitted a Joint Stipulation of Facts.

With respect to the question whether there is any genuine issue of material fact, the key provision of the Joint Stipulation of Facts from petitioners' perspective is Paragraph 12, which indicates that there was no adjudication of the underlying facts in the civil lawsuit as the matter ended with a settlement. Nonetheless, respondent argues in effect that the scope of the material facts extends beyond the Joint Stipulation of Facts. As respondent points out, it submitted evidential materials in regard to the first set of motions for summary decision indicating that its investigation supported the student's allegations of assault. A written statement by S.F. indicates that Matthews pulled her arm, yanked her out of her seat and then grabbed her neck. Interviews of two other students support this version of the events, but another student directly contradicted this account. It is noteworthy that petitioners have not specifically denied S.F.'s version of the events. Under the circumstances, petitioners have not established that there are no genuine issues of material fact. It follows that petitioners' motion for summary decision must be denied.

E. Respondent's Motion

To a large extent, respondent's current motion is based upon legal arguments that are not dependent on a determination that Matthews' actions did not arise out of and in the course of the performance of the duties of his employment. These legal arguments will be considered next.

1. Res Judicata

Respondent contends that petitioners' claim for reimbursement has already been dismissed with prejudice by the Superior Court of New Jersey in the civil action by the student against Matthews and that the doctrine of res judicata bars petitioners from re-litigating the matter. In support of this argument, respondent set forth the facts in regard to the civil action in Superior Court as follows:

On February 5, 2008, [S.F.], filed a complaint against Arthur Matthews and the Union County Vo-Tech Board of Education. In her complaint, the plaintiff alleged Mr. Matthews, a teacher employed by the Board of Education, assaulted her causing personal injury. See, Exhibit A. Union County Vo-Tech Board of Education forwarded the complaint to their general liability insurance carrier, Zurich American Insurance Company.

On April 8, 2008, the Zurich Company sent a letter to Mr. Matthews advising him that under the terms of their policy there was no coverage afforded him and they would not defend or indemnify him in regard to the [F.] lawsuit. See, Exhibit B.

Mr. Matthews obtained insurance for the aforementioned lawsuit through the N.J.E.A. and its general liability carrier, the Horace Mann Insurance Company. That insurance company retained the law firm of Wills, O'Neill & Mellk, to represent Mr. Matthews and its interest. This is the same law firm that now represents both Mr. Matthews and Horace Mann Insurance Company in the Administrative Law Action.

On September 24, 2008, the firm of Wills, O'Neill & Melik filed an answer to plaintiff's complaint in the Superior Court action. Included in that answer was a cross-claim made by Mr. Matthews against the Union County Vo-Tech Board of Education. That cross-claim alleged:

1. That the Union County Vo-Tech Board of Education was liable for all claims asserted by plaintiff in the action;
2. That he [Matthews] should be awarded judgment on its cross-claim against Union County Vo-Tech Board of Education including attorney's fees and costs of the action as provided for under N.J.S.A. 18A:16-6. See, Exhibit C.

During the course of the Superior Court litigation defendant, Union County Vo-Tech, filed a motion for summary judgment requesting that the Court dismiss the plaintiff's complaint. Included in that motion was a second request that the Court dismiss Mr. Matthews' cross-claim against the Board. On December 8, 2008, the Honorable Lisa F. Chrystal, J.S.C. entered an Order dismissing plaintiff's complaint and all cross-claims against Union County Vo-Tech with prejudice. See, Exhibit D. Accompanying the Order was a written opinion by Judge Chrystal. See, Exhibit E.

The attorneys for Mr. Matthews were served with the above motion, had an opportunity to oppose the dismissal of the cross-claim and/or join the motion. Instead they chose not to respond to the motion and allowed the papers to be submitted unopposed by either Matthews, Horace Mann Insurance Company and the plaintiff

Subsequent to the dismissal of the complaint and cross-claim against Union County Vo-Tech the Horace Mann Company through counsel agreed to pay \$10,000.00 to settle the case. A Stipulation of Dismissal with prejudice signed by both plaintiff's counsel and Mr. Matthews' attorneys was filed on October 16, 2009. See, Exhibit F. Then defendant, Matthews, now petitioner, Matthews, now brings a claim in the Administrative Law Court for reimbursement identical to the cross-claim he raised against the Board of Education in the Superior Court lawsuit.

Preliminarily, it must be recognized that the applicability of court-made procedural tools is not automatic in an administrative proceeding but rather depends upon the nature of the agency's responsibilities toward the subject matter in controversy as well as the particular parties to the dispute. Hackensack v. Winner, 82 N.J. 1, 30 (1930). Moreover, court-made doctrines such as res judicata, collateral estoppel and the single controversy rule must be applied prudently and selectively in administrative proceedings. Id., at 31.

Under the doctrine of res judicata, when a controversy between parties is once fairly litigated and determined, it is no longer open to relitigation. Lubliner v. Board of Alcoholic Beverage Control, 33 N.J. 428, 435 (1960). Where the second action is no more than a repetition of the first, the first lawsuit stands as a barrier to the second; the rule precludes parties from relitigating substantially the same cause of action. Culver v. Ins. Co. of N. Am., 115 N.J. 451, 460 (1989). A cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by these parties or their privies in a new proceeding. Roberts v. Goldner, 79 N.J. 82, 85 (1979). A determination on the merits is not limited to adjudications following a full trial of the substantive issues. Velasquez v. Franz, 123 N.J. 498, 506 (1991). When an issue is actually determined on a motion for summary decision, the doctrine of res judicata will be applicable. Id., at 506-07. The purpose of the doctrine of res judicata is to provide finality and repose for the litigating parties, to avoid the burdens of relitigation for the parties and the court, and to maintain judicial integrity by minimizing the possibility of inconsistent decisions regarding the same matter. Id., at 505.

Here, respondent filed a motion for summary decision in the civil suit in Superior Court requesting dismissal of the complaint as to respondent and the cross-claim against respondent. The motion was unopposed, and the court entered an Order dismissing the complaint and the cross-claim with prejudice. A dismissal with prejudice is ordinarily indicative of a determination on the merits.

Nonetheless, the fact is that the Court's letter opinion discusses the dismissal of the plaintiff's complaint but does not even mention the cross-claims. Evidently, petitioners viewed the situation as simply letting respondent out of the civil suit. Under the circumstances, Matthews' request for reimbursement was not fully and fairly litigated and actually determined on the merits. It follows that the doctrine of res judicata should not be applied in this situation.

2. Entire Controversy Doctrine

Respondent cites Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310 (1995) for the proposition that the objectives behind the entire controversy doctrine are three fold: (1) to encourage the comprehensive and conclusive determination of a legal controversy; (2) to achieve party fairness, including both parties before the court as well as prospective parties; and (3) to promote judicial economy and efficiency by avoiding fragmented, multiple and duplicative litigation. Id., at 322. In Mystic Isle, a party ignored its obligation to assert claims against potential defendants that could have been named in one proceeding. When the party filed claims against those defendants in a subsequent proceeding, the matter was dismissed for failure to file the claim in the original proceeding. Respondent reasons that petitioners should have opposed the motion for summary decision in the civil action in Superior Court such that all claims would have been decided in a single proceeding. Further, since petitioners failed to do so, the pending proceeding should be dismissed.

Respondent's argument is unpersuasive for several reasons. First, Mystic Isle represented the high-water mark for the entire controversy doctrine. Over time, the doctrine had been expanded to include joinder of defenses, affirmative claims, counterclaims and cross-claims as well as parties in a single controversy. Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. at 323. Additionally, a court was required to adjudicate both equitable and legal issues arising from one underlying transaction. Id., at 322. But since that time, the consequences of failure to comply with the single controversy rule have receded substantially.

In 1998, N.J. Court Rule 4:5-1(b)(2) was amended to require a party in its first pleading to provide notice of other actions and potentially liable persons. Further, if a party fails to comply with its obligations under this rule, the court may impose an appropriate sanction including dismissal of a successive action. The amended rule states as follows: "A successive action shall not, however, be dismissed for failure of compliance with this rule unless the failure was inexcusable and the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action."

For example, in Kent Motor Cars, Inc., v. Reynolds, 207 N.J. 428 (2011), our Supreme Court observed that there is a general preference for addressing disputes on the merits and that dismissal is reserved for matters in which lesser sanctions are inadequate. Id., at 447. In that case, the Court determined that the violation of the Rule was inexcusable and that there was substantial prejudice with respect to one claim. Nonetheless, the Court limited the sanction to dismissal of the one claim where there was substantial prejudice, with the trial court to consider lesser sanctions as to the other claim.

Here, respondent has not demonstrated any prejudice from consideration of the claim for reimbursement in this forum. In addition, petitioners' action was excusable in that this is actually the appropriate forum in which to consider a claim for reimbursement under N.J.S.A. 18A:16-6. As our Supreme Court noted in Bower v. Board of Education of East Orange, 149 N.J. 416 (1997), which involved a claim for reimbursement under N.J.S.A. 18A:16-6 and N.J.S.A. 18A:16-6.1, the Law Division action should have been dismissed because the Commissioner of Education has primary jurisdiction to hear and determine all controversies arising under the school laws pursuant to N.J.S.A. 18A:6-9. Thus, the effect of petitioners' action is that the dispute is now in the correct forum. It follows that the petition in this matter should not be dismissed on the basis of the entire controversy doctrine.

3. Tort Claims Act

Respondent maintains that petitioners' claim for reimbursement arises out of an alleged tort which led to a civil action by a student against Matthews and respondent. The civil action was dismissed as to respondent, and petitioners settled the case for \$10,000. Petitioners now seek reimbursement for the \$10,000 plus attorney's fees. Matthews did not pay the cost of the settlement himself. Rather, the Horace Mann Insurance Company paid the entire amount. Respondent relies on N.J.S.A. 59:9-2(e), which states that "no insurer or other persons shall be entitled to bring an action under a subrogation provision in an insurance contract against a public entity or public employee." Respondent contends that the Horace Mann Insurance Company is seeking to recover for a contractual obligation which they owed to Matthews in the tort lawsuit. In other words, the Horace Mann Insurance Company brings this action under a subrogation provision, which is barred by N.J.S.A. 59:9-2(e). Respondent reasons that this action is barred by the Tort Claims Act and that therefore petitioners' application should be denied.

The New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to -12.3, modified the doctrine of sovereign immunity and created limited situations in which parties could assert tort claims against public entities. Feinberg v. State D.E.P., 137 N.J. 126, 133 (1994). The TCA has no effect when a claim against a public entity does not arise from tort liability. Owens v. Feigin, 194 N.J. 607, 613 (2008).

Here, petitioners are not pursuing a tort claim against respondent; rather, petitioners seek reimbursement pursuant to a specific statute, N.J.S.A. 18A:16-6, which provides for indemnification. It follows that the TCA has no bearing on this proceeding. Therefore, respondent's contention that the petition should be dismissed on the basis of the TCA is without merit.

4. N.J.S.A. 18A:16-6

Respondent advances two related arguments based upon the specific language of N.J.S.A. 18A:16-6, which is quoted again with different emphasis as follows:

Whenever any civil or administrative action or other legal proceeding has been or shall be brought against any person holding any office, position or employment under the jurisdiction of any board of education, . . . for any act or omission arising out of and in the course of the performance of the duties of such office, position, employment or student teaching or other assignment to professional field experience, the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom;

. . . .

Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses. [Emphasis supplied.]

Respondent contends that the word "person" in N.J.S.A. 18A:16-6 refers only to a natural person such as Matthews and not to an entity such as an insurance company. Respondent reasons that since Matthews did not actually incur any costs, he cannot recover anything from respondent. Further, since the Horace Mann Insurance Company is not a person within the meaning of N.J.S.A. 18A:16-6, it cannot be reimbursed for any costs which it may have incurred in regard to the civil action in Superior Court.

Respondent's argument is unpersuasive for two reasons. First, respondent's argument that Matthews does not have a financial stake in the matter was previously rejected in Ray Waters and the Horace Mann Insurance Company v. Board of Education of the Township of Toms River, EDU 02611-10, Initial Decision (April 4, 2011), <http://njlaw.rutgers.edu/collections/oal/>. Further, remedial legislation should be construed liberally to achieve its beneficent purposes. Teichler v. Curtiss-Wright Corp.,

24 N.J. 585, 592 (1957). It is evident that the intent of N.J.S.A. 18A:16-6 is for the board of education to defray the costs of defending civil actions that meet the standards set forth therein. Any interpretation that places the burden of defraying these costs on anyone other than the board of education is plainly contrary to the intent of N.J.S.A. 18A:16-6. It follows that respondent's argument is without merit.

5. Assault

Respondent argues that petitioners are not entitled to reimbursement, because the provisions of N.J.S.A. 18A:16-6 do not apply to Matthews' assault on a student. There are two aspects to respondent's argument. First, respondent maintains that the alleged conduct, an assault by petitioner on a student, could not arise out of and in the course of the performance of respondent's duties as a teacher within the meaning of N.J.S.A. 18A:16-6. The difficulty with this argument is that it is settled that indemnification cannot be denied merely because an alleged act, if it actually occurred, would be beyond the scope of a teacher's duties. Bower v. Board of Education of East Orange, 149 N.J. at 431. It follows that respondent's argument is without merit.

Finally, respondent maintains that the facts are established by student statements that Matthews grabbed a student by the neck. Respondent fails to mention that one student specifically stated that Matthews did not grab anyone. As previously determined, there are genuine issues of material fact in regard to the incident on February 27, 2006. It follows that respondent's motion for summary decision must be denied.

Despite the denial of the motions for summary decision, several important legal issues have been decided herein. These determinations will be binding for purposes of this proceeding, as if they were decided on a motion in limine.

Accordingly, it is **ORDERED** that:

1. Petitioner's motion for summary decision is denied.

2. Respondent's motion for summary decision is denied.

This matter may be reviewed by the Commissioner of Education, either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case pursuant to N.J.A.C. 1:1-18.6.

Sept. 10, 2011
DATE

ljb

Richard McGill
RICHARD MCGILL, ALJ

BHANUMATI DESAI, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT : DECISION
OF THE CITY OF PATERSON, :
PASSAIC COUNTY, :
RESPONDENT. :
_____ :

SYNOPSIS

Petitioner, a retired teacher formerly employed by the respondent school district, sought restoration of sick leave relative to a fall she sustained on January 30, 2004 while in the course of her employment, pursuant to *N.J.S.A.* 18A:30-2.1. Petitioner alleges that the fall resulted in neck problems in addition to the back, ankle, and knee injuries initially diagnosed at the time of her work-related accident. The matter was placed on the inactive list pending settlement of a related worker's compensation case. On January 6, 2010, petitioner reached a settlement with the school district regarding her worker's compensation claim. Petitioner then sought restoration of 77.5 sick days used in relation to her neck issues.

The ALJ found that: the petitioner did not waive her sick-leave claim in the worker's compensation settlement; accordingly, the Commissioner retains jurisdiction to determine whether the district should reimburse her sick time; to prevail in her claim, however, petitioner must establish – by a preponderance of medical evidence – a link between her work injury and the neck problems she experienced; according to the medical records, petitioner did not complain at the time of the fall that her neck sustained injury; petitioner failed to establish that her neck injury was work-related because the credible medical evidence was not able to conclude – because of the lapse of time between petitioner's fall and her subsequent diagnosis of neck injury – that petitioner's neck pain was caused by the fall on January 30, 2004. Accordingly, the ALJ concluded that petitioner is not entitled to reimbursement of sick time.

The Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 12, 2012

OAL DKT. NO. EDU 7168-04
AGENCY DKT. NO. 149-4/04

BHANUMATI DESAI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON,	:	
PASSAIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto – submitted in accordance with *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

Exceptions of the petitioner recast and reiterate her arguments advanced before the Administrative Law Judge (ALJ) below, again maintaining that her continued absence after April 18, 2004 was directly attributable to the injuries she sustained at school on January 30, 2004 – thus entitling her to benefits pursuant to *N.J.S.A.* 18A: 30-2.1 – and she, therefore, urges the Commissioner to overturn the Initial Decision. As all of petitioner's proffered arguments in this regard were fully considered and addressed in the ALJ's decision, they will not be revisited here.

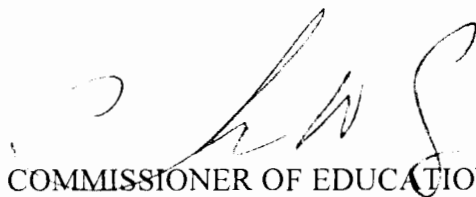
Upon review and full consideration, the Commissioner initially concurs with the ALJ that petitioner's settlement of her two workers' compensation claims without any findings on the underlying merits does not bar her from litigating a sick-leave injury claim, pursuant to *N.J.S.A.* 18A:30-2.1, before the Commissioner as petitioner did not knowingly and intelligently

waive her rights to pursue this school law claim when she accepted settlement of her workers' compensation claims. See *Patsy N. Marino v. Willingboro Township Board of Education, Burlington Co.*, Commissioner's Decision No. 111-99, decided by the April 13, 1999, *rev'd*. State Board of Education, March 1, 2000; *Darienne T. Franks v. Board of Education of the City of East Orange, Essex County*, Commissioner's Decision No. 318-01, decided September 20, 2001.

Notwithstanding this, however, under such circumstances, to prevail on her instant sick-leave injury claim, petitioner must demonstrate – by a preponderance of the competent and credible medical evidence – a causal link between her injuries and her work duties. See *Laffey v. City of Jersey City*, 289 N.J. Super. 292 (App. Div. 1996). For the reasons clearly presented on pages 8-10 of the Initial Decision, the Commissioner is in full agreement with the ALJ that petitioner has failed to sustain her burden of establishing – by demonstrable objective medical evidence – a causal connection between her neck pain and any accident arising out of or in the course of her employment so as to entitle her to sick-leave benefits under N.J.S.A. 18A:30-2.1 for the period April 19, 2004 through January 1, 2005.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 10/12/12

Date of Mailing: 10/15/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 07168-04

AGENCY DKT. NO. 149-4/04

**IN THE MATTER OF BHANUMATI DESAI,
PATERSON STATE-OPERATED
SCHOOL DISTRICT.**

Gregory T. Syrek, Esq., for petitioner (Bucceri & Pincus, attorneys)

Richard J. Turano, Esq., for respondent (DeYoe, Heissenbuttel & Buglione,
attorneys)

Record Closed: July 20, 2012

Decided: August 31, 2012

BEFORE **JOANN LASALA CANDIDO, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner seeks the reinstatement of sick days deducted by the Paterson State-Operated School District (respondent or District), for whom she was employed as a teacher, relative to a fall she sustained on January 30, 2004, while in the course of her employment. On July 6, 2004, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. Since petitioner had two workers' compensation claims pending (one for the fall on January 30, 2004, and another claim for a different date), the Honorable Thomas Clancy placed this matter on the inactive list until the

resolution of the workers' compensation claims. On or about January 6, 2010, both claims were settled. Accordingly, the matter was restored to the calendar and a hearing was set for February 11, 2011. This date was adjourned to afford the parties an opportunity to file dispositive motions. On June 08, 2011, respondent filed a motion seeking to dismiss the petition before the OAL. On June 28, 2011, petitioner submitted a brief in opposition. On July 13, 2011, oral argument on the motion was heard by the undersigned. The motion was denied.

After adjournment requests by petitioner, the matter was heard on June 28, 2012. Post-hearing briefs were submitted on July 20, 2012, on which date the record closed.

FINDING OF FACTS

Bhanumati Desai (petitioner) was employed by Paterson State-Operated School District as a biology teacher from September 1979 until her retirement on January 1, 2005.

1. On January 30, 2004, petitioner suffered a work-related injury during the course of her employ with respondent. She also suffered a prior injury in May 2003, hurting her leg.
2. On January 30, 2004, during the morning school hours when the bell rang, two students inadvertently pushed petitioner to the ground and she fell on her belly.
3. Petitioner was taken to Barnert Occupational Health Center and x-rays were taken. Physical therapy was prescribed and petitioner was released from the hospital on the same day.
4. On January 30, 2004, petitioner completed an initial "Workers' Compensation Treatment Authorization." (P-1.) In the initial report, under "employee complaints" she wrote "[p]ain left lower back, both lower extremities – left hip." There was no complaint of neck pain.
5. On February 16, 2004, Dr. Schultz of Garden State Orthopaedic Associates diagnosed petitioner. Dr. Schultz noted that she "suffered an injury to her left side and is primarily complaining of occasional numbness in her legs and lower

- back pain.” Petitioner could return to work on February 23, 2004. No complaint from petitioner of neck pain.
6. On March 8, 2004, petitioner visited Drs. Ben-Yishay and Jonathan Lester, complaining for the first time about neck pain.
 7. Dr. Ben-Yishay noted, “she was knocked down at school on January 30th landing on her left side. She had pain in her neck, left arm and shoulder, low back, and leg at that time.” (P 13.)
 8. On March 8, 2004, Dr. Lester signed two physician’s notes. The first note indicated that petitioner was able to work, could stand and sit as tolerated, and could not lift objects heavier than 2.5 pounds. The second note on the same date indicated that petitioner was unable to work until her next evaluation, on March 15th.
 9. On March 15, 2004, Dr. Lester signed a physician’s note, which indicated that petitioner could not work “until further notice,” and prescribed Percocet.
 10. On March 25, Dr. Ben-Yishay amended his earlier statements regarding the cause of petitioner’s neck pain stating he cannot determine with certainty the correlation between petitioner’s neck complaint and the incident. Dr. Ben-Yishay concluded, “[u]nless the patient has a very clear explanation as to why she did not complain of neck pain, or if there was simply a failure of documentation by Dr. Schultz, then I would be forced to conclude that the cervical disc pathology is not clearly work related”
 11. Between January 30, 2004, and April 8, 2004, the District did not charge petitioner sick time for her absences and was paid temporary disability.
 12. On April 19, 2004, when school resumed after a spring break, the District began charging petitioner sick days for her absences.
 13. Between April 19, 2004, and the end of the school year, the District charged the petitioner forty-eight sick days.
 14. When petitioner failed to return to work in September, the District charged the petitioner another thirty-nine and one-half sick days, for a total of eighty-seven and one-half sick days.
 15. When the petitioner ran out of sick days on November 1, 2004, the District charged petitioner five personal days, and then considered her on unpaid leave.

- She took leave days from November 15, 2004, until her retirement. She retired on January 1, 2005.
16. On or about April 16, 2004, petitioner filed a petition with the Commissioner of Education, seeking restoration of sick days, pursuant to N.J.S.A. 18A:30-2.1.
 17. On July 6, 2004, the matter was transmitted the Office of Administrative Law (OAL) and assigned docket number EDU 7168-04.
 18. Around the same time, petitioner filed two (2) workers' compensation claims—C.P. 2004-11857 and C.P. 2004-13961.
 19. On or about January 6, 2010, petitioner's workers' compensation claims were settled, in accordance with N.J.S.A. 34:15-20.
 20. In addition, the Orders approving settlement provided that "this is a lump sum settlement between the parties . . . pursuant to N.J.S.A. 34:15-20 which has the effect of a dismissal with prejudice, being final as to all rights and benefits of the petitioner and is a complete and absolute surrender and release of all rights arising out of this/these claims." Similar language is found in the above-quoted statute.
 21. EDU 7168-04 was subsequently restored to the calendar and a hearing was set for February 11, 2011.
 22. On June 08, 2011, respondent filed a motion seeking to dismiss the petition before the OAL.
 23. On June 28, 2011, petitioner submitted a brief in opposition.
 24. On July 13, 2011, oral argument on the motion was heard by the undersigned.
 25. The motion was denied and the hearing was held on June 28, 2012. Briefs were submitted on July 21, 2012, on which date the record closed.

ISSUE

The issue presented is whether petitioner's settlement agreement before the Division of Workers' Compensation precludes her from bringing a claim for lost sick time before the Commissioner of Education.

TESTIMONY

Petitioner testified on her own behalf. On January 30, 2004, during the morning school hours when the bell rang, two students inadvertently pushed her to the ground and she fell on her belly. Her neck, back, shoulder, and right ankle hurt but mostly her ankle. Petitioner was taken to Barnert Hospital and x-rays were taken. She stated that she sprained her ankle. (P-2, P-3, P-4; R-2.) Physical therapy was prescribed and she was released.

On the same day, petitioner completed an initial, "Workers Compensation Treatment Authorization." (P-1.) In the initial report, under "employee complaints" she wrote "[p]ain left lower back, both lower extremities – left hip." (R-2.) Petitioner did not write that she complained of neck pain although she states she experienced neck and shoulder pain which she attributes to the incident of January 30, 2004. She did not recall exactly what she told the hospital at that time.

On February 16, 2004, Dr. Schultz of Garden State Orthopaedic Associates diagnosed petitioner. He noted that petitioner "suffered an injury to her left side and is primarily complaining of occasional numbness in her legs and lower back pain." (P-5.) Physical therapy was continued and an MRI of her cervical spine was prescribed. Petitioner claims she complained to Dr. Schultz about neck pain but does not recall what she specifically told the doctor. He was the first physician to order an MRI. He opined that petitioner could return to work on February 23, 2004.

On March 8, 2004, petitioner visited Drs. Ben-Yishay and Jonathan Lester. (P-6.) Petitioner was diagnosed with left-cervical HNP (herniated nucleus pulposus) in her neck. (P-6.) It was recommended that she have spinal surgery. She chose not to have surgery. This was the first time she complained of a stiff neck. In a report, Dr. Ben-Yishay noted "she was knocked down at school on January 30th landing on her left side. She had pain in her neck, left arm and shoulder, low back, and leg at that time." (P-13.) On March 8, 2004, Dr. Lester signed two physician's notes. (P-7, P-8.) The first note indicated that petitioner was able to work, could stand and sit as tolerated, and could not lift objects heavier than 2.5 pounds. (P 7.) The second note of the same date

indicated that petitioner was unable to work until her next evaluation, scheduled for March 15. (P-8.) On March 15, 2004, Dr. Lester signed a physician's note, which indicated that petitioner could not work "until further notice," and prescribed Percocet. (P-9.)

On March 23, petitioner followed up with Dr. Ben-Yishay. (P-12.) He advised petitioner to follow up with Dr. Rajaraman, a neurosurgeon, and Dr. Ben-Yishay discussed surgical options with her. On March 25th, Dr. Ben-Yishay amended his earlier statements regarding the cause of petitioner's neck pain stating he could not determine with certainty the correlation between petitioner's neck complaint and the incident. (P-14.)

On April 7, 2005, the Board of Trustees of the Teachers' Pension and Annuity Fund granted petitioner a service retirement, effective January 1, 2005. (P-18.)

Between January 30, 2004, and April 8, 2004, the District did not charge petitioner sick time for her absences. (P-19.) She was paid temporary disability. On April 19, 2004, when school resumed after a spring break, the District began charging petitioner sick days for her absences. Between April 19, 2004, and the end of the school year, the District charged the petitioner forty-eight sick days. When petitioner failed to return to work in September, the District charged the petitioner another thirty-nine and one-half sick days, for a total of eighty-seven and one-half sick days. When the petitioner ran out of sick days on November 1, 2004, the District charged petitioner five personal days, and then considered her status as an unpaid leave of absence. She took leave days from November 15, 2004, until her retirement on January 1, 2005.

On January 6, 2010, petitioner reached a settlement with the District regarding her worker's compensation claims. (P-20.) Under the settlement, petitioner received a lump-sum payment of \$30,000 for the 2004 incident and \$14,000 for an incident that occurred in 2003. She is seeking 77.5 sick days.

No other witnesses were offered on behalf of petitioner.

No witnesses testified on behalf of respondent.

LEGAL ANALYSIS

Under the school laws, an employee receives full salary without losing sick time if the employee is absent “as a result of a personal injury caused by an accident arising out of and in the course of his employment” N.J.S.A. 18A:30-2.1(a). This language mirrors language in the workers’ compensation statute, which applies to “accident[s] arising out of and in the course of employment” N.J.S.A. 34:15-7. The identical wording of the two statutes indicates that the New Jersey Legislature “intended the phrase to have the same construction and consequence in both statutes.” Theodore v. Dover Bd. of Educ., 183 N.J. Super. 407, 416 (App. Div. 1982). The purpose of the sick leave provision “is to complement workers’ compensation benefits for a strictly limited time period” Ibid.

Because the school law statute supplements the worker’s compensation statute, the sick leave provision “contemplates a prior determination of a compensable injury by the compensation court before consideration by the Commissioner of the eligibility of the injured employee for the additional benefits provided by the [sick leave] statute.” Forgash v. Lower Camden County Sch., 208 N.J. Super. 461, 466-467 (App.Div. 1985). However, “a settlement of the compensation claim without any findings on the underlying merits does not necessarily bar a petitioner from litigating a sick-leave injury claim before the Commissioner.” Franks v. Bd. of Educ. of E. Orange, EDU 7423-97, Initial Decision (August 6, 2001), adopted, Comm’r. (September 20, 2001), <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>. In Franks, the petitioner filed claims for worker’s compensation benefits and sick leave benefits. Franks, supra, EDU 7423-97 at *2.¹ The petitioner insisted “she never intended to give up her sick-leave claim when she accepted the settlement of her compensation claim.” Id. at *4. Because the petitioner did not waive her sick leave claim, the Commissioner

¹ While this case is available on the Rutgers Law Library website, the link to the Word document is inoperative.

retained jurisdiction to decide the claim. Ibid.; see also Sheridan v. State-Operated Sch. Dist. of Paterson, EDU 3767-98, State Bd. of Educ. (June 6, 2001), <<http://www.nj.gov/education/legal/sboe/index.html>> (petitioner who settled worker's compensation claim before filing for sick leave was not collaterally estopped); Marino v. Willingboro Bd. of Educ., EDU 8580-98, State Bd. of Educ. (March 1, 2000), <<http://www.nj.gov/education/legal/sboe/index.html>> (petitioner who clearly reserved his right to file for sick leave benefits in settlement of worker's compensation claim not collaterally estopped); Hern v. Bd. of Educ. of Union City, A-339-91 (App. Div. October 23, 1992) (slip op. at 3-4)² (petitioner who did not file a worker's compensation claim was not precluded from filing for sick leave benefits).

Here, petitioner did not waive her sick-leave claim in the worker's compensation settlement. (P-20.) Therefore, the Commissioner retains jurisdiction to determine whether the District should reimburse her sick time. Franks, supra, EDU 7423-97 at *4. The Commissioner has jurisdiction to determine petitioner's sick-leave claim because her worker's compensation claim resulted in a settlement which did not address the sick time she seeks.

To prevail on a worker's compensation claim, and consequently on a sick-leave claim, a petitioner must establish, by a preponderance of the medical evidence, "a link between [her] disease and occupational conditions." Laffey v. Jersey City, 289 N.J. Super. 292, 303 (App. Div. 1996). In Laffey, the petitioner's medical expert "asserted a causal relationship without credible foundation." Id. at 307. The medical expert's conclusion that the petitioner's duties as a police officer caused his pulmonary conditions "was based solely on the subjective characterizations of the petitioner and not on any existing medical, epidemiological, or scientific studies establishing causation." Id. at 306. Similarly, in Franks, the petitioner did "not offer any medical evidence to connect her alleged illness to any incident occurring at the workplace." Franks, supra, EDU 7423-97 at *3. The only evidence of a causal link between the petitioner's condition and her employment was "her own subjective feeling, belief, or understanding that her illness was stress-induced." Ibid.

² This unpublished decision is not publically available.

Here, petitioner relies solely on medical reports prepared in anticipation of litigation and her own testimony to establish a link between her neck injury and her fall. On January 30, 2004, she was injured and was initially diagnosed by Barnert Hospital with a lower-back sprain, ankle sprain, and knee sprain. (P-2; R-2.) On February 16, 2004, Dr. Schultz similarly diagnosed her with a lower-back sprain and cleared her to return to work on February 23, 2004. On March 8, 2004—nearly six weeks after her fall on January 30—petitioner, for the first time, was diagnosed with neck problems.

Moreover, while Dr. Ben-Yishay initially reported that petitioner's neck injury was caused by the fall, he changed his position in that he could not say, within medically reasonable probabilities, that her neck pain was caused by the January 30th fall. (P-14.) Dr. Ben-Yishay concluded, "[u]nless the patient has a very clear explanation as to why she did not complain of neck pain, or if there was simply a failure of documentation by Dr. Schultz, then I would be forced to conclude that the cervical disc pathology is not clearly work related" Ibid. Because of this discrepancy, Dr. Ben-Yishay declined to conclude that petitioner's injury was work related. Dr. Vonroth (whom did not testify) excused petitioner from work from September to October 14, 2004. He did not connect her medical conditions to her fall on January 30, 2004. (P-17.)

Dr. Kulkarni was the only physician who connected petitioner's neck pain to her fall. (P-15 (who also did not testify but relied upon in petitioner's brief).) He relied on petitioner's own explanation "that on January 30, 2004, she was walking to her class when she was pushed by several students and she fell, striking her neck, lower back, and left knee." Dr. Kulkarni did not address the lapse between petitioner's fall and first complaint of neck pain, and did not explain the basis of his conclusion that her fall was "the proximal cause of the complaints, physical findings, diagnosis and disability rating noted in the body of this report." Dr. Kulkarni did not find evidence of a pre-existing condition, unlike Dr. Schultz and Dr. Ben-Yishay. (P-5, P-13.) As in Laffey, Dr. Kulkarni "asserted a causal relationship without credible foundation." See Laffey, supra, 289 N.J. Super. at 307. His conclusion that petitioner's neck pain was caused by her fall "was based solely on the subjective characterizations of [Desai] and not on any existing medical, epidemiological, or scientific studies establishing causation." See id. at 306.

Therefore, Dr. Ben-Yishay's conclusion that petitioner's neck pain was not work-related directly contradicts Dr. Kulkarni's conclusion that her neck pain was work-related. (P-14, P-15.) While Dr. Ben-Yishay based his conclusion on the lapse of time between petitioner's fall and neck pain, Dr. Kulkarni based his conclusion on petitioner's own subjective explanation that she fell on her neck, lower back, and knee. (P-14, P-15.) Because Dr. Ben-Yishay's conclusion is based on a credible foundation, his opinion is deemed more credible than that of Dr. Kulkarni. See Laffey, supra, 289 N.J. Super. at 307 (medical expert's testimony establishing a causal relationship must be based on a credible foundation). Therefore, petitioner did not establish that her injury was work-related by a preponderance of the competent and credible medical evidence. Id. at 303.³

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioner did not establish, by competent and credible evidence that her neck pain was caused by the fall on January 30, 2004. Accordingly, she is not entitled to reimbursement of sick time deducted between April 19, 2004, and January 1, 2005.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the appeal filed by petitioner be and is hereby **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

³ Because petitioner failed to establish her injury was work related, whether she was in fact medically unable to work during her absence has not been addressed.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 31, 2012
DATE

Joann LaSala Candido
JOANN LaSALA CANDIDO, ALJ

Date Received at Agency:

August 31, 2012
Joann LaSala Candido

Date Mailed to Parties:

SEP - 4 2012

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

APPENDIX

WITNESSES

For Petitioner:

Bhanumati Desai

For Respondent:

None

EXHIBITS

For Petitioner

- P-1 Petitioner's Worker's Compensation Treatment Authorization Report
- P-2 Discharge Instructions from Barnert Hospital, dated January 30, 2004
- P-3 Discharge Instructions from Barnert Hospital, dated February 6, 2004
- P-4 Discharge Instructions from Barnert Hospital, dated February 11, 2004
- P-5 Correspondence from Garden State Orthopaedic Associates, dated February 18, 2004
- P-6 Correspondence from Ari Ben-Yishay, M.D. dated March 8, 2004
- P-7 Correspondence from Ari Ben-Yishay, M.D. dated March 8, 2004
- P-8 Correspondence from Ari Ben-Yishay, M.D. dated March 8, 2004
- P-9 Correspondence from Ari Ben-Yishay, M.D. dated March 15, 2004
- P10 Correspondence from Ari Ben-Yishay, M.D. dated March 16, 2004
- P-11 Correspondence from Ari Ben-Yishay, M.D. dated March 18, 2004
- P-12 Correspondence from Ari Ben-Yishay, M.D. dated March 23, 2004
- P-13 Correspondence from Ari Ben-Yishay, M.D. dated March 23, 2004 (3 pages)
- P-14 Correspondence from Ari Ben-Yishay, M.D. dated March 25, 2004
- P-15 Correspondence from Vijaykumar Kulkarni, M.D., FACS, dated June 4, 2004 (4 pages)
- P-16 Return to Work memo, dated August 31, 2004 from William Vonroth, Jr., M.D.
- P-17 Application for Leave of Absence, dated September 18, 2004
- P-18 Letter from Treasury, dated April 22, 2005, re: Retirement Approval

P-19 Print out from Paterson Public Schools, dated March 24, 2009

P-20 Order approving Settlement with Dismissal

For Respondent

R-1 Letter from Ari Ben-Yishay, M.D. dated March 25, 2004

R-2 Packet from Barnet Occupational Health Center

R-3 Letter and settlement transcripts from Richard J. Turano, Esq., dated July 13, 2012

IN THE MATTER OF THE TENURE	:	
HEARING OF KEVIN HARRIMAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	
BOROUGH OF ELMWOOD PARK,	:	DECISION
BERGEN COUNTY.	:	

SYNOPSIS

The petitioning school district certified tenure charges of unbecoming conduct, insubordination and other just cause against respondent – a tenured physical education teacher – alleging, *inter alia*: deceptive and untruthful conduct; inappropriate, defiant and insubordinate conduct; failure to follow administrative directives; failure to enroll in anger management classes; and disregard of corrective plans. The charges related to several specific incidents as well as ongoing issues involving respondent's consistently negative interactions with his supervising administrators. The petitioning Board contended that respondent's misconduct warrants dismissal from his tenured position.

The ALJ found, *inter alia*, that: respondent's testimony regarding the Board's claim that he made a false representation in a memo to the wrestling coach lacked credibility; respondent was combative and argumentative with representatives of the New Jersey State Interscholastic Athletic Association (NJSIAA) and this unprofessional, inappropriate behavior left the school district vulnerable to sanctions from the NJSIAA – though none were assessed; respondent's testimony and written statements in the record indicate that he did not think that he should have to adhere to the directives of, or answer to, school administrators who were younger than himself; his testimony and writings indicate that respondent considered the administrators to whom he reported to be incompetent, meddling micro-managers who were unworthy of his respect; respondent believed that the tenure charges arose totally out of a conspiracy against him and not out of any behavior on his part; respondent considered the multiple write-ups of his behavior during a short period of time to be the result of a campaign by administrators to ruin him rather than a reflection of his own behavior; a school system cannot operate if the staff and administrators are constantly at odds; and, in the instant case, the disagreements reached mammoth proportions and compelled administrators to spend inordinate amounts of time responding to respondent's many voluminous "rebuttal" memoranda. The ALJ concluded that the petitioning Board sustained its burden of proving that respondent was guilty of conduct unbecoming, and that the appropriate penalty is termination of tenure.

Upon careful and independent review of the Initial Decision and the record – in particular, exhibits containing respondent's memoranda – the Commissioner concluded that the charges were substantiated. The Commissioner concurred with the ALJ that the respondent must be terminated from employment in petitioner's schools. A copy of the final decision will be forwarded to the State Board of Examiners for action as that body deems appropriate.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
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October 12, 2012

OAL DKT. NO. EDU 3510-12
AGENCY DKT. NO. 50-3/12

IN THE MATTER OF THE TENURE	:	
HEARING OF KEVIN HARRIMAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	
BOROUGH OF ELMWOOD PARK,	:	DECISION
BERGEN COUNTY.	:	

Before the Commissioner are certified tenure charges alleging that respondent has demonstrated conduct which is unbecoming a teaching staff member, including deception, insubordination and incivility. Upon consideration of the Initial Decision of the Office of Administrative Law (OAL) and the record – which includes hearing transcripts and numerous exhibits¹ – the Commissioner concludes that the charges are substantiated.

In Charge One, pertaining to deceptive conduct, the Administrative Law Judge (ALJ) found two “counts” to be proven. One referred to an incident in which respondent forwarded to the petitioner’s athletic director a negative addendum to the 2003 evaluation of an assistant wrestling coach, and allegedly falsely stated to the athletic director that the high school principal had recommended that he do so. In another, the principal of one of the schools in which respondent taught directly observed that he had left his class unattended, but respondent denied same when the principal spoke to him about it. The Commissioner concurs with the ALJ that the record supports the foregoing allegations and also finds that an incident referenced in Charge Three constituted dishonesty. In that incident, respondent was seen injecting himself with insulin in a cafeteria filled with children – contrary to prior direction – but when confronted about his actions, falsely contended that he was injecting an emergency dose of glucose.

¹ Neither party filed exceptions to the Initial Decision.

Charge Two, concerning insubordinate behavior, includes fourteen counts – twelve of which the ALJ found to be substantiated. Some of those twelve counts relate to incidents that occurred in or about the 2005-2006 school year when respondent was a wrestling coach. Respondent was, for example, said to have defied his supervisor when he selected as most valuable player a student who had been suspended for spewing profanity at a teacher. In another incident, respondent was reported to have been argumentative and unprofessional in telephone calls with New Jersey State Interscholastic Athletic Association (NJSIAA) personnel regarding the NJSIAA's seeding or ranking of petitioner's wrestling team – jeopardizing petitioner's standing in the NJSIAA. When directed to attend an NJSIAA compliance meeting, he initially refused. And in May 2006, respondent defied an administrative directive to coaches to distribute their awards at a unified high school athlete dinner. He instead distributed his awards at a municipal recreation department dinner for wrestlers, creating a situation in which the high school athletes were not all recognized in a consistent manner.

The balance of the counts which the ALJ found to be substantiated pertain to incidents in 2011 in which respondent openly defied instructions or directives given by his supervisors. For example, in June 2011 respondent was said to have failed to comply with two administrative directives by principal Allison Jackter to schedule a meeting with her, instead advising her in a memorandum that he would communicate with her via whiteboard only. (Petitioner's Exhibit P-12 at 5)

Especially serious was respondent's reaction, in September 2011, to District Superintendent Richard Tomko's placement of him on a 90-day action plan requiring, *inter alia*, that respondent 1) refrain from making insubordinate comments; 2) refrain from discussing with colleagues his dealings with the administration; 3) refrain from discussing with students his

issues with the administration or staff; and 4) attend an anger management professional development course to be funded by the district. (Petitioner's Exhibit P-18 at 3) Before the 90-day improvement plan had run its course, respondent sent an email to Tomko stating that he would henceforth never meet alone with him, or with Principal Jackter or Principal David Saper. (Petitioner's Exhibit P-23)

In a second memorandum respondent advised Tomko that he viewed the 90-day action plan as invalid. Denying responsibility for any insubordinate statements or actions, and alleging that Tomko was colluding with other administrators to trump-up charges against him, respondent advised that he would not accept monitoring from Tomko, Saper or Jackter – referring to the latter two as “coworkers” – and would not attend an anger management program. (Petitioner's Exhibit P-25 at 3-4) This memorandum was copied, *inter alia*, to all members of the respondent board of education. (*Id.* at 5) On the same date, respondent sent a memorandum only to board members claiming that Tomko's write-ups about him were fabrications and threatening legal action for harassment. (Petitioner's Exhibit P-24)

The Commissioner concurs with the ALJ that the allegations discussed above are substantiated by the record, and also finds that respondent's previously mentioned injection of himself with insulin in the cafeteria – after being directed to refrain from doing so – falls under the rubric of insubordination.

As to Charge Three, the ALJ found eleven of the fourteen counts – which describe displays of hostility, contempt, and/or verbal abuse by respondent toward supervisors and colleagues who did not endorse his views and/or behavior – to be proven. The eleven counts include an incident in which respondent was said to have ignored Jackter when she directly asked him to meet with her, and other incidents where respondent was belligerent toward

principals Jackter or Saper during meetings. The counts also include respondent's harassment of a security guard when he learned that the guard had reported to his superiors the gist of a rant against Saper that respondent had made in a personal telephone call to the guard.

But most significant are the counts which make reference to respondent's "rebuttals" to the written directives of his supervisors. In multiple situations, the attempts of respondent's supervisors to meet with him to discuss problems were unsuccessful. Notwithstanding the fact that in many cases the supervisors were calling meetings with respondent simply to get a full picture of how a particular event unfolded, respondent would regard questions about his actions as hounding, and would typically leave such meetings prematurely. Hence the follow-up memoranda stating in writing what the supervisors had wished to communicate in person – and respondent's rebuttals.

Respondent's rebuttal memoranda were defensive, accusatory, demeaning, and often threatened legal action. They would typically begin with versions of the subject events that respondent would describe as the truth, and characterizations of the supervisors' observations as falsehoods. In each rebuttal, respondent belittled his supervisor and depicted himself as superior. In each rebuttal, respondent attributed to his supervisor intentions and motives as to which respondent could not possibly have had any insight. Finally, each memorandum ended with respondent's rejection of his supervisor's directives and a warning that further "harassment" would not be tolerated. (*See, e.g.*, Petitioner's Exhibits P-9, P-12, P-17 and P-36)

More than any witness testimony, respondent's rebuttal memoranda provide insight into the reasons not just for Charge 3, but for all of petitioner's charges. The memoranda demonstrate respondent's undisguised disdain for his supervisors, his failure to appreciate their

responsibilities and authority, his defiance of their directives and his failure to understand his obligation to cooperate with them for the smooth operation of the school.

Accordingly, the Commissioner adopts the ALJ's recommendation² that petitioner's Charges One, Two, Three and Four (which alleges a pattern of the behavior described in the first three charges) be upheld, and that respondent must be terminated from employment in petitioner's schools. Further, the State Board of Examiners will be provided with a copy of this decision for action as it deems appropriate.

IT IS SO ORDERED.³



COMMISSIONER OF EDUCATION

Date of Decision: 10/12/12
Date of Mailing: 10/15/12

² The ALJ's recommendations were based, in part, upon credibility determinations which complement the critical documentary evidence. Pursuant to *N.J.S.A. 52:14B-10(c)*, an ALJ's credibility determinations are entitled to deference and may not be modified unless the findings are arbitrary, capricious or unreasonable, or are not supported by the record.

³ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36*.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 03510-12

AGENCY DKT. NO. 50-3/12

**IN THE MATTER OF THE TENURE HEARING
OF KEVIN HARRIMAN, SCHOOL DISTRICT OF
THE BOROUGH OF ELMWOOD PARK, BERGEN
COUNTY.**

Nicholas Celso, Esq., for petitioner Borough of Elmwood Park Board of
Education (Schwartz, Simon, Edelstein, Celso, attorneys)

Philip Feintuch, Esq., for respondent Kevin Harriman (Feintuch, Porwich and
Feintuch, attorneys)

Record Closed: August 6, 2012

Decided: August 31, 2012

BEFORE **CAROL I. COHEN, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On February 28, 2012, the Board of Education of Elmwood Park found probable cause and on February 29, 2012, passed a resolution certifying tenure charges against respondent Kevin Harriman alleging that he was guilty of deceptive and untruthful conduct; conduct that was inappropriate, defiant and insubordinate; failure to follow specific administrative directives; failure to enroll in anger-management courses; and

disregard of corrective actions. He was also charged with treating his supervisors in a contumacious, discourteous and overtly disrespectful and personally demeaning manner. On March 1, 2012, those charges were received by the Office of Controversies and Disputes of the Department of Education. On March 13, 2012, Mr. Harriman filed an answer to the charges. On March 15, 2012, the Department of Education certified the tenure charges, and forwarded the matter to the Office of Administrative Law (OAL), where it was filed under OAL Dkt. No. EDU 3510-12.

A prehearing conference was held on March 27, 2012, and an Order was issued on March 29, 2012. Discovery was completed on May 7, 2012, and the matter was heard on June 7, 20, 26, 27 and 28, 2012. Initially, the summation briefs were due on July 27, 2012. However, the respondent asked for an extension, and I allowed for the Findings of Fact, as part of the summation briefs, to be filed on July 27, 2012. The Procedural History and Analysis of the Law were submitted on August 6, 2012.

ISSUES

1. Do the allegations set forth in the tenure charges rise to the level of conduct unbecoming, insubordination and other just cause?
2. If the charges do rise to that level, what relief is the Board entitled to receive?

FACTUAL DISCUSSION

Testimony

Michael Nazzaro

Mr. Nazzaro, who is retired, worked for the Elmwood Park Board of Education in various positions from September 1968. His last position before retiring in 2003 was as principal of the high school. Mr. Nazzaro testified about two incidents. In the first, Mr. Harriman was sent a memo because he failed to notify Mr. Nazzaro of his absence as

per prior instructions to do so.¹ The second involved an incident in which Mr. Harriman sent a memo to Rich LaGrotta, the wrestling coach. In the memo, Mr. Harriman said that he strongly requested that Mr. Galler not return as the assistant wrestling coach. The memo said that Mr. Harriman was sending the memo "as recommended by Mr. Nazzaro." Mr. Nazzaro testified that he never recommended that Mr. Harriman do this, and pointed to P-1, his memo to Mr. Harriman of May 6, 2003, in which he said that he never recommended for him to submit a memo regarding Mr. Galler to Mr. LaGrotta. Mr. Nazzaro said that he thought that Mr. Galler was a good coach if he was approached correctly, and suggested that if Mr. Harriman changed his own attitude towards him it could benefit the program. On cross-examination, Mr. Nazzaro stated that he had had a prior discussion with Mr. Harriman in which the respondent said that Galler was not behaving well and he wanted him fired. Mr. Nazzaro told him that, if he did not think he was competent, then Harriman should have put that in his evaluation two months before. Mr. Nazzaro also pointed out that Mr. Harriman did not copy him on the memo that he sent to Mr. LaGrotta, even though he was the principal of the school and supposedly had recommended that the respondent write the addendum. When asked if it were possible that things had changed after Harriman wrote the evaluation, Mr. Nazzaro stated that he did not think so, since the wrestling season was over at the time Mr. Harriman wrote the evaluation. Mr. Nazzaro said that Mr. Harriman did not contact him prior to sending the memo to Mr. LaGrotta.

Allison Jackter

Ms. Jackter testified that she has been the principal of Gantner Avenue Elementary School for two years. Before that she was an instructional math supervisor for four years and worked as a math teacher in North Brunswick High School for five years. Ms. Jackter said that she knew Mr. Harriman originally when she was a math supervisor and he was a gym teacher. The respondent later worked part time at Ganter Avenue School when she was the principal. Ms. Jackter described a number of incidents that took place in May 2011 at a Field Day event organized by Mr. Harriman.²

¹ Mr. Harriman had notified the substitute caller of his absence.

² The Field Day started at about 9:00 a.m. About 330 students, 20-40 parents and 40-50 staff were involved in competing in outdoor relay and sporting events.

The principal said that throughout the day she was nervous about the weather. The event was outdoors and the weather conditions were either threatening, misty or raining. However, she made the decision to move forward with the outdoor event. Throughout the day staff came up to her and questioned her about where they were supposed to be and what was going on. Ms. Jackter realized that some of the pages that Mr. Harriman had prepared, including a map of where students were supposed to go for various activities, were missing from the packets that the staff was given for the day. When she approached Mr. Harriman about the problem, he began yelling at her in front of students, parents and staff. Ms. Jackter said that after a brief conversation, in order not to create a scene, she walked away. From Mr. Harriman's demeanor, she sensed that he was upset that she was questioning anything about the Field Day. Eventually he gave her the information that she requested.³ At some point in the late morning it began precipitating harder, and she decided that she had to bring the children in for safety reasons. She began waving the people to come inside. She tried to set up activities in the hallway so that the children could continue to play. However, she said that she saw Mr. Harriman and he was rolling his eyes at her.

Ms. Jackter said that she asked Mr. Harriman to meet with her at the end of the day. She wanted to talk to him about the problems with the packet and how things could be changed for the next year's Field Day, and to discuss his demeanor. She said that Mr. Harriman became angry and started yelling at her. He was so loud that her secretary had to close two doors adjoining her office so that parents and staff would not hear what was going on. The principal said that Mr. Harriman yelled out two times, "you are wrong." It was her impression that Mr. Harriman felt that he was in charge of the day and she had no business getting involved. Ms. Jackter identified P-7, which was a memo to Mr. Harriman dated May 26, 2011, regarding events that went on at Field Day. In it she recounted that towards the end of their meeting, "you placed your hand on your genitals and moved your hand around for so long that I had to address your behavior asking, 'what are you doing?'" Mr. Harriman's response was that his pants were sticking to him. Ms. Jackter did not buy Mr. Harriman's response. She said that she was disgusted and ended the meeting. Ms. Jackter said that Mr. Harriman responded

³ Ms. Jackter admitted that it was her oversight that she did not notice, when she reviewed the packet, that the map for the afternoon's activities was missing.

to her memo with P-12, which she described as a lengthy memo with many false accusations, including that she was untruthful, dishonest, uncooperative, harassing and jealous of him. She characterized the memo as a rant against her. He accused her of unwarranted meddling and micromanagement. According to Harriman, she needed to Google the word insubordinate, and learn its true meaning in education as well. He also accused her and Mr. Saper, the principal of the other elementary school that Harriman worked in, of conspiring against him to harass him. He said that she was incompetent, did not know what she was doing, and allowed a chaotic and dangerous situation to occur because she waved the students in from outside. He also denied that he had made inappropriate sexual gestures and said that he tugged at his shorts because they were wet. (Ms. Jackter denied his accusations and said that at the time of the incident she was not tenured as a principal and she was doing her best to do a good job. She claimed that she would never make baseless accusations about a staff member.) Mr. Harriman went on to say that he would no longer talk to her, since she tells everyone that he yells at her, and would only communicate with her through the use of a dry board. Ms. Jackter emphasized that communication in that manner was not an appropriate means of communication between a supervisor and staff. Ms. Jackter pointed out that while her memo to Mr. Harriman was copied to the superintendent of schools, the two other principals for whom the respondent worked and the president of the Board of Education, Mr. Harriman's memo was addressed to them and also to the vice president of the Board, all the members of the Board of Education, the head of Human Resources, the president of the union and the attorney for the union.

The second incident that Ms. Jackter recalled involved coverage for another gym teacher's classes at her school. Eric Schwartz, who also taught at her school, had to be out on a particular day. It was Ms. Jackter's understanding that Mr. Schwartz had made arrangements to make up the gym time on other dates. However, on the day that Mr. Schwartz was absent, Mr. Harriman arrived at the school. She was in the midst of conducting orientation for the new kindergarteners. She saw Mr. Harriman in the hallway talking to the second-grade teacher. Mr. Harriman said that he was there to take the class to gym. She told him that she understood that Mr. Schwartz had made other arrangements. Mr. Harriman raised his voice and said "poor communication" two times in the hall filled with parents, students and staff. Ms. Jackter walked away and

thought that if Mr. Harriman were going to take the class, then he should proceed to do so. Ms. Jackter claimed that she had spoken to Mr. Schwartz, who told her that he had informed Mr. Harriman that it was not necessary for him to cover his classes. Since Mr. Harriman had said that he would not speak to her (see P-12), she wrote a memo in which she said that his insubordination would not be tolerated. (P-13.) In response to her memo, Mr. Harriman wrote P-17. In the memo he said that he had been instructed by Mr. Saper to cover Mr. Schwartz's classes on June 8, 2011. He accused Ms. Jackter of trying to form a wedge between him and Mr. Schwartz and instigating trouble. He also claimed that she had fabricated stories and was relentlessly harassing him. Ms. Jackter testified that she did not harass Mr. Harriman and she prided herself on her honesty. Ms. Jackter pointed out that the respondent again copied his memo to all of the Board of Education members, Human Resources, the union president and the union attorney.

The third incident that Ms. Jackter recounted involved Mr. Harriman's leaving his class unattended by a certificated teacher. She testified that in June 2011 she popped into the gym and saw fifth-grade students playing basketball.⁴ There was a security guard and an aide in the gym, but the teacher was not present. Ms. Jackter asked the adults where Mr. Harriman was. They said that they did not know. She went to the door of the gym, which was opened and emptied onto a field, and saw Mr. Harriman placing cones outside with the assistance of a student. She did not say anything to him, but went back into the gym so that there would be a certificated person with the students. Ms. Jackter said that she told Mr. Harriman what she saw. Mr. Harriman responded that he was simply propping the door open and could see the students at all times. Ms. Jackter denied that this was so. She said that in her eleven years in the education system, she has never left a class unattended. Following the incident, she sent a memo (P-10) in which she said that it was irresponsible, unprofessional and potentially dangerous to leave students alone without proper supervision and she did not appreciate his dishonesty.⁵ In response Mr. Harriman wrote P-16, titled: "The real truth to your write up letter dated June 6, 2011." In the memo he claimed, "While

⁴ Ms. Jackter testified that as part of her job, she went around to various classrooms in the school to see how things were functioning in the school.

⁵ The dishonesty consisted of his telling her that he was only out of the gym for a minute propping open the door, when he was out of the gym for at least five minutes.

propping the stubborn door open, the students were still in my vision. . . . I immediately turned in from the gym/stage archway and saw you standing there. You snapped. 'Mr. Harriman, Mr. Harriman, I've been standing here 3 or 4 minutes, you left your class unattended.'" He claimed that he was only out of the gym ten to fifteen seconds. He then went on to counter that she had no right to call him negligent, since she allowed an unregistered student to participate in Field Day. During her testimony, Ms. Jackter denied "snapping" at Mr. Harriman. She also explained that on Field Day, parents help out, and often bring the students' younger siblings because of child-care issues. She allowed the children to participate in activities on their level.

Ms. Jackter was asked if Mr. Harriman ever met with her, as she had requested in her May 26, 2011, memo (P-7). She testified that he had not done so. On June 10, 2011, (P-14) she made a second formal request for a meeting. Mr. Harriman did not comply with that request either.

Ms. Jackter discussed a September 2011 meeting regarding a 504 Plan for a new kindergarten student who had a severe heart condition and who needed accommodations. All staff members were required to read and sign off on the plan. Since Mr. Harriman was going to be providing physical education to the student, she asked him to meet with her and sign off on the plan. He refused to meet with her unless there were other people present. (See P-23, email to Dr. Tomko,⁶ superintendent of schools). He stated, "I cannot trust a one-on-one meeting again especially with Ms. Jackter, Mr. Saper or yourself again."⁷ Ms. Jackter testified that after Dr. Tomko's intervention, Mr. Harriman agreed to meet regarding the 504 Plan.

Ms. Jackter testified about an incident that occurred in November 2011. She said that she was notified that there was an altercation between two students while Mr. Harriman was in the class. Ms. Jackter wanted to get an adult's perspective on what went on, and she asked Mr. Harriman to briefly fill her in while the next group of kindergarten students was coming into the classroom. Ms. Jackter said that as Mr.

⁶ At a certain point Mr. Tomko receive his doctorate and became known as Dr. Tomko. He will be referred to throughout this document as Dr. Tomko.

⁷ Dr. Tomko copied Ms. Jackter on his memo and Mr. Harriman's response, but Mr. Harriman did not copy her on his email to Tomko.

Harriman was explaining how he handled the situation, he reached his arm across her body, grabbed her arm, and pushed her to demonstrate how he physically separated the students. She told Mr. Harriman never to touch her again. Ms. Jackter said that Mr. Harriman continued to describe what had happened by making wild hand gestures and came extremely close to her personal space. She wrote a memo (P-29) dated November 9, 2011, to Dr. Tomko saying that she explained to Mr. Harriman how uncomfortable his actions made her feel. Ms. Jackter said that following the incident she had a meeting with Mr. Harriman and the union representative, Karen Toscano, during which she attempted to discuss her feelings about what had occurred. Mr. Harriman rolled his eyes and left the room.

Ms. Jackter also discussed a memo that she wrote on December 21, 2011(P-40). In it she claimed that she addressed Mr. Harriman, asking him if he had gotten her note that she had left in his mailbox. She said that he ignored her and walked right past her. When he returned to school, he came to the main office and complained that someone had taken his parking space. While Ms. Jackter attempted to speak to him about temporarily parking in a visitor's spot, Mr. Harriman walked away from her. She followed him out the door and tried to talk to him about giving her the opportunity to finish what she had to say, but he ignored her. She said that it was at this point that she had a clear sense that Mr. Harriman was not going to be cooperative and communication with him was going to be nearly impossible.

On cross-examination Ms. Jackter was asked about the planning of Field Day. She said that the Physical Education Department selects the activities and gives the schedule to her for approval. She said that on the day in question the children had been outside for about two hours when she alone made the determination to bring them in. The way she accomplished this was to go to the doors on either side of the gym and wave the students in. She did not recall seeing Mr. Harriman when she moved the students inside. She brought the children inside between 11:00 and 11:30 a.m. The students had lunch in shifts. She said that she spoke with Mr. Harriman about the activities that the students would do when they came inside, but they did not necessarily agree on what she proposed. Mr. Harriman disagreed with her decision to bring the children inside and had concerns that if the students came inside, their sneakers would

be wet and there might be accidents. After the three lunch shifts the weather had cleared up and Ms. Jackter decided to send the students back outside again until 3:00 p.m., when school ended. Principal Jackter said that she wrote P-7 after the meeting, after school, following Field Day. The purpose of the meeting was to discuss issues that had come up during the day, including the missing map and Mr. Harriman's inability to communicate with her throughout the day. During the meeting, Mr. Harriman took issue with her bringing the students inside and with doing any activities inside. (Ms. Jackter acknowledged that she had reviewed the packet for Field Day and did not notice that the map was missing. After she brought it to Mr. Harriman's attention, he distributed a map to the teachers to use.) Ms. Jackter testified that during the meeting Mr. Harriman raised his voice and told her that she was wrong. He felt that the principal should have consulted with him before deciding on bringing the children inside. She told him that just because he ran the event did not mean that he ran the school. She felt that Mr. Harriman was upset about the whole day's events. She said that she did not believe Mr. Harriman's explanation that his shorts were sticky because they were wet, and that is why he touched himself in his genital area during the meeting. She said that he was touching the area for a length of time that was definitely inappropriate.

Ms. Jackter was questioned about Mr. Harriman's covering Mr. Schwartz's classes. She acknowledged that P-8, a memo from Mr. Saper, the principal of another school, to Mr. Harriman directed him to work Mr. Schwartz's Physical Education schedule on Wednesday, June 8, 2001, since Mr. Schwartz would be running the Field Day at Gilbert Avenue School. Her response was that she had talked to Mr. Schwartz, who told her that he made other arrangements and it would not be necessary for Mr. Harriman to cover his classes, and he had told the respondent this. She also stated that she had a conversation with Mr. Saper about this issue; however, she could point to no subsequent written memo from Mr. Saper telling Mr. Harriman not to follow the prior directive. When asked why Ms. Jackter sent copies of her memo to Mr. Harriman to other people, she said that it was her understanding that teachers report to their principal; principals report to assistant superintendents and the director of personnel; and those individuals report to the superintendent of schools. It was District procedure

to send copies of memos to an employee's immediate supervisors.⁸ The superintendent would be the person in the chain of command who would report to the Board of Education. Mr. Harriman chose to send his memos directly to Board of Education members. This was not the proper procedure to follow in the table of organization.

When questioned about P-29, which memorialized the physical altercation between two students and Mr. Harriman's actions toward her, Ms. Jackter insisted that it was unnecessary for the respondent to touch her in order to explain what happened between the two students. She also did not think that it was necessary to send Mr. Harriman, or the other principals, a copy of her memo to Dr. Tomko, the superintendent of schools. Ms. Jackter said that she did not resent the fact that Mr. Harriman pointed out in a memo that she had reviewed the packet for Field Day and had not noticed that the map was missing. She said that he was right about her overlooking the absence of the map. When asked about her opinion of Mr. Harriman's teaching ability, she said that she had done informal observations of his teaching and found his teaching to be adequate. However, she pointed out that she was not assigned to formally observe him.

Rebuttal

Ms. Jackter identified P-48 as the Agenda she presented on September 7, 2010, at the Staff Orientation. She pointed to item #27, which said that cell phones were to be on a "silent" setting during the day, but if there were an extenuating circumstance that necessitated a cell phone call, then she should be notified prior to the call. She said that she conducted a similar meeting the following year, and she reiterated the same policy on cell phone use. (P-49.) She also pointed out that in both memos it said that calls to parents should be made either from the phone in the faculty room or a second line in the main office. Ms. Jackter said that Mr. Harriman was present during the Staff

⁸ Ms. Jackter did not know if there was actually a policy regarding this procedure, but she knew that this was the general practice. On rebuttal, she was shown P-44 and P-45, which basically mirrored the chain of command that she referred to as the procedure in the District.

Orientation meeting in 2010 when these items were discussed, but was not present in 2011 because he had been involved in an auto accident on that day.

Ms. Jackter was asked if there was a grievance mechanism in place if a teacher believed that he or she was not being treated fairly by a superior. She said that there was a mechanism that proceeded through the union. Ms. Jackter was not aware of any grievance being filed by Mr. Harriman against her.

Marie Corrigan

Ms. Corrigan testified that she has worked as a school nurse for the Elmwood school system for many years and in the Gilbert Avenue School at the time of the incident complained of. She said that in October or November 2011 the principal asked her to talk to Mr. Harriman about not injecting himself in the school cafeteria.⁹ She talked to Mr. Harriman and he claimed that he was not injecting himself in the cafeteria. She responded that if he was not doing it, then he should continue not doing it. Ms. Corrigan recalled a meeting in May 2012 with Mr. Harriman, Mr. Thornton, a union representative, and the principal in which Mr. Saper stated that he saw Mr. Harriman injecting himself in the cafeteria with the students in attendance. Mr. Harriman yelled a number of times, "you did not see me doing it." Ms. Corrigan said that she told him that that was not the point. The point was that he should not be doing it. Because Mr. Harriman would not stop yelling, she said that she had to go back to the nurse's office, because there were students in the room, and left the meeting.

On cross-examination, Ms. Corrigan was asked if Mr. Harriman could have been giving himself glucose, not insulin. She said that she has never seen anyone give himself glucose. Glucose is usually taken by a diabetic in the form of something edible (orange juice or a glucose tablet) and not an injection. A glucose injection is usually given by someone else, when a person is so debilitated that he cannot give himself a needle.

⁹ Mr. Harriman is an insulin-dependent diabetic. He injects himself with an insulin pen in his arm, abdomen or other site four times a day on a fixed schedule.

David Saper

Mr. Saper testified that he has been employed as the principal of the Gilbert Avenue School, which is pre-K through grade 5, for the past three years. Before that he was athletic director/vice principal for the District, and vice principal for Discipline before that. He stated that Mr. Harriman worked in his school as well as in other elementary schools, including the school at which Ms. Jackter was the principal.

Mr. Saper recalled an incident that occurred in 2006, when he was the athletic director. The Elmwood Park wrestling team had had a successful season and the New Jersey State Interscholastic Athletic Association was responsible for seeding the team for the statewide championships. Mr. Harriman, who was the wrestling coach, was unhappy with how the team was seeded. Mr. Saper said that without his knowledge the respondent placed a call to the Association and spoke with two of its officials, Mr. Baly, who was the director, and Mr. McMillian, the wrestling statistician. Mr. Harriman complained about the seeding. Mr. Baly, in a conversation with Mr. Saper, stated that he tried to explain the rationale behind the seeding, but Mr. Harriman would not accept the explanation and proceeded to speak to him inappropriately. In a memo to Mr. Harriman from Mr. Saper (P-3) dated February 10, 2006, Mr. Saper recounted what Mr. Baly said to him, namely, that he continued to "beat a dead horse." The executive director took exception to the fact that Harriman would "not let up." In another telephone call from Harriman to Mr. McMillian, Harriman "spoke rudely to [Mr. McMillian], cut him off several times, and used profanity (this is bullshit) toward him." Mr. Saper testified that it is not common practice for the coach to communicate with the Association. He said that Harriman should have gone through Saper. According to Mr. Saper, it placed the school program in jeopardy with the Association and was unsportsmanlike. Mr. Saper spoke with Dr. Tomko, who decided that Mr. Harriman should attend a compliance meeting from the Association, which trains coaches on appropriate behavior. Mr. Saper also did not want Mr. Harriman to contact the association for one year.¹⁰

¹⁰ Mr. Saper explained that coaches can contact the Association for reasons other than complaints about seeding.

Mr. Saper testified about another encounter in 2006, which involved the end-of-year awards dinner. He said that the administration had decided that there should be a unified dinner for all the teams and athletes. The dinner, which was sponsored by the Booster Club as a fundraiser, would be geared toward the recognition of seniors. At the dinner every team would be given the same number of awards. All awards were to be given at the dinner. Mr. Saper said that he communicated what was expected of them, including the awarding of the MVP and coach's award by the coaches, in a memo. Mr. Saper said that before the Booster dinner, Mr. Harriman attended a separate Recreation Department dinner and handed out the wrestling awards, including the MVP and Coach's Award, instead of at the Booster dinner.¹¹ Mr. Saper voiced his concerns to Dr. Tomko, who was the principal of the high school at the time. Dr. Tomko subsequently wrote a memo to Mr. Casapulla, then superintendent of schools. In it he said that he was concerned about Mr. Harriman's continued abrasive demeanor, which had been going on for some time, and he felt that he had to address his continuing inappropriate behavior. First, Dr. Tomko referred to the incident with the Wrestling Association officials. Then he pointed to the fact that Mr. Harriman had awarded MVP to a student who was absent from the championship match because he had been suspended for telling a teacher to "go f... herself." Dr. Tomko felt that a more appropriate athlete could have been picked. He also stated that Mr. Harriman refused to change his award designation, even when asked to reconsider. In a June 2, 2006, memo from Dr. Tomko to Mr. Casapulla, the principal stated that Mr. Harriman's giving the awards at the Recreation dinner was his way of circumventing the meaning of the Booster dinner and doing things his way. In addition, Mr. Harriman presented a third award for most improved player, when he knew that the other coaches were only going to be presenting two awards. Dr. Tomko also pointed out that he was still unaware that Mr. Harriman had signed an agreement to attend the compliance meeting.

Mr. Saper referred to P-6, Mr. Harriman's end-of-year evaluation for 2011. In it Mr. Harriman got good evaluations for developing instructional strategies and was deemed passionate about teaching physical education. However, Mr. Saper noted that Mr. Harriman needed to become more open to administrative feedback, must ensure

¹¹ The Recreation Department is not affiliated with the school system.

that he supervise the gym at all times, and must report student injuries to the nurse in a timely fashion.

Mr. Saper testified regarding an incident that took place on May 25, 2011. Mr. Saper claimed that he had been out of the building. When he came back five students were in his office and they were upset about something that had happened in Ms. Valentine's class. Mr. Saper said that he spoke to the students and attempted to speak to Mr. Harriman after school to get more information. He said that the meeting did not go well. Mr. Harriman came into his office and began by saying "What now?" Mr. Saper said that he tried to get information from Mr. Harriman, who became abrasive and disrespectful and claimed that the principal was harassing him. In the memo memorializing the meeting (P-8),¹² Mr. Saper said that he deemed Mr. Harriman's actions to be highly insubordinate and that it was impossible to communicate with him and to find out what had occurred. Mr. Saper testified that in his eighteen years in education he had never had anything like this occur. He directed Mr. Harriman to schedule a meeting with him by June 3, 2011, and bring a union representative, if he chose to do so.¹³ Mr. Saper said that after the May 25, 2011, incident, there was no way that he could work with Mr. Harriman on Field Day. Therefore he directed that Mr. Schwartz run the Field Day at Gilbert School and Mr. Harriman take Mr. Schwartz's schedule on June 5, 2011. Mr. Harriman did not show up for the meeting that Mr. Saper told him to arrange. Instead he sent him P-9, which was a six-page rebuttal to P-8. Mr. Harriman first discussed the students' allegation of unfair treatment by him, including his threatening to call a student's mother on her cell phone during class because of the student's misbehavior. Mr. Harriman asserted that Mr. Saper was dishonest in his evaluations of him; interfered with his doing his job; did not know the answers to questions posed to him; fabricated charges against him; meddled in matters that he should not have been involved in, i.e., Field Day; was incapable of managing the fifth-grade class in the school; and exhibited behavior unbecoming a principal. In the memo Mr. Harriman said that he was being harassed, insulted and intimidated and that he

¹² In the memo Mr. Saper recounted five student complaints about Mr. Harriman's treatment of them during gym class.

¹³ The memo also dealt with the lunch room. Mr. Saper said that he had received complaints from the lunch aides that Mr. Harriman was not supposed to be there and was getting in the way. Mr. Saper said that he had not assigned Mr. Harriman to the lunch room, and teachers who were not assigned their took their lunch in the faculty room.

would be submitting a Daily Gilbert Avenue Log, with conversations and issues he had had with the principal from January 4, 2010, to the end of the school year, to Dr. Tomko, the Board of Education, the union lawyer and his personal lawyer. This memo was distributed to many people, including all of the members of the Board of Education, Human Resources and the NJEA attorney. In a memo dated June 7, 2011, Mr. Saper followed up on his prior memo (P-8) and stated that Mr. Harriman had not gotten back to him about the meeting he had requested with his union representative. Mr. Saper testified that his correspondence back and forth with Mr. Harriman took an inordinate amount of time and took him away from his duties as principal, but he felt that he had to respond because of the nature of what Mr. Harriman had put in writing, which he felt was insubordinate, inappropriate and threatening. Following what he considered was the chain of command, Mr. Saper copied the superintendent of schools, Ms. Jackter and Mr. Silla, the two other principals for whom Mr. Harriman worked, the president of the Elmwood Park Education Association and Human Resources.¹⁴ In the memo Mr. Saper stated that he thought that Mr. Harriman's letter was threatening, troubling and unprofessional. In addition, he chastised Mr. Harriman for calling the mother of a student on her cell phone during class time, for asking a young student to fetch a water bottle for him from the teacher's lounge, and for making baseless accusations against him.

Mr. Saper said that he was copied on a memo from Mr. Harriman to Superintendent Tomko. In the memo Mr. Harriman accused Dr. Tomko of making libelous remarks. He stated that he would continue to share his personal issues with anyone he chose, including faculty, staff and parents. The memo also stated, "Apparently, my professional presence overshadows the two novice Principals and they are just going to have to 'get over it.'" He also accused them and the superintendent of violating a handful of Administrative Codes of Conduct. Mr. Harriman denied having any anger-management issues and refused to attend any anger-management course. He also asserted that the sexual accusation by Mrs. Jackter was absurd and a fantasy and that he would be reporting these accusations to his personal lawyer and anyone else he deemed necessary. He stated that he had a seven-year log regarding Mr.

¹⁴ It was Mr. Saper's testimony that the Board of Education members were not normally copied on letters because that was not part of the chain of command.

Saper; that it was his personal property; and that he would not be handing it over to the superintendent.

Mr. Saper also testified regarding a memo (P-9) that Mr. Harriman sent to him. In it he accused Mr. Saper of being incompetent as a principal and not knowing the answers to any questions put to him. He accused him of dishonest evaluations of him and harassment that would "not be tolerated," and stated that Saper would be "held accountable to the fullest. What goes around comes around Mr. Saper." Mr. Harriman also stated that he was keeping a daily log of Gilbert School and it would be handed over to the proper authorities. This memo was also distributed to all the members of the Board of Education and other administrators.

Mr. Saper related an incident that occurred in the winter of 2011. Mr. Saper was in the all-purpose room/gym/cafeteria. Mr. Saper said that he looked over and witnessed Mr. Harriman lift up his shirt and inject himself with something into his belly. Mr. Saper wanted to address the situation, but there were students in the area. After they left, he walked over to Mr. Harriman and asked him if he had injected himself. He said that Mr. Harriman seemed annoyed and turned to him and said "yes." Mr. Saper responded, "why would you do that here?" Mr. Harriman stated that no one could see it and it was not a big deal. Mr. Saper told him that he could not do that again; there were students eating their lunch and it was inappropriate. Mr. Saper said that at the beginning of the year he thought he saw Mr. Harriman self-injecting in the cafeteria, but since he was unsure he pulled the nurse aside and asked her to speak with him about not injecting in the lunchroom. Mr. Saper wrote a memo to Mr. Harriman (P-30) in which he stated, "injecting yourself with an insulin shot causes an opportunity for blood to be exposed and includes heightened measures to be taken when considering blood borne pathogens and related sanitary concerns." He reminded Mr. Harriman that on a prior occasion Mrs. Corrigan had spoken to him about not taking insulin in the lunchroom and recommended that he go to the nurse's office, the faculty room or the bathroom to administer his insulin shot. Mr. Saper also mentioned in the memo of December 9, 2011, that his denial of being told beforehand was proven false, when Mrs. Corrigan was brought into a meeting and she confirmed that she had previously talked to him about the situation. Mr. Saper also disputed Mr. Harriman's "excuse" that he had

taken the insulin because it was an "emergency situation" by stating that when he approached him in the cafeteria at the time, the respondent did not mention an emergency, looked fine, and instead just said that no one could see him taking the shot. In Mr. Harriman's response to the memo, he said that it was a poor assumption on his part to decide that there was no emergency, but, Saper could not comprehend that it was better to be safe than sorry because he could not comprehend such a common-sense concept and had no regard for his teachers' health. On the day of the injection, Mr. Saper said that Mr. Harriman never said that he was injecting himself with glucose. There was no discussion of what was in the injection.

Mr. Saper testified regarding Mr. Harriman's behavior on gate duty. According to the principal, Mr. Harriman was assigned to supervise the gate area between 8:30 and 8:45 in the morning, on the days that he was at the school, when the parents dropped their children off at school. The parents had been instructed to line up with their cars, drop their children off and pull away. He received information that Mr. Harriman was going down the line and opening the car doors and helping the students exit the cars. Mr. Saper thought that this was a safety hazard, because a parent might not see Harriman opening the door and a student could fall out, and because there was a lot of activity going on in the gate area at the time and this would add to the confusion. In addition, since Mr. Harriman was walking down the line, he would not be on the blacktop, where he was supposed to be supervising. Mr. Saper said that he tried to speak to Mr. Harriman about this, but Harriman became disrespectful and said that Saper was harassing him. Mr. Saper testified that Harrison Werner, a former security guard at the school, who had told the principal about Harriman's actions, received a telephone call from him saying that he was a snitch. He said that Harriman "flipped out" and insulted Saper. Mr. Saper said that he had a meeting with Mr. Harriman and a union representative, Mr. Thornton, in which he wanted to tell the respondent that he thought that what he was doing was insubordinate and to cut it out. He said that Harriman responded that Saper could not tell him what to do and who to speak to. (P-31) According to Mr. Saper, Mr. Harriman threatened him by saying "wait until you see the log that I have on you." Mr. Saper characterized Mr. Harriman's response (P-32) as trying to justify what he did by saying that it was an emergent situation. Mr. Harriman claimed that Mr. Saper had no regard for teachers' health and he could not ban the

respondent from the lunch room and had no authority to order him to eat in the faculty room where the female teachers conducted “baby showers, weddings, engagements and the like.” I will continue to monitor my blood sugar out of the sight of the students . . . except for a rare occasion . . . when I had to do it right then and there.”

Mr. Saper commented on two memos (P-34 & P-35) that he sent to Mr. Harriman regarding “his verbal attack on Mr. Werner,” in which he directed him to keep confidential information, confidential. Mr. Harriman’s response, at a meeting that Mr. Saper convened, was that he could say anything he wanted and share confidential information with anyone including parents. In it Mr. Harriman accused Saper of being insecure and jealous of him, of verbally attacking Mrs. Corrigan about the insulin situation and about planting moles among the staff to snitch on him. Mr. Saper sent a response to Mr. Harriman regarding the gate incident and the insulin injection (P-41), again disputing the respondent’s version of what occurred.

Cross-Examination

On cross-examination, Mr. Saper was questioned about the “seeding issue.” He acknowledged that he received information about the seeding, but did not discuss it with Harriman, even though it would have been appropriate to do so. Mr. Saper denied telling Harriman, after he expressed his dissatisfaction regarding the seeding, that he knew nothing about wrestling, and therefore Harriman should call the Association himself. Mr. Saper said that he did not follow up on his directive to Mr. Harriman that he attend the compliance meeting, and does not know if he attended. He did know that no sanction was put on the District as a result of Mr. Harriman’s phone call to the Association. Mr. Saper said that he was copied on P-4, the memo from superintendent of schools Joseph F. Casapulla to principal Richard Tomko regarding “Athletic Concerns—Kevin Harriman.” In it he said that he was very upset about the MVP player that Mr. Harriman chose because the player had been absent from the championship match due to his suspension for telling a teacher to “go f... herself.” In addition, he was unhappy that both awards went to Bogota students, and he felt that this was due to parental involvement and concerns rather than who was the most deserving of the award. Mr. Saper acknowledged that it was within Mr. Harriman’s discretion, as the

coach, to choose the MVP and coach's award recipients. However, he felt that he should have considered the administration's concerns, which he did not feel that he did. When asked if it was inappropriate to challenge the findings of the Association, Saper said that it was appropriate for the athletic director to challenge, but not the coach. When questioned about the Recreation dinner awards, Mr. Saper said that he did not attend. However, the Recreation Department is separate from the Board of Education; he did not know if they had their own awards.

Mr. Saper was questioned about P-6, his evaluation of Mr. Harriman on March 15, 2011. He asserted that the overall evaluation was not satisfactory because Harriman received "needs improvement" in Standards, 6, 8, 9, 10 and 11. Mr. Saper claimed that too many students had been injured in Mr. Harriman's class and Mr. Harriman never reported it to him. In addition, there were bullying incidents that were noticed, and that raised concerns. Mr. Saper testified that the original evaluation gave an overall evaluation of "needs improvement," but Mr. Harriman spoke with him and Saper agreed to change the evaluation to "effective."

Mr. Saper was questioned about P-8, in which he outlined a number of student complaints, among which was an incident in which a student was upset because Harriman allegedly screamed at her and called or threatened to call her mother during class time from his cell phone. He was asked what a teacher should do if he had a problem with a child. Saper said that the teacher should call the parent from a landline at the school. Saper said that this was not a policy, but it was common practice. On redirect examination, Mr. Saper said that he had two concerns about using a cell phone during class. The first was that there was a policy against the use of cell phones, and the second was that a teacher should not cut into instructional time by speaking on the phone during class. Saper also testified that he has never seen or heard of a teacher asking a student to leave the classroom to retrieve something for the teacher.¹⁵ As for the remark about not eating in the lunchroom, Mr. Saper said that the lunch aides have asked that he not be there because he gets in the way. Mr. Saper was asked if there

¹⁵ Mr. Saper was asked what Mr. Harriman could do if he needed water to take a pill when he was in the classroom. The principal said that he could send two students, using a buddy system, to retrieve the water, or could ask a teacher to cover his class while he got the water.

was any written prohibition about the teaching staff writing to the Board of Education. Mr. Saper said that there is no written policy, but it was common practice that the staff go through the chain of command and not write directly. Mr. Saper admitted that prior to becoming principal, he had had a relationship with Mr. Harriman as athletic director and coach and he had had problems with him. When asked how he felt about Mr. Harriman's statements in his rebuttal memo, he said that he felt threatened by them even though he did not feel that he had done anything wrong.

When asked about the cafeteria incident that was outlined in P-30, Mr. Saper said that Mr. Harriman's administration of insulin occurred while the children were still in the cafeteria, not when they were leaving. There were 100 students at tables in the room when Mr. Harriman injected himself. He said that Mr. Harriman was sitting at a table with an aide, Ms. Romero, and two students, one next to her and the other across from her. They were three feet from him. Mr. Saper estimated that he was about twenty feet from Harriman, but there was nothing blocking his view. He saw Harriman quickly lift his shirt and inject himself in his abdomen. Mr. Saper said that he waited four to five minutes, until there was a private moment and Harriman was working on his computer, and then asked him if he was injecting himself. Mr. Harriman's response was that no one saw him do it. He did not say anything about an emergency. When asked about the gate incident, Mr. Saper said that Mr. Harriman was assigned gate duty the first day of school. He became aware that the respondent was opening car doors sometime closer to December 9, 2011. Mr. Saper said that he was pretty sure that other teachers did not open the car doors. Mr. Werner told him that he had opened a car door once or twice upon a parent's request. When asked on cross-examination what confidential information Mr. Harriman had shared with other people (P-34), Mr. Saper said that any incident regarding students or what occurred at gate duty should not be shared with anyone else. When asked whether it was his business if an employee complained about another employee, he answered in the affirmative. He was then asked why he thought it was necessary to write another memo. He said that he wrote the memo because he got a report from Mr. Werner in which Werner said that Mr. Harriman had called him, when he was off duty, and accused him of getting Harriman in trouble and harassing him. He said that Werner had told him that Harriman made remarks about Saper's personal life and Werner did not want to have anything to do

with it. In addition, Mr. Werner reported that Mr. Harriman had shared confidential information about the gate incident with a parent, Mrs. Tester.

Mr. Saper was asked about the Field Day reassignment regarding Mr. Schwartz. He said that he was not aware that the plan had changed and that Mr. Harriman was not needed at Ms. Jackter's school. When questioned about his memo to Harriman on December 21, 2011 (P-41), he said that in response to Mr. Harriman's statement that he never injected himself before, he stated that that was another lie and that he had seen him do it earlier in the year and brought it to the nurse's attention.

Rebuttal

During his rebuttal testimony, Mr. Saper said that he had become principal on January 4, 2010. After that time he regularly conducted faculty meetings. At the first faculty meeting in September 2010 he discussed the use of cell phones and stated that they should not be on during the day except for family emergencies.¹⁶ He was sure that he discussed this at the faculty meeting at the opening of school for the 2011–12 school year as well, and at other faculty meetings.

Erik Schwartz

Mr. Schwartz testified that he has been employed as a physical education teacher in the Elmwood Park schools for five years. He stated that in 2011 they had originally decided that he and Harriman would plan Field Day together at Mr. Saper's school. However, after Mr. Saper decided that Mr. Harriman should not conduct Field Day at his school, he told Mr. Harriman to cover his classes at Ms. Jackter's school. Mr. Schwartz testified that he had informed Mr. Harriman that it would not be necessary for him to cover his classes at Ms. Jackter's school because he had made arrangements to cover the Wednesday classes. He had doubled up on classes prior, so there was coverage. Mr. Harriman just had to show up at the school at the appointed time. Mr. Schwartz said that he had this discussion with Harriman well before the Field Day. Mr.

¹⁶ Mr. Saper acknowledged that if the September faculty meeting was on a Monday, Mr. Harriman would not have been at his school.

Schwartz said that he understood that Harriman reported to the building, notwithstanding the fact that Schwartz told him that he did not have to cover the classes, and said that it was poor communication on Mr. Schwartz's part that he was not told that the classes were covered. Mr. Schwartz said that following Field Day at Ms. Jackter's school, he met with Mr. Harriman at his home. Harriman showed him the letter that he had received from Ms. Jackter. Mr. Harriman was very upset and asked him to write a letter of support for him about what happened at Field Day at Ms. Jackter's school. Mr. Schwartz responded that he would not write a letter and did not want to get involved. Mr. Harriman retorted that he would do it for him, and told him to "man up." Subsequently Mr. Harriman called Mr. Schwartz on his cell phone and proceeded to curse him out, make derogatory remarks about Mr. Saper, call Schwartz a snake, and refer to Jackter as a lying bitch. Over a three-day period he received numerous text messages from Mr. Harriman, to the point that Mr. Schwartz said that he felt that he was being harassed and went to Dr. Tomko to speak about it.

When asked what he would have done if he received a memo from Mr. Saper telling him to cover classes in another school, he said that Saper was not the principal of Gantner School and therefore did not have the authority to tell him to go to another school to cover classes. Schwartz said that he never told Saper that the classes at Gantner were covered. Instead, he spoke to Harriman directly and told him that.

Michael Wartel

Mr. Wartel testified that he is employed as an investigator/attendance officer/courier for the Elmwood BOE. He said that in December 2011 he was called upon to deliver paperwork from the superintendent to Mr. Harriman. He did not know what was in the envelope that he delivered. When he delivered the envelope to Mr. Harriman in the Central Office, Mr. Harriman replied that it was more harassment from Tomko, Jackter and Saper. Mr. Harriman then said that it didn't matter because he had an attorney and he would be suing.

Mr. Wartel also testified that in December 2011 he was standing next to Ms. Jackter at the Gantner School near the exit door. Mr. Harriman was exiting through one

of the doors. Ms. Jackter said three times, in a loud voice, "Mr. Harriman." Wartel said that Harriman never looked back, just walked straight down the corridor, between Ms. Jackter and himself, and through the exit door. (Mr. Wartel said that he may have backed up a little as Harriman walked between them.) The corridor in which this occurred was just seven feet wide, and at the time that Ms. Jackter called Harriman's name, they were just two feet from each other. Mr. Wartel denied that Harriman was wearing headphones at the time of the incident. Wartel said that he commented to Ms. Jackter, "I can't believe he did not answer you." She responded, "I know."

Harrison Werner

Mr. Werner testified that he used to be a security officer for the Elmwood Park Board of Education. As part of his responsibilities at the time he had gate duty, which entailed watching the students entering the school and making sure that they were safe. Mr. Werner said that he was warned by Mr. Saper not to open the car doors of the children that were being dropped off until they were the first in line.¹⁷ He said that for safety reasons (fear that parents would not be aware that children were exiting the car and might fall out while the car was moving) he was told not to open the car doors. Mr. Werner said that he observed on all of the days, from September to December 2011, that Harriman worked at the school that he would walk down the line of cars and open the car doors before the cars got to the school gate. At any one time period eight or nine car doors would be open at the same time.¹⁸ At those times the cars were lined up on Spidell Ave. on the public street. In December 2011 he told Mr. Saper that Harriman was opening car doors. The Saturday following his talking to Mr. Saper, he received a telephone call from Mr. Harriman at his job.¹⁹ Mr. Harriman called him a "snitch" and spoke very loudly on the telephone. He made derogatory remarks about Mr. Saper's personal life, called him a cheater, and told him that Mr. Saper did not run Gilbert Avenue School; Ms. Jackter and Dr. Tomko ran it. When he told Mr. Saper what Harriman had said, Saper asked him to put it in writing. (P-33.) On Monday, following the telephone call, Mr. Harriman came at him "very aggressively, nose to nose," called

¹⁷ Werner admitted that on at least two occasions, upon parents' requests, he opened the car door before the vehicle had come to the gate.

¹⁸ There were approximately 300 students at the school.

¹⁹ He worked part time for his father at a garage.

him a mole and a snitch, cursed at him, and screamed at him, "how could you have done this to me?" At the time there were parents and students within earshot who turned around to see what was going on. Mr. Harriman opened the car door of a parent waiting in line named Mrs. Tester. Mr. Werner overheard Harriman saying to her that he was getting into trouble for opening the car doors, and that Saper does not like it when he does a good deed for parents. Harriman turned to Werner and said to him, "go run mole and tell Dave [Saper] everything I said." Mr. Werner testified that at this time, every other word out of Harriman's mouth was a curse word and parents and children were turning around to see what was going on between Harriman and Werner. Werner testified that he was worried because he was afraid that there would be a physical altercation.

On cross-examination Mr. Werner said that at any one time in the morning there could be nine to twelve cars lined up on the street. He never saw Mr. Harriman opening a car door when the car was moving and he never saw an incident when the respondent opened a door that caused him concern. Mr. Werner was asked why he waited from September to December to talk to Harriman about opening the car doors. He said that he did it in December because it had gotten to a point where Harriman would open up a line of car doors. Werner felt that this caused congestion and he worried about the students' safety. When asked, Mr. Werner said that he did not know if any of the parents had asked Mr. Harriman to open the car doors, but based on the location of the cars, he did not think that the parents waived Harriman over to open the car doors. Mr. Werner did admit that the children who were let out of their cars were on the sidewalk side; they did not have to cross a street.

Dr. Richard D. Tomko

Dr. Tomko testified that he has been the superintendent of schools for Elmwood Park for three years. Before that he held the positions of assistant superintendent, high school principal and middle school principal. He held the position of athletic director in another district. He has known Mr. Harriman since he came to the District in 2002, when he was the middle school principal and Harriman was the physical education teacher and head coach of wrestling. He first became concerned about Mr. Harriman in

the winter of 2002–03 because of a situation regarding a Mr. Galler, who was a science teacher and wrestling coach. He described Mr. Galler as being one of the best wrestlers to come out of E. Paterson and someone who was very involved in the school system. He said that on occasion Galler disagreed with Harriman and there had been a verbal altercation between them about wrestling philosophies, but it was a successful wrestling year and Galler would be returning to coach the next year. Dr. Tomko said that he was shocked when he received a copy of a memo from Mr. Harriman to Mr. LaGrotta in which the new coach and teacher appeared to be suggesting that Mr. Galler, the most liked coach and teacher at the time, should be fired. Dr. Tomko said that the memo caused a rift between Nazzaro and Harriman because it appeared that he was countenancing Galler's removal as a coach. Dr. Tomko said that he had a brief conversation with Mr. Harriman about resolving the issues between Mr. Galler and him. Mr. Harriman's response was that there was no talking with Mr. Galler and his mind was made up. The matter resolved itself because the District decided to no longer have a middle school program, which Mr. Galler had been running.

Dr. Tomko testified that when he became principal of the high school, he had another problem with Mr. Harriman. Dr. Tomko was charged with putting together a Booster Club dinner for all the sports so that all of the teams would be treated equally. The Board of Education had felt that there were inequities in the way the different teams were treated and as a result morale was down. Dr. Tomko formed a Booster Club, which would have one event for all of the athletes. The athletic director and he put together a Booster Club dinner in which everything would be equitable, and each coach was told to talk only about the senior athletes. Every coach complied with this instruction except for Mr. Harriman. He spoke about every student, not just the seniors, and about every match they had been involved in. Dr. Tomko said that he got a lot of flak from the parents and Board members after the event about what Mr. Harriman had done. When Dr. Tomko spoke to Mr. Harriman after the dinner, Mr. Harriman said that it was a miscommunication and he had not understood what Dr. Tomko wanted. Dr. Tomko did not believe Mr. Harriman's explanation, but he said that he gave him the benefit of the doubt. The following year the coaches were instructed to hand out only two awards and only at the Booster dinner—the MVP and Coach's Award. Instead, Mr.

Harriman handed out three awards²⁰ at a separate Recreation Department awards dinner. Dr. Tomko said that he received many telephone calls from parents who were upset that Mr. Harriman gave out two of the awards to Bogota students,²¹ added an additional award, and did not hand them out at the Booster dinner, but presented them at a non-Board of Education function before the official dinner. After Dr. Tomko looked into the matter he saw that not only was Mr. Harriman giving the majority of the awards to Bogota students, but to players who had less accolades in the league than some of the Elmwood Park students. Dr. Tomko was also concerned that Harriman gave an award to a student who had been suspended from a championship match because he had told a teacher to "go f--- herself." Dr. Tomko insisted that Mr. Harriman had to know what the student had done, because he had not been allowed to compete in the championship match. Dr. Tomko said that he was very upset and had a conversation with Mr. Harriman, who said that it was a done deal. Dr. Tomko said that he had supported Harriman when he was the JV coach and threw students off the team for doing less than what the MVP had done. Dr. Tomko said that he planned to override Mr. Harriman, but then he realized that the coach had already handed out the awards at the Recreation dinner.²²

Dr. Tomko testified about the problem with the New Jersey State Interscholastic Athletic Association (NJSIAA). In the year in question Elmwood had an excellent team. Dr. Tomko said that he was close to the NJSIAA officials. The Association oversees all the sports programs in the high school and makes the rules for all the sports. The Association can impose penalties on teams including forfeitures, suspensions and non-participation in tournaments. Dr. Tomko said that he received a call from the Association's director, Bob Baly, about a situation involving Coach Harriman. The director said that Mr. Harriman had upset his secretary and then went on to speak in an argumentative manner toward the seeding manager. According to Mr. Baly, Mr. Harriman yelled at the manager, and when he did not get his way, told him that it was "bullshit" and hung up on him. Mr. Baly said, "how dare the coach talk to my people that

²⁰ Mr. Harriman included a most improved player's award.

²¹ The Elmwood Park and Bogota wrestling teams had been combined because there were not enough players on either team.

²² The trophies that Harriman handed out at the Recreation dinner were paid for by the District. At the Recreation dinner, Mr. Harriman also awarded a trophy for the most improved player, which was not a sanctioned award. Wrestling was the only sport that presented this award.

way?" He said that the athletic director, rather than the coach, should have contacted him. There was a way to protest seeding through an appeals process, but that was not the way that Harriman did it. Mr. Baly asked Dr. Tomko what he was going to do about the situation. He said that he was going to have the athletic director, Mr. Saper, look into the situation. At that point they talked about Mr. Harriman going to a compliance meeting, which is a professional development program for coaches to learn the rules and proper sports etiquette. Mr. Saper sent a memo to Mr. Harriman (P-3) in which he discussed Harriman's behavior toward the Association directors and directed him to attend the NJSIAA compliance meeting.

Dr. Tomko discussed a memo (P-4) that he sent to the then superintendent of schools, Joseph Casapulla, on May 26, 2006. In the memo he stated that he had tried in every way to moderate Coach Harriman's abrasive demeanor, but it had reached a level that had to be addressed. He stated that he had witnessed Harriman arguing with parents, demeaning students, arguing with administrators and blatantly disregarding administrative directives. Tomko said that he had to express his continued unhappiness with Mr. Harriman as a coach in the district. He then cited the incidents with the Association and the Booster Club dinner. The superintendent responded that Tomko should continue to try to work things out. After another memo, when Dr. Tomko discovered that Mr. Harriman had handed out the awards at the Recreation dinner, it was decided that Harriman should not be rehired the next year as the wrestling coach.

Dr. Tomko commented on Mr. Harriman's "rebuttal to your meeting write up letter dated May 26, 2011," which was copied to all members of the Board. Dr. Tomko said that he had tried to educate the Board, when he became superintendent, that the prior practice of direct communication with the Board regarding the day-to-day operations of the schools was not appropriate. It was his position that the Board should not see and deal with job reprimands. They were a policy body. There was a grievance procedure set out in the collective bargaining agreement that dealt with teacher grievances. There was nothing in that procedure that allowed for direct communications to the Board. Dr. Tomko felt that Mr. Harriman's sending copies of his rebuttal to the Board circumvented the whole procedure that had been established and usurped the superintendent's authority.

In early July of that year, after he had reviewed some of Mr. Harriman's rebuttals, Dr. Tomko felt that he had to put a stop to what was going on. He said that he counted fifty-four insubordinate statements in Mr. Harriman's various rebuttals. In addition, Dr. Tomko alerted the affirmative action officer regarding Ms. Jackter's accusation about Mr. Harriman touching his genitals in her presence. Dr. Tomko felt that what the respondent had done could have created a hostile work environment and should be investigated. Dr. Tomko said that he called a meeting with Mr. Harriman and the union president. Mr. Harriman in turn called in a higher level union representative from the State. Mr. Harriman asserted that he had shown his rebuttals to the union people, including the union attorney, and they advised him that they were perfectly all right. Dr. Tomko said that it was hard to get across to Mr. Harriman that his actions and rebuttals were insubordinate. Dr. Tomko wrote a letter (P-18) regarding the meeting with union representatives, in which he summarized the meeting and cautioned Harriman to refrain from sharing his views with students, parents and faculty. He also put Mr. Harriman on a 90-Day Action Plan. In it he set forth the goals that he thought that the respondent should meet in order to get back on the right path to coexistence. Dr. Tomko said that Mr. Harriman never contacted him to ask for any clarification of the goals, but the union representative wanted to speak with him. The representative, Ms. Spina, wanted all of the negative letters and memos removed from Mr. Harriman's file. Dr. Tomko responded that Mr. Harriman had not taken responsibility for what he had said and issued no formal or informal apology. Therefore, at that point he would not remove the letters and memos from his file. (See P-20.) Dr. Tomko pointed to P-24, a letter from Mr. Harriman to the Board members dated September 6, 2011, in which he felt that the respondent repudiated the Action Plan. Harriman went on to assert that he was being slandered and the things said about him had been fabricated. He claimed that he was planning to file a defamation suit.

Dr. Tomko pointed to P-43, which was an organizational chart that depicted the chain of command. According to the chart, there was no authority for a teacher to report directly to the Board of Education. P-44 states:

The Board expressly disapproves of any attempt to expedite the resolution of a problem by disregard of the organizational plan and the appropriate processes. A staff member's persistent disregard for the established management organization of this district in violation of this policy will be considered an act of insubordination subject to discipline.

Dr. Tomko also discussed the fact that from the 2004–05 school year forward, Mr. Harriman made it known that he was refusing to meet with administration on any topic by himself; a union representative would have to be present. On that basis, he refused to attend a meeting regarding a 504 Plan for a student where all of the student's teachers were supposed to attend. Dr. Tomko wrote a memo (P-21) in response to Harriman's refusal to attend the meeting. Dr. Tomko referred to P-25, which was a reply to a memo from Dr. Tomko. Dr. Tomko testified that he felt that the memo was a threat and he was concerned about Mr. Harriman's aggressive behavior toward him. In the memo, Mr. Harriman said that he would not be attending any anger-management course, as recommended by Tomko. Mr. Harriman copied this letter to all the Board members. The Board was not aware of the compliance meeting or the suggestion of an anger-management course until Harriman told the Board. Then Dr. Tomko began receiving calls from Board members wanting to know what was going on.

Dr. Tomko pointed out that in a memo from Mr. Harriman to Dr. Tomko dated September 9, 2011, along with stating that he would not attend any meetings with administrators alone, Harriman said:

Please be careful using sarcastic adjectives to describe your interpretation of how I conduct myself when I have to defend myself against dishonesty and/or invalid reprimands being forced upon me. I am not at all intimidated by you and you keep antagonizing me. The more you harass me, the bigger my case gets.

[P-26.]

Mr. Harriman also claimed that Dr. Tomko's use of the word "caution" was a threat, and that his 90-Day Action Plan was invalid and was another attempt to turn "this deceitful circumstance into my fault."

Dr. Tomko testified that he wrote P-27 because he was concerned about Mr. Harriman's allegations that he was keeping logs. He thought that there might be information in the logs that had something to do with a staff member hurting a student.²³ Dr. Tomko directed Mr. Harriman to meet with him on Friday, September 16, 2011, at 3 p.m. and to provide him with the logs prior to that date. The meeting never took place. Instead, Dr. Tomko met with Mr. Harriman's attorney, but nothing was resolved.

Dr. Tomko testified that he directed another letter to Mr. Harriman on December 16, 2011, after the action plan expired, in which he discussed his "willful disobedience and insubordination towards this administration," which included his injecting himself in the cafeteria and his argumentative tone toward Mr. Saper and Ms. Jackter; his conversation with the school security officer regarding his being harassed by the administration; and his accusing Mr. Werner of getting him in trouble. Dr. Tomko also claimed that Mr. Harriman had shared confidential information with parents and staff after he had been specifically advised not to do so. Dr. Tomko claimed that his having to write memos, speak with people about incidents with Mr. Harriman, and trying to get the union and therefore teachers involved in remedying the situation, all took away from the time he should have been spending administering the school system and negatively impacted the District. In addition, he was concerned that Mr. Harriman's comments that he would not accept the threats that he felt were being hurled at him passively meant that the respondent might do something violent. In addition, Mr. Harriman also refused to follow Dr. Tomko's directive to enroll in an anger-management course.

Dr. Tomko referred to P-45, which was a policy memo regarding the use of cellular telephones at school. According to the policy, if a staff member had to make a personal call on a cellular telephone during the school day, the staff member should not make the call while assigned to school district responsibilities. Dr. Tomko also pointed to R-28, which was a September 9, 2011, letter to Mr. Harriman. In it he stated that he found Mr. Harriman's letters of September 6 and 9, 2011, to be insubordinate and to contain threats.

²³ Dr. Tomko said that Mr. Harriman had made a comment in a prior communication about bullying, and he thought that it might refer to actions of a student and he needed to know about that.

Cross-Examination

Dr. Tomko was questioned regarding P-1, a memo to Mr. LaGrotta dated May 6, 2003. The superintendent said that the memo showed a pattern of insubordination by Mr. Harriman. Dr. Tomko said that as the head coach Mr. Harriman only had the right to recommend someone for reappointment or not; he did not have the right to hire or fire someone. The problem was that in his evaluation, Mr. Harriman had recommended Mr. Galler. It was only after the season ended that Mr. Harriman appeared to change his mind and was manipulating the system. Dr. Tomko stated that the real problem he had with Mr. Harriman over this incident was that he misrepresented what Mr. Nazzaro had allegedly directed him to do. Dr. Tomko testified that his memo to Superintendent Casapulla was intended to bring him up to speed with the problems he and other members of the administration had had with Mr. Harriman, and specifically the problem with the NJSIAA and the team's seeding and the issue of the presentation of awards at the Recreation dinner. Dr. Tomko asserted that it was not appropriate for Mr. Harriman to have discussed the seeding with the Association. He should have gone to the District's athletic director. He said that every coach knows this procedure, but it is Harriman's mentality to do it himself. Dr. Tomko admitted that between 2006 and May 2011 Mr. Harriman had no write-ups. He said that it was because he had been transferred to the elementary schools, which he thought would be a better fit. He said that Mr. Harriman coached baseball. There had been some issues regarding students who made fun of him, and Dr. Tomko said that the administration supported him. Dr. Tomko acknowledged that prior to Mr. Saper being appointed as principal in January 2010, he had not received complaints from the prior principal about Mr. Harriman. Similarly, prior to Ms. Jackter being appointed, he had not received complaints about Mr. Harriman from the prior school administrator. Dr. Tomko said that there had been a complaint from Mr. Silla, the principal of Sixteenth Avenue School, where Mr. Harriman had also worked. It had to do with Mr. Harriman's eating a student's food. Mr. Silla wanted to handle the situation himself, so Dr. Tomko did not deal with it.

Dr. Tomko was questioned about whether it was possible that the awards that Mr. Harriman gave out at the Recreation dinner were separate Recreation awards. Dr.

Tomko said that that was not possible, since the Recreation wrestling team was made up of younger students and the awards were given to the high school wrestling team. Dr. Tomko also pointed out that at the Booster awards dinner the second year, Mr. Harriman again talked about all of the players, when he had been instructed two years in a row to talk about the seniors only. Mr. Harriman again claimed that it was miscommunication.

Dr. Tomko was questioned about Ms. Jackter's allegation about Mr. Harriman's touching his genitals. He said that Mr. Harriman told him that his shorts were wet from being outside in the rain on Field Day and his pants were sticking to him. Dr. Tomko said that he was upset that Mr. Harriman never apologized to Ms. Jackter for making her feel uncomfortable. The superintendent was asked what happened to the complaint lodged with the affirmative action officer regarding this incident. He said that the officer became pregnant and the new officer was the Board's secretary. This created a conflict. Ms. Jackter told the superintendent to hold off on the investigation until the tenure action was over. When questioned about the cell phone incident, Dr. Tomko said that it was not unusual for a teacher to contact a parent after school hours. However, it would be unusual for a teacher to have a parent's number in his cell phone, because the union would not want the teacher to have the number.²⁴ When questioned about the July 5, 2011, memo in which Dr. Tomko said that it was inappropriate for Harriman to contact the Board before discussing the incident with the administration, Dr. Tomko said that Harriman told him that the union told him to send the letter to the Board, but Dr. Tomko stated that the union knows the proper chain of command. Dr. Tomko also recalled that at some point he strongly suggested that it was inappropriate for Mr. Harriman to go directly to the Board, and that he should instead follow the chain of command. When questioned about why he was so concerned about what was in the alleged logs that Mr. Harriman referred to, Dr. Tomko said if there was something in the logs that referred to improper action by a staff member toward a child, the District could be liable and he needed to know about it.²⁵ When asked why the 90-Day Action Plan

²⁴ This stemmed from another incident involving cell phone usage by a teacher.

²⁵ There had been a case in the 1990's in which a principal was found guilty of improperly taking pictures of students on the wrestling team. After the charges were filed, teachers came forward to say that they had seen things that were improper, but they did not know to whom they should report the information.

was started July 6, when school was not in session, Dr. Tomko said that he did it that way because the anger-management course was conducted during the summer and Mr. Harriman could work on not being insubordinate over the summer. However, he was counting the 90 days from the time school was back in session. Dr. Tomko was asked whether the union officials had made it clear that whenever Mr. Harriman was to meet with administration, there should be a union representative present. The superintendent said that he did not recall such a conversation, but he did recall that in a meeting with Mr. Oxfeld, an attorney for the union, he made it clear that a union representative had to be present when the meeting involved a reprimand, and not for normal meetings involving students.²⁶

Dr. Tomko was asked what prompted him to write P-38, the memo to Harriman about continuing to defy directives not to speak to anyone about confidential matters. The superintendent said that it was a result of Mr. Wartel telling him that Mr. Harriman said he was continuing to be harassed when he delivered the papers to him. The superintendent believed that it was inappropriate for Harriman to talk to a messenger about this. Dr. Tomko said that he talked to the union representative about this, but it did not make a difference. In addition, Tomko testified that three teachers informed him that Harriman had tried to get them on his side by encouraging them to file complaints because they also had issues. The superintendent was also told that Harriman used a school laptop during school time to write his rebuttals. Dr. Tomko did acknowledge that he has heard of a teacher leaving the classroom unattended for a short period of time during class. When questioned about P-45, the "Use of Cellular Phones," Dr. Tomko said that he believed that it was circulated among the teachers and given to the union, but he could not verify it. In addition, he acknowledged that the policy talked in terms of personal calls, and Mr. Harriman was asserting that the cell call that he made was not personal, but was made to the parent of a student.²⁷ However, Dr. Tomko asserted that

Following this incident the District was very sensitive to any allegations of possible wrongdoing by employees.

²⁶ The meeting with Mr. Oxfeld involved an incident in which a parent filed charges against a teacher for allegedly grabbing a student. The union felt that its members were being targeted. In negotiations with the union, it was decided that if the meeting just involved fact-finding, then a union representative was not required.

²⁷ There had been prior complaints that teachers did not want to call parents/students from their home or cell phones because then they would have their private numbers. Therefore, the District installed extra

he did not consider it appropriate to call a parent during instructional time except in an emergency.

Rebuttal

Lt. Michael Foligno

Lieutenant Foligno testified by telephone. He testified that he was at the Elmwood Park Recreation dinner in 2006 because he was an assistant coach for the Recreation wrestling team. He said that the event was held sometime after the end of the wrestling season, which terminates at the end of March. He said that the Recreation wrestling team consisted of younger children, but they had invited the high school wrestling team to the event. He recalled that Mr. Harriman gave out the MVP award at the dinner. He recalled this because there was a controversy about two out of the three awards—MVP, coach's and most improved player, going to Bogota wrestlers. On cross-examination Lieutenant Foligno was asked if the awards given out to the high school students at the Recreation Dinner could have been Recreation awards. He said that that was not possible since the Recreation wrestling team consisted of younger children, not high school athletes. Lieutenant Foligno said that in past years, when he was in high school, the high school wrestlers and the Recreation wrestlers used to have a dinner together. However they stopped doing that. The high school wrestling team was invited to the 2006 Recreation awards dinner as an inspiration to the younger children. Lieutenant Foligno was questioned about whether there could have been joint awards at the 2006 dinner. He said that there were no joint awards. The same awards were given at both dinners and they were not Recreation awards.

Kevin Harriman

Mr. Harriman testified that he has been employed in the Elmwood Park School District for the past ten years. His last assignment was at the three elementary schools,

phones in the school buildings so that calls could be made to parents either before or after school from the school building.

among which he split his time.²⁸ Mr. Harriman has a bachelor's degree in physical education, health and drivers' education and is near completion for a master's degree from the University of Phoenix. Besides having been a wrestling and football coach at Elmwood Park, he is a coach at Pascack Hills and had coached at a number of other facilities prior to his teaching career.

Mr. Harriman discussed P-1, the memo from Principal Nazzaro to Mr. Harriman, in which Mr. Nazzaro stated that he never recommended that Harriman submit the memo regarding Mr. Galler to Mr. LaGrotta. The respondent said that when he started as the wrestling coach in 2002, he inherited an assistant coach, George Galler. Throughout the season Mr. Galler had difficulty with students and some of the parents. Harriman tolerated the situation and had discussions with Mr. Galler and Mr. LaGrotta, the athletic director. In Galler's end-of-year evaluation, Mr. Harriman gave him a number of "NI" grades, but he did not recommend that Galler be terminated. He said that a few days later Mr. LaGrotta came to him and said that Galler was not happy with the evaluation and wanted to know what could be done about it. Harriman said that it was a proper evaluation. When Harriman came to LaGrotta with his concerns about Galler and suggested a meeting with LaGrotta, Nazzaro and himself, Mr. LaGrotta said that Nazzaro did not have the time to handle it²⁹ and LaGrotta suggested that Harriman put an addendum to his prior evaluation of Galler. Harriman said that there was no need to fire Galler, he just wanted to be able to choose a new assistant coach that he could work with. When questioned about P-2, which was a memo from Mr. Nazzaro dated May 22, 2003, about his failure to call him when he was going to be absent, Mr. Harriman said that he was following the procedure in effect at the time for calling in absences, namely calling the substitute service and telling them his name, the name of his school and where his lesson plan could be located. Mr. Harriman pointed out that between the years 2003 and 2006 he had no problems with the administration and received no write-ups.

Mr. Harriman explained that for the 2005–06 wrestling season the Elmwood Park team had twenty-two wins and only two losses. It was the best record that they had

²⁸ The three schools were Gantner, Gilbert Avenue and Sixteenth Avenue.

²⁹ Mr. Nazzaro was about to retire as principal of the high school and was busy with that and graduation.

ever had. He explained how the seeding was calculated by adding up "power points" at the end of the season. The NJSIAA calculated a seeding that placed the Elmwood Park team in a certain position. The Star Ledger then published the seedings based on the Association's statistics. Mr. Harriman stated that at the end of the season the seedings calculated by his assistant coach and statistician were different from what was published in the Star Ledger. Mr. Harriman said that he was upset when he saw the seedings and went to Mr. Saper to ask him to call the Association to find out why there was a discrepancy. Mr. Saper said that he did not know anything about wrestling and told Harriman to call the Association directly. Harriman said he first spoke to a Mr. McMillian from the Star Ledger, who was at the Association meeting when they calculated the points and who published the results in the Ledger. Harriman told him that he thought that the Association had changed the seedings, because the seedings published in the Star Ledger were different from those that had been sent to him as final. Mr. McMillian said that he had some input into the calculations, but the final seedings were done by the Association. McMillian suggested that Harriman call Mr. Baly at the Association, and gave him the telephone number. Mr. Harriman said that he called Mr. Baly and told him that he had spoken with Mr. McMillian and that the power points in the newspaper were different from the Association's numbers.³⁰ The respondent said that he did not use any profanity in speaking with Mr. Baly. (Harriman did say that when speaking to McMillian, Harriman said "this is BS," but McMillian did not take exception to his language.) He did continue to ask Baly if there were any way they could work the problem out, because his numbers and those of the Association did not match up. Baly continued to assert that that was how it was and there would be no change. He wished Harriman good luck in the tournament and did not seem upset. Harriman stated that Mr. Baly did not say anything to him about attending a compliance meeting. It was the respondent's understanding that attendance at a compliance meeting was ordered when a coach gets ejected from a game. When he did go to the compliance meeting, he approached Baly and apologized for any misunderstanding. Then he asked him why he was at the compliance meeting. Baly responded that Tomko wanted him to attend.

³⁰ Mr. Harriman claimed that Mr. Baly and McMillan were the only people that he spoke to. This testimony differed from that of Dr. Tomko, who said that Mr. Baly told him that Mr. Harriman had spoken to his secretary and had upset her.

When questioned about P-4, which dealt with the giving out of awards, Mr. Harriman said that he never saw the document until he received the tenure charges. Harriman said that the MVP was chosen because he had scored the most points for the team score. He said that the assistant coach and two volunteer coaches were from Bogota. He was never told that there was a problem with the student from Bogota who received the MVP award. On the day of the championship match, when the student did not show up, Harriman was told that the student had trouble at school and was not going to be at the match. He denied ever being told between the date of the match in March and the award presentation in May that there was a problem with the MVP receiving the award. He said that if he had known the circumstances, he would not have given the student the award. He said that Mr. Saper had talked to him before the award was presented, saying that it should be given to an Elmwood Park student, but he never mentioned the problem with the student from Bogota.

Mr. Harriman asserted that he did not present the MVP and coach's award at the Recreation dinner. He stated that the two awards that were presented were from Bogota; the only Elmwood Park Award that he presented at the Recreation dinner was for most improved player. The respondent acknowledged that recreation wrestling teams were second through eighth graders and, therefore, they were a different group of students than those who were on the high school team.

Mr. Harriman testified that before the Field Day activities that were the subject of P-7, he had coordinated five Field Days and participated in fourteen Field Days in total. He designed the activities, got the equipment, arranged the teams and laid out the program in a four- to five-page packet. Ms. Jackter was given the plan two weeks prior to the Field Day and she approved it. On the day in question he and Mr. Schwartz arrived at Ms. Jackter's school at 7:00 a.m. to set everything up.³¹ Mr. Harriman said that it was a misty morning; he said good morning to Ms. Jackter and her immediate response was, "we are having it!" Mr. Harriman proceeded to set up the equipment for the activities both inside the gym and outside. He had scheduled the children to begin

³¹ Mr. Schwartz had asked to come along to learn about Field Day, but he was not involved in planning the program.

coming down at 9:15 two classes at a time, but they did not come down until 9:30. Ms. Jackter requested to speak to the students first and he gave her the megaphone to use to address them. After that he gave the students general instructions that involved safety issues. At 9:45 the program began. About ten to fifteen minutes after they got outside, Ms. Jackter came up to him and said that she did not understand something in the packet. Harriman said that he explained it. He then went on to handle activities. When he went outside to the blacktop, where the outside activities were to take place, he saw that it started to drizzle. There were no students there; he only saw Ms. Jackter picking up hula hoops from the ground. He asked Jackter where the kids were. She said that it was raining. Harriman stated that he told her that she should have talked to him before calling the students inside so that he could bring the students in one class at a time. Instead it was chaos; he was told that the children were wet and some were crying. Jackter then ordered him to organize relay races. He questioned her about the fact that the students' sneakers would be wet and there were obstacles in the hallways where the events would take place. She told him to modify the relay race. Mr. Harriman took issue with Ms. Jackter's stating that his attitude during Field Day was inappropriate. He said that during Field Day, every half hour she came to him and criticized something that he was doing. She seemed relentless in pointing out problems with the organization; either she did not understand or a teacher did not understand something in the packet. He said that no teacher complained to him. The teachers had done the same program for the past three years with no problems. Two or three times during the day Ms. Jackter said, "See me when this is over." Harriman said that when he went into Ms. Jackter's room he was sweaty, dirty and wet from the rain. He sat down across the desk from Ms. Jackter. She told him that she was disappointed with his attitude and accused him of yelling at her. He denied the charge. At some point during the discussion he tugged on his thighs because his pants were sticking to him. The rest of the time his arms were across his chest. He stated that his hands were never on his genital area.

Mr. Harriman was asked about P-8, which concerned five students. Mr. Harriman said that one of the students did cheat on the fitness test and he told her that she was going to lose points for part of the test. Another student was unprepared for class and therefore could not do the fitness run. A third student was acting difficult and

crumpled his fitness paper. As for the student who said that Harriman screamed at her and called or threatened to call her mother, Mr. Harriman said that he had had problems with the student being hostile before, and when he spoke to her mother before, she told him that if there were any problems with her daughter he should call her on the spot. Harriman said that he told the student that he was going to call her mother because she had asked him to do so if there were problems with the child. The student's response was that she would do what Harriman asked her to do. As for the allegation that he asked a student to get him his water that he had left in the faculty room, Harriman said that he was never advised that a student could not go into the faculty room, and he had seen other students go in there to get things for other teachers. Mr. Harriman said that the student he had sent to the faculty room was seven years old. Mr. Harriman denied ever directing the lunch aides. He said that the principal, not he, was in charge of the aides. Mr. Harriman also disputed the remark that Mr. Saper put in the memo about his walking in the office in a huff and saying "what now?" Instead Mr. Harriman insisted that he said "what's up?" As for the issue about the student getting his water bottle, Mr. Harriman said that Mr. Saper called him into the office at 9:40, just before the start of Field Day, to ask about the incident. He felt that this was a form of harassment. When questioned about P-6, his evaluation by Mr. Saper, Mr. Harriman disputed the statement that there had been a number of problems involving student safety and bullying. Harriman said that only two students were injured in his class during the year and there were no incidents of bullying. He would never have tolerated bullying and Mr. Saper never discussed any bullying incidents with him.

Mr. Harriman was asked to explain what had occurred with the children who were mentioned in P-8, the memo from Mr. Saper to Mr. Harriman. The respondent said that he had no difficulty managing the fifth-grade class, which he had been teaching for five years. The children listed in the memo were students who did not want to do the fitness class because it was a hot day. Before he had started the class, Ms. Valentine, their regular classroom teacher, had told him that the class was out of control and wished him good luck with them. In his rebuttal memo of June 2, 2011, Mr. Harriman explained how he handled the situation with each of the students. Harriman felt that all of a sudden he was being harassed. Mr. Harriman said that his speech, tone and mannerism, when he met with Mr. Saper on May 25, 2011, were not disrespectful or

argumentative. He said that it was Mr. Saper who turned things around and started with an aggressive tone when Harriman was just sitting there. The memo stated that the respondent was going to file a grievance against Mr. Saper. When questioned, Mr. Harriman said that he did not file a grievance.

In the memo, Mr. Saper directed him not to assist with the lunch program and to work Mr. Schwartz's physical education schedule on Wednesday, June 8, 2011.³² Saper made it clear that Mr. Harriman was not going to be running the Field Day program with Mr. Schwartz. Mr. Harriman said that since he had been directed to cover Mr. Schwartz's class at Gantner, he went there on June 8, 2011. When he went to get the class at Gantner, the teacher said that Mr. Schwartz told her that he would make up the class at another time, but if Harriman wanted to take the class, that was fine. Ms. Jackter also became involved, and she told Mr. Harriman that it was okay for him to cover Mr. Schwartz's classes that day. Mr. Harriman said that Mr. Schwartz did not tell him not to take his classes at Gantner; he was not speaking to Schwartz at the time. Mr. Harriman said that, under any circumstances, he would have followed the administrative directive to cover Schwartz's classes at Gantner. In P-9, Mr. Harriman also explained that the reason that he asked a student to get his water bottle from the faculty lounge was that he had to take a pill and the water fountains were polluted and had been "bagged up" for some time.³³ Mr. Harriman also claimed that he spoke to the lunch aide about Mr. Saper's statement that the aides did not want him helping in the cafeteria. Mr. Harriman said that the aide told him that they complained to Mr. Saper about a Mr. Harrison, not Mr. Harriman. She promised that she would talk to Mr. Saper about the error. Mr. Harriman protested Mr. Saper's repetitive misstatements that he yelled, screamed and was in his face. He also claimed that he had exaggerated and been dishonest in his past evaluations of Mr. Harriman.³⁴ When asked about the tone of his rebuttal, Mr. Harriman acknowledged that it was on the harsh side and he might have gotten carried away with the details, but he felt that he had to defend his position. He felt that he had to write to the Board because he was being harassed by

³² Mr. Harriman testified that he spoke to the head lunch aide, who claimed that she never told Saper that Harriman was interfering with her job and she claimed that she told Saper this.

³³ Later testimony by the District's witness was that the water problem was being handled by the water department and the District had no control over the situation.

³⁴ Harriman claimed that in 2007 Mr. Saper gave him an evaluation that was not proper. He refused to sign the unsatisfactory evaluation and asked Saper to change the evaluation, which he did five days later.

administrators, and the only ones who would be neutral were the Board members. Mr. Harriman said that during the summer the Board replied to him that State law did not permit them to run the daily operations of the school, but they would refer the situation to the administrators. If things did not work out with the administration, then the Board would get involved.

Mr. Harriman was asked about the memo from Ms. Jackter to him on June 6, 2011, regarding the allegation that he left his students unsupervised. Mr. Harriman said that the children were doing their physical fitness routines and it was getting hot in the gym. He went to open the door to get some air and tried to finagle the door to keep it opened. He said that the whole procedure took fifteen to twenty seconds and he could see the students in the gym at all times. When he stepped back inside, Ms. Jackter was standing there with her assignment pad. Ms. Jackter accused him of being outside setting up cones. Mr. Harriman said that he had set the cones up earlier in the day before the students were in class.

Mr. Harriman said that he did not attend a meeting referenced in P-11, because he preferred at that time to have an NJEA representative or an attorney present at all meetings with administration. It was his understanding that he did not have to attend the meeting. P-12 was Mr. Harriman's rebuttal. Mr. Harriman said that he felt that Jackter and Saper were scheming to harass him. When questioned about the reference to the megaphone, Mr. Harriman said that Ms. Jackter was nervous while using the megaphone, and a principal should not be nervous when talking to students. He felt that this evidenced that something was going on between Jackter and Saper. When asked if he would characterize his memo as harsh, he said "no," but it was detailed. He thought that the harassing was starting up again and he was reacting out of self-defense. At the time he was being treated for depression and was taking meds for anxiety.

Mr. Harriman was questioned about P-15, in which Mr. Saper stated that Mr. Harriman had said to him, "what goes around comes around Mr. Saper." Mr. Saper took this as a threat. Mr. Harriman said that it was not a threat, just an expression. When asked about the logs that Mr. Harriman referred to in a number of his memos, he

said that they were reflections of his teaching on a week-to-week basis. It was pointed out that in answers to interrogatories he would not produce the logs because he considered them personal. Mr. Harriman stated that P-17 was his response to his fourth write-up in eleven or twelve days. In the memo he again dealt with the issue of his covering Mr. Schwartz's classes. Mr. Harriman said that he would have had no reason to go to Gantner School if he had known that he was not needed. Instead, administration could have reassigned him to other duty. It did not do so.

Mr. Harriman took issue with P-18, the letter that Dr. Tomko wrote to him on July 5, 2011. First, he could not understand why a letter would be sent to him when school was not in session. Mr. Harriman was taken aback by Dr. Tomko's taking issue with the tone and tenor of the respondent's rebuttals. Harriman could not understand how Dr. Tomko could devise an action plan in which the people he allegedly was insubordinate to and with whom he took issue would be monitoring his actions. Mr. Harriman claimed that Dr. Tomko never discussed Ms. Jackter's allegations about his touching his genitals, and no action was ever taken except getting a letter from the affirmative action officer.

Mr. Harriman was asked why he again wrote to the Board of Education on September 6, 2011. He said that he had written to the Board previously about the past five write-ups and did not receive a response. He said that he was never told not to write to the Board. Mr. Harriman testified that he wrote P-25 in response to Dr. Tomko's letter and the prior write-ups. At the time he was being treated for depression and was taking medication for anxiety. He also had issues at home. He said that he had to stop working on his master's degree and focus on defending himself against three people: Ms. Jackter, Mr. Saper and Dr. Tomko. Mr. Harriman was asked whether he met with Dr. Tomko on September 16, 2011, as mentioned in P-27. He said that he did not, but subsequently Mr. Feintuch met with Dr. Tomko. Mr. Harriman explained what he perceived had occurred on November 9, 2011, which was the subject of a memo from Ms. Jackter to Dr. Tomko (P-29). Mr. Harriman said that two special education students began fighting over a soccer ball. He dealt with the situation and reported to the regular teacher that the boys were not getting along. Ms. Jackter approached him and asked him to explain what happened. He showed her how he separated the boys by

extending his arms between another teacher and Ms. Jackter. As soon as he did this, Ms. Jackter said "don't touch me." Mr. Harriman said that that was all that happened, and then he walked away. He did not push her and she did not lose her balance; at most his arm may have touched her sleeve.

Mr. Harriman gave his version of what Mr. Saper outlined in P-30. He said that on December 2, 2011, he had finished preparing the afternoon equipment in the gym. He was sitting in the cafeteria and was working on his attendance book. He had his glucose monitor in a black bag. He was feeling dizzy and was sweating. He said that he knew his blood sugar was low. He went to a table fifty feet away from where the students were lined up against the stage waiting to go out.³⁵ None of the students were facing him. Mr. Harriman said that he lifted up the top of his laptop and gave himself an injection. He said that he was having a hyperglycemic episode. When Mr. Saper came over to him and asked if he had injected himself, Mr. Harriman said that he had. Mr. Saper's response was that that was not smart to do.

Mr. Harriman testified that on the first full day of school at Gilbert Avenue he was assigned to gate duty. Mr. Saper did not tell him anything about what procedures to follow. Harriman said that he thought he was to help children get out of their cars and into school. Beginning in September he started opening car doors to assist the students in the morning as a courtesy and for safety reasons. He either helped the students out of the cars or assisted them with their book bags and then closed the car doors. He felt that this expedited the drop-off process, and since the children exited onto the sidewalk on the school side of the street, it was safe. He said that he would make eye contact with the parent and then open the car door. The parents were thankful for the courtesy. Harriman said that before the December 9, 2011, memo (P-31) he had never been told not to do this, and Mr. Werner opened the car doors as often as he did. Mr. Harriman said that he asked Mr. Saper where the policy was written that he could not open a car door, but he never received anything from Mr. Saper. As for the comment that he had shared confidential information with a parent, Mr. Harriman said that a parent, Mrs. Tester, drove up each morning and he opened the door for her twin girls, who were

³⁵ Mr. Harriman claimed that the students had finished their lunch by this time.

small and who had trouble closing the door. On a day after he received the memo, Mrs. Tester asked him to open the car door. He told her that he was sorry, but he could not open the door anymore. Harriman asserted that he did not consider that to be sharing confidential information. Mr. Harriman denied having a conversation with Mr. Werner after he received P-31. He said that he called Mr. Werner on a Saturday and asked him if he received a memo about opening car doors. Mr. Werner said that he was working with his father and could not talk then. Mr. Harriman said that the conversation lasted less than a minute. When asked whether Mr. Werner's memo to Mr. Saper was correct, he said that some of it was correct, in that he did call Werner back, and he did discuss whether Werner had gotten a call about opening the car doors. However, he denied saying anything to Werner about Saper, Jackter or Tomko.

In discussing P-36, Mr. Harriman asserted that Mr. Saper yelled at him that he was married and had kids and that Mr. Harriman should get a life. Mr. Harriman was asked about his comments that Mr. Saper had planted moles in the school. He said that different people would go to Mr. Saper and say things that they had fabricated. Mr. Harriman said that Harrison Werner's referring to Mr. Saper as "Dave" during his testimony reinforced what he already knew, which was that Werner was a mole. Mr. Harriman asserted that he never discussed with Superintendent Tomko the incident regarding his injecting himself. The respondent said that Tomko came to a conclusion without consulting him. He did the same thing when jumping to his conclusion about Werner and confidentiality. Mr. Harriman also testified that Mr. Wartel delivered an envelope to him. As he was doing so Wartel said, "more BS from you know who." Harriman said that he responded, "they don't let up," and he might have said that he was going to take them to court. Mr. Harriman also re-asserted that the children were not eating their lunch when he injected himself. He disputed Ms. Romero's rendition that two students were sitting near her in the lunchroom near where Mr. Harriman injected himself. He said that they were thirty feet away. When asked about P-40, Ms. Jackter's memo about his ignoring her when she called to him at the entrance to the parking lot, Mr. Harriman said that at the time he was walking out of the school toward the parking lot. He did not hear her call to him. He denied ever walking between Ms. Jackter and Mr. Wartel and stated that he was in a hurry at the time. When he came back to school someone was in his parking spot. He asked Ms. Jackter what he should

do. She told him to just put the car in a visitor's space and he did so. Mr. Harriman claimed that he never received P-45, the Cellular Telephone Policy. He said that at times pieces of paper are put in his mailbox, but he never receives them.

Mr. Harriman testified that when the memos from Jackter, Saper and Tomko started, about June 2010, he started being treated for depression and was receiving new medication in May and June 2011, around the time of the first five write-ups. He said that he was stressed out about all of his responsibilities. However, he did not consider taking a leave of absence.

Cross-Examination

On cross-examination, Mr. Harriman said that he started receiving treatment and medication for his depression in 2010. He is no longer taking medication for this condition.

Mr. Harriman was questioned about the incident in which it was alleged that he called a student's mother on his cell phone during class because the child was misbehaving. Mr. Harriman had several renditions of what occurred. At one point he said that he did not actually call the mother, but just took the phone out and threatened to call. At another point he said that he called the parent's number, but she did not answer. Then he said that he did not remember whether he actually called or not. Mr. Harriman was referred to his answer to interrogatory #26 in which he stated that a call was made to the parent during the warm-up time at the gym class. Mr. Harriman responded that it happened so quickly, but he now remembered that he took the phone out and threatened to call, but did not actually call. Mr. Harriman was then asked whether it was incorrect when he said, in his rebuttal to Mr. Saper's memo, that he did call and left a message. Mr. Harriman then responded that he did call and left a message.

In response to questioning about P-1, page 2, the memo from Mr. Harriman to Mr. LaGrotta, Mr. Harriman said that he did not meet with Mr. Nazzaro regarding Mr. Galler. He said that Mr. LaGrotta told him that Mr. Nazzaro was too busy to meet with

him and the respondent should deal with LaGrotta directly.³⁶ Mr. Harriman denied Mr. Nazzaro's testimony that he never recommended to Mr. Harriman that he write an addendum to his initial evaluation of Mr. Galler and told him that if he had wanted Mr. Galler fired he should have stated so in his initial evaluation. The respondent stated that he thought that Mr. Nazzaro's testimony was colored by the fact that he was a good friend of Mr. Galler. Mr. Harriman stated that Mr. Galler was negative, untrustworthy, and degrading toward the students. These characteristics justified his recommendation not to renew his contract. Based on this information, Harriman was asked if he gave Mr. Galler a negative initial evaluation. At first Mr. Harriman said that he did not recall if, in the evaluation, he recommended that Galler not be rehired. Upon further questioning Mr. Harriman said that he now recalled giving Mr. Galler an unsatisfactory evaluation. Mr. Harriman said that from the date he received Mr. Nazzaro's memo on May 6, 2003, until the end of the school year he did not follow up as to whether Mr. Galler had been rehired. Despite the fact that he had written rebuttals to other memos that he received, Mr. Harriman did not write a rebuttal to P-1, page 1, the memo from Mr. Nazzaro in which he denied ever recommending that Harriman attach an addendum to his evaluation of Mr. Galler and recommending that Mr. Harriman take a look at his own attitude. Harriman said that he did not have any further responsibilities with regard to wrestling until the season began in November. Harriman said that he was not aware that wrestlers worked out over the summer using the school facilities.

Mr. Harriman was asked to explain the process by which wrestling teams are seeded. He said that first groups are determined based on the enrollment of the school. At the time in question, Elmwood Park was in Group #2. Within the group there were seedings, which are based on power points. Power points are determined by the strength of a team's opponents and the number of wins and losses. The Star Ledger reported the power points as well as the seeding. Mr. Harriman said that if the seeding had been done the way he thought it should have been done, his team would have been in a higher group. He believed that the seedings were off by a number of percentage points.³⁷ Harriman said that one of the assistant coaches and the score keeper, a student, kept a record of the points. He glanced at the calculations

³⁶ Mr. Harriman said that he did not copy Mr. Nazzaro on his memo to LaGrotta for the same reason.

³⁷ Percentage points are the wins versus losses, based on the strength of the team.

throughout the season and did the computations at the end of the season. Mr. Harriman asserted that he spoke to Mr. Saper about the seeding and that he gave him permission to call the Association.³⁸ Mr. Harriman characterized his discussion with Mr. Baly at the Association as a gentlemen's agreement to disagree.³⁹ Mr. Harriman stated that when he attended the compliance meeting in August 2006, he was not upset about being there, even though the meeting was generally for coaches who had been ejected from competitions. Harriman said that he apologized to Mr. Baly. When asked why he did that if his prior conversation with Baly had been cordial, the respondent said that he did not think that it would hurt. He said that his apology was just for sticking up for the team. Baly said that it was not his idea that he attend the compliance meeting; rather, Tomko wanted him to attend. Mr. Harriman said that he took exception to that. He felt that Dr. Tomko did not have the authority to send him to the compliance meeting. Mr. Harriman was questioned about his statement that between 2003 and 2007 he had no problems with the administration. He did acknowledge that in the spring of 2006 he was stripped of his coaching responsibilities. Harriman also did not recall discussing with Mr. Saper his remarks in the May 10, 2011, evaluation that Mr. Harriman needed to become more open to administrative feedback.

Mr. Harriman said that he did not recall being directed to hand out the MVP award only at the unified Booster Club dinner. Harriman said that he handed out the Recreation award, and he denied handing out the MVP award at the Recreation dinner. When questioned about the student to whom he awarded the MVP award, Mr. Harriman said that he did not know the nature of the student's infraction. He said that at the time that the student did not appear, it was a league match, it could have been a championship match, but he would not know that until the other teams had played their matches.⁴⁰ Harriman said that the student was from Bogota High School and the Bogota coach told him only that the student had gotten into trouble at the school. Harriman said that he requested information about the situation from the athletic directors at Bogota and Elmwood, but neither responded to him. He thought that he asked them the next day. He figured that if he did not receive a response, he was not

³⁸ At the time Mr. Saper was the athletic director and assistant principal.

³⁹ This differed from his direct testimony, in which he said that Baly said on the telephone that it was a done deal and he refused to send Harriman a written explanation of the seeding.

⁴⁰ It turned out to be the championship match.

supposed to know. Mr. Harriman said that from the time of the match in January until June, when he received the memo from Dr. Tomko about handing out the MVP award, he never heard from anyone about the problem with the student and he never inquired further. Mr. Harriman said that when Dr. Tomko told him what the student said, he thought that the District did him an injustice; it was a shame, but it was not his fault.

When questioned about P-6, Mr. Saper's evaluation, Mr. Harriman said that it was not the first time that he had expressed concerns to Saper about an evaluation. He admitted that in the past Mr. Saper had listened to his reasons for changing his evaluation and had made modifications. Mr. Harriman was asked why he made the statement in his rebuttal to the Field Day write-up (P-12) that Ms. Jackter was pacing nervously and was envious of his megaphone, since he testified at the hearing that Ms. Jackter wanted to speak first at the Field Day activities and handed the megaphone back to him after she finished making the announcements. Mr. Harriman said that when he testified, he just answered the questions posed to him and that is why his response deviated from what he said in the rebuttal. When discussing Field Day, Mr. Harriman said that he was concerned when Ms. Jackter ordered the children inside. He felt that if he had done it, it would have been more organized. He was also concerned about their doing relay races because the children's shoes were wet. He also disagreed with Ms. Jackter's taking it upon herself to send the children back out again when it stopped raining, because he felt that it was too wet. He said that he was unable to speak with Ms. Jackter because she walked away from him.

Mr. Harriman admitted that he got a little carried away in the memo, but he thought that Ms. Jackter's actions were unwarranted, meddling and micro-managing. When asked whether he thought that it was appropriate to address a principal the way he did in the rebuttal, he said that at the time he wrote the rebuttal he had just received a write-up from Jackter and had been humiliated in front of students and staff all day. In his view, Ms. Jackter knew nothing about how Field Day should be run and he had conducted many Field Days. Mr. Harriman was asked in what way he believed that Ms. Jackter had been uncooperative, untrustworthy and dishonest. Mr. Harriman said he considered that Ms. Jackter was dishonest because she wrote him up for yelling at her throughout the day, and he did not yell at her. When asked why he wrote in the rebuttal

accusing Ms. Jackter of scheming with Mr. Saper to harass him, he said this was based on the fact that he felt that both of them were harassing him at the same time. Mr. Harriman acknowledged that he was aware of the fact that there was an affirmative action officer in the District that he could have filed a complaint with, but he chose not to do so. The respondent was also asked about his comment that he was sorry that Ms. Jackter was not able to comprehend the Field Day packet that he had submitted. He said that he made the comment because in all the years he had been preparing the packet, no one had ever questioned the information he put in the packet. He also believed that he was correct when he said in the rebuttal that Ms. Jackter needed to learn the meaning of the word insubordinate, because he had not been insubordinate and it was unheard of that he would be written up over Field Day. Mr. Harriman also reaffirmed his remarks that Ms. Jackter tried to sabotage his Field Day by prohibiting him from doing what he needed to do and by temporarily removing material that he needed for the field activities. He concluded that Ms. Jackter was less concerned about having the day succeed and more concerned about sabotaging it at his expense. In addition, he believed that if there were problems with Field Day, then Mr. Schwartz should have been called in by Ms. Jackter as well, since he was working on that day also. He did not understand why Ms. Jackter was more concerned with her interaction with him than with the mechanics of the day.

Mr. Harriman said that he consulted with the union representative and showed her Ms. Jackter's memo. The rep said that he could write a rebuttal, but that it had to be truthful. Mr. Harriman said that he was not aware that he could have filed a grievance. When asked why he did not go to a meeting that was requested by Principal Jackter, he said that after what happened with the allegations about his touching his genitals, he did not want to meet with someone from the administration without proper representation. When asked why he therefore did not ask a union representative to attend the meeting with him and Ms. Jackter, he responded that he did not have enough time to do that.

Mr. Harriman asserted that Ms. Jackter's accusation that he was touching his genitals was a complete fabrication. He said that his hands were never near his genitalia. He said that his hands were on the top of his thighs. While in that position, he pulled down his shorts, which were sticking to him. The rest of the time during the

meeting with Jackter, his hands were on his chest. Mr. Harriman said that there was no way that Ms. Jackter could have confused what she said with what had actually occurred. What she said was a total lie. In response to a question, Mr. Harriman said that Ms. Jackter's accusation was all part of a larger conspiracy with Mr. Saper. Mr. Harriman said that the conspiracy began in May 2011, when he asked Saper to change his evaluation. That was when the harassment intensified. He did not know what triggered the conspiracy, because just a few days before Ms. Jackter had praised him about his supervision of a volleyball game. However, once the harassment started, he felt that any time he got positive attention from the faculty or students, Ms. Jackter would retaliate against him and follow him around with her assignment pad. When asked whether his remark on Page 4 of P-12 that if Ms. Jackter continued to yell at him, in the future he would only communicate with a dry board, was reasonable, he responded that he had gotten carried away.

Mr. Harriman insisted that Mr. Schwartz had never informed him that he was not needed to cover his classes at Ms. Jackter's school. He denied that Schwartz had texted him to that effect. He also said that, when he came to the school, Ms. Jackter told him to cover Schwartz's classes. Mr. Harriman said that Mr. Schwartz made up the testimony about covering the classes. Mr. Harriman said that at some point he and Schwartz stopped talking to each other. During Field Day Mr. Harriman observed Ms. Jackter and Mr. Schwartz speaking a lot. After that Schwartz would not return his calls. When asked whether Mr. Schwartz was part of the Saper-Jackter-Tomko conspiracy, Mr. Harriman said that he found it disturbing, but he thought that Schwartz was part of it. As for Harrison Werner, he thought that he had been persuaded to say things that were an exaggeration. On cross-examination, Mr. Harriman acknowledged that he did call Mr. Werner, but the security guard's testimony was an exaggeration. The respondent said that he had had a good relationship with Werner and knew him since he was a student at the high school, but he believed that he succumbed to outside pressure to lie about him.

Mr. Harriman discussed the meeting of May 25, 2011, which was the subject of P-8. He said that Mr. Saper's testimony that he called Harriman into the office and wanted to have a discussion with him about the five complaints he had received was an

incorrect characterization of what occurred. He said that Saper did not want to have a discussion. Instead, he accused Harriman of wrongdoing. When the questioner pointed out that nowhere in the document did it say that Mr. Saper concluded that he had done anything wrong, but rather stated that Harriman's inability to communicate like an adult precluded the principal from investigating the allegations, Mr. Harriman said that Saper did not really want to have a discussion. Mr. Harriman stated that contrary to what Mr. Saper said, that Harriman approached him and said "what now," in reality he said "what's up?" Mr. Harriman said that what Mr. Saper said in the memo never happened; it was all part of the conspiracy. Harriman told Mr. Saper to back off. The respondent speculated that something must have happened when Mr. Saper had a prior meeting with the superintendent and now he was the brunt of his frustration. Mr. Harriman insisted that he remained calm when he talked to Mr. Saper, and asked him to please stop harassing him. Mr. Harriman was referred to P-9, in which he stated that he deemed Mr. Saper's attitude and actions toward him to be highly unbecoming an elementary school principal. While he acknowledged that in the past Mr. Saper had listened to his concerns about his prior evaluations and made adjustments, Mr. Harriman felt that at this point Mr. Saper had turned against him. Mr. Harriman testified that he felt that Saper was interfering with his job and that the way that he treated him was unjustified. He believed that Mr. Saper was unable to manage the school.

Mr. Harriman asserted that he was the most effective physical education teacher in the District, but he was frustrated and was under a lot of stress because he was being bombarded over issues that he felt were very petty. When questioned about whether it was petty when five students came to the principal with complaints, Mr. Harriman said that it was possible that Mr. Saper had made the complaints up. When asked about why he did not submit the log that he claimed in P-45 that he had, Mr. Harriman said that he wanted to work things out and therefore he decided not to submit it. However, it was pointed out that based on the tone of the memos from Mr. Saper, it seemed clear that things were not working out.

When questioned about Ms. Jackter's write-up (P-10) regarding his being outside setting up cones, Mr. Harriman said that the allegation was a fabrication. Mr. Harriman also stated that he did not meet with Mr. Saper as he requested on June 3, 2011. He

said that he met with the union representative, who said that she would handle the situation and he did not have to attend a meeting. Mr. Harriman was asked whether he needed to make the remark in his memo to Ms. Jackter responding to her write-up about his leaving the class unattended, "Negligent behavior you mention? Coming from the person who allowed a non-registered child to participate in Field Day?"⁴¹ He responded that he did not need to make the remark, but he was upset. Mr. Harriman also testified that he believed that Dr. Tomko's Action Plan was invalid and he doubted his authority to impose the plan. He said that he had consulted with the union and they were concerned about the things that the superintendent was asking him to do and the start date of the plan.⁴² However, the union representative did tell him that after consulting with Dr. Tomko, the superintendent said that the plan was still in force. Mr. Harriman questioned the plan's goal that he not "make any insubordinate comments," since he believed that he had not been insubordinate. Mr. Harriman believed that he had complied with the plan, except that he did not take the anger-management course, although he said that he was looking into it. Mr. Harriman acknowledged that even though he thought that the plan was invalid, he had not received anything in writing from Dr. Tomko or the union saying that he did not have to comply with the plan. Mr. Harriman stated that he did not consider it insubordinate to send a letter to the Board members telling them that the 90-Day Action Plan was invalid, even though he went outside the chain of command. He believed that he had a right to go to the Board at any time. Mr. Harriman said that he was not given the Policy outlined in P-44, which dealt with the chain of command. However, he was familiar with the chain of command, but felt that it did not apply to a teacher's questioning a reprimand. Mr. Harriman said that he filed a grievance against Dr. Tomko for making threatening comments.⁴³ However, even though he alleged in the letter to the Board that Dr. Tomko had slandered him, Mr. Harriman did not file a grievance regarding slander. Mr. Harriman also did not consider his actions as outlined by Dr. Tomko in P-28 to be signs of insubordination.

⁴¹ Ms. Jackter had explained that this was the child of a parent who was helping with the Field Day activities.

⁴² There was a question of when the plan began since Mr. Harriman was not in school during the summer and the 90 days in the plan ran from July 6 through November 14, 2011, which was more than 90 days.

⁴³ Mr. Harriman considered Dr. Tomko's statements "I strongly cautioned you" and "address me as 'sir'" to be threats.

Mr. Harriman was asked about the self-injection incident on December 5, 2011. He reiterated that the students were not anywhere near him and that he placed the cover of his computer up so that no one could see him injecting. He stated that he could not go to the nurse's office because he was having a hypoglycemic incident; his heart was racing and he was sweating. He injected himself with glucose. He felt that if he walked to the restroom he could pass out. When Mr. Saper observed that Mr. Harriman seemed to be okay, the respondent said that he did not think it was necessary to tell the principal that he was having an emergency; he just needed to sit down and allow the glucose to take effect. Mr. Harriman was also questioned about his remark in P-32 that Mr. Harriman could not ban him from the lunch room. Mr. Harriman acknowledged that he had taken a course as part of his master's degree program on the role of the principal. On re-cross examination, Mr. Harriman said that he did not believe that the number of write-ups were the result of his conduct, but rather the conduct of the administrators. Mr. Harriman also did not believe that Mr. Saper was really seeking to find out whether the complaints by the students were valid. Instead he believed that it was just another vehicle for Mr. Saper to continue his harassment of him. Mr. Harriman acknowledged that he had read the letter from Maria Romero, an aide at Mr. Saper's school, in which she stated that she was assisting students at lunch and was sitting next to Mr. Harriman, who had a small black rectangular zip-up case in his hands, while they were eating. She did not know what he did with the case. However, he continued to assert that there were no students near him and eating lunch when he injected himself.

Redirect

On redirect examination, Mr. Harriman stated that he and his assistant coach had followed the seedings in the Star Ledger and tallied them up. There seemed to be a conflict between his scores and that of the Ledger. Over the weekend the Ledger changed its seedings, and that was what caused him concern. Mr. Harriman disputed Lt. Michael Foligno's recollection of the number of awards that were given out at the Recreation awards dinner. He claimed that the MVP and most improved player awards were not mentioned at the Recreation dinner. He said that the plaque for the most improved player, which was given out at the Recreation dinner, was paid for by the

Recreation Department. Mr. Harriman testified that traditionally the principal had a minor role to play at Field Day, just going over the packet of information prior to the day and making one or two appearances during the day. He was surprised at how involved Ms. Jackter was in the day and how she kept interfering with how he was running the activities and causing the children to be misplaced and off task. He felt that his program was running smoothly without her overseeing it.

Mr. Harriman said that he felt there was a conspiracy because two days after the Booster dinner, Dr. Tomko took his coaching positions for the wrestling and football team away from him. Harriman was also going to be signed up to coach football in Ridgewood, but because Dr. Tomko did not get back to him in time to give him permission, he forfeited that job as well. That left him without three sources of additional income. That occurred in 2007. In 2011, Mr. Harriman felt that there was a conspiracy because he had been written up five times in five weeks and had not had problems for years before that. The first incident involved Ms. Jackter's criticism of his inappropriate behavior at the meeting after Field Day, which he disputed. The second involved the fitness testing when Mr. Saper took issue with the manner in which he allegedly spoke to him (P-8). Mr. Harriman characterized Mr. Saper's behavior as "going off on a tear." Mr. Harriman said that Mr. Saper never said that his actions toward the children mentioned in the memo were inappropriate. The third write-up occurred when Ms. Jackter stated in P-10 that in her sixteen years in education she had never seen a classroom left unattended.⁴⁴ The fourth incident involved his covering Mr. Schwartz's classes at Ms. Jackter's school. Mr. Harriman said that there would have been no reason for him to go to Gantner if he did not think that he had to cover the classes (P-13). The fifth incident involved his not hearing Ms. Jackter calling to him while she was standing next to Mr. Wartel. He questioned how the people who wrote him up could be impartial about monitoring him. He also did not think the plan was valid because of the July 6 start date, which would make it longer than a 90-day plan. Mr. Harriman pointed out that he ultimately attended the 504 Plan meeting. Mr. Harriman also disputed that he had touched Ms. Jackter as she alleged in P-29 or that he rolled his eyes as he left the meeting. Finally, Mr. Harriman stated that if he had to do it over

⁴⁴ Mr. Harriman pointed out that the nurse had testified that she had left her office when there were children in it and Dr. Tomko had said that he had seen teachers leave their classrooms unattended.

again, he would not have written the rebuttals in the tone that he used. He was letting it get too personal. Mr. Harriman testified that it never occurred to him that the number of write-ups that he received over a relatively short period of time were a function of his own conduct.

FINDINGS OF FACT

The following facts were stipulated to by the parties and are incorporated in this decision:

1. Respondent began his employment in the Elmwood Park School District as a teacher in January of 2003.
2. Respondent holds an A.A.S. degree from Bergen County College and a B.S. from Montclair State University.
3. Respondent holds teaching certifications in the following areas: Health and Physical Education and Driver's Education.
4. Respondent is currently a tenured teacher assigned on a rotating basis to the Gilbert Avenue School, Gantner Avenue School, and Sixteenth Avenue School.
5. On January 11, 2012, Sworn Tenure Charges Against Kevin Harriman, together with a Sworn Statement of Evidence, were filed with the Board secretary/school business administrator against Kevin Harriman, by Richard D. Tomko, superintendent of schools.
6. On or about January 11, 2012, respondent was served with a copy of the Sworn Tenure Charges and Sworn Statement of Evidence filed against him by superintendent of schools Richard D. Tomko.

7. On or about January 23, 2012, respondent filed a response with the Board secretary to the Tenure Charges.
8. On February 28, 2012, at a duly convened meeting, the Board of Education passed a resolution to certify the Sworn Tenure Charges Against Kevin Harriman and to suspend respondent, without pay, effective immediately, in accordance with the provisions of N.J.S.A. 18A:6-14.
9. On March 1, 2012, the Tenure Charges Against Kevin Harriman were filed with the Commissioner of Education.
10. On or about March 13, 2012, respondent filed an Answer to the Tenure charges with the Commissioner of Education.
11. On March 15, 2012, the Commissioner of Education deemed the charges sufficient, if true, to warrant dismissal or reduction in salary and transmitted same to the Office of Administrative Law.

Based on the testimony and exhibits, I make the following **FINDINGS OF FACT**:

1. Kevin Harriman was assigned to teach physical education at three of the District's elementary schools.
2. Michael Nazzaro worked in the school district from 1968–2003. In his last position he served as principal of Elmwood Park High School in the 2002–03 school year, where Mr. Harriman was employed as a wrestling coach.
3. On May 6, 2003, Mr. Harriman sent a memorandum to Richard LaGrotta, who was the athletic director, regarding Michael Galler, the assistant wrestling coach. In the memorandum Mr. Harriman stated that Mr. Nazzaro recommended that he attach a memo to Mr. Galler's evaluation.

4. Mr. Nazzaro did not make that recommendation, and on or about May 6, 2003, Mr. Nazzaro sent a memo to Mr. Harriman saying that he never recommended that the respondent send such a memo to Mr. LaGrotta. Further, Mr. Nazzaro stated that he had previously told Mr. Harriman that, if he had wanted Mr. Galler to be fired, he should have indicated so in the assistant coach's end-of-season evaluation.

5. Prior to the 2002–03 school year, there had been a policy in place in which teachers who were going to be out were to contact a substitute service, which would arrange for coverage of their classes. According to this policy, teachers were not supposed to call their principal to report their absence.

6. However, during the 2002–03 school year, due to the abuse of the substitute service, the principal of the high school, Michael Nazzaro, and the superintendent, Joseph Casapulla, directed employees to call the principal as well as the substitute service if they were going to be absent. The teaching staff had been made aware of the change in policy during a joint faculty meeting with the middle and high school staff. However, no new written policy was issued modifying the prior written policy on substitute call-in and there was no proof that Mr. Harriman had been informed of the change in procedure.

7. The New Jersey State Interscholastic Athletic Association (NJSIAA) oversees all high school athletic programs in the state of New Jersey. In February 2006, Dr. Tomko received a telephone call from Robert Baly, executive director of the NJSIAA, complaining about Mr. Harriman's behavior toward him and his staff. According to Mr. Baly, Mr. Harriman was belligerent toward him and his secretary regarding the seeding decision and stated to the statistician, Mr. McMillian, "this is bullshit." Confronting the Association in this way was inappropriate and unprofessional and could have placed the wrestling program in jeopardy.

8. Mr. Harriman acted without permission from the athletic director or any other supervisory personnel in the District and contrary to the policy of the District

when he unilaterally decided to call the NJSIAA to dispute the team's seeding. Prior to making the call to the Association, Mr. Harriman did not receive outside confirmation that his calculations on the team's seeding were correct.⁴⁵

9. It was decided by Dr. Tomko and Mr. Saper, the athletic director at the time, that Mr. Harriman should attend a compliance meeting at the Association to learn proper sportsmanship. Mr. Harriman disputed the necessity of his attending the meeting, but finally did attend.

10. In June 2004, Dr. Tomko decided that a new format should be established to provide awards for student athletes. Rather than having separate award dinners for each of the sports, it was decided that a Booster Club should be formed and awards should be given to all athletes at the dinner. The coaches were directed by Dr. Tomko to speak only about the senior athletes, in order to give them a special acknowledgment and to give the underclassmen something to look forward to. All of the other coaches followed the directive. However, Mr. Harriman, contrary to the instructions given to him, spoke about every member of the team.

11. During the 2005–06 school year, the Elmwood Park wrestling program and the Bogota program were combined.

12. Mr. Saper, the athletic director at the time, instructed the coaches to present only two awards—most valuable player (MVP) and the coach's award—at the Booster Club dinner at the end of the school year. No other awards were to be given out, and they were to be presented at the Booster dinner only. Contrary to these instructions, Mr. Harriman presented three awards—MVP, coach's and most improved player—at a Recreation dinner, to which the wrestling team had been invited. These awards were not Recreation awards, but rather District awards that should have been presented at the Booster dinner.

⁴⁵ Mr. Harriman relied on the calculations of his assistant coach and a student who was calculating the stats.

13. Mr. Harriman gave the MVP award to a student from Bogota. This student had been disqualified from the championship match because he had told a teacher to "go f--- herself." While Mr. Harriman protested that he did not know that the student had said this, he was aware that the student had gotten into trouble in school; he had a relationship with the Bogota coach; and he knew or should have known that the student was disciplined for a serious infraction. Despite Mr. Saper and Dr. Tomko's concerns regarding Mr. Harriman's awarding the trophy to the Bogota student, Mr. Harriman refused to change his decision.

14. Mr. Harriman disregarded administrative directives by handing out District awards at the Recreation dinner prior to the Booster Club dinner.

15. Mr. Saper, the principal of Gilbert School, was Mr. Harriman's direct supervisor. On March 17, 2011, Mr. Saper evaluated the respondent. In the evaluation Mr. Saper indicated that Mr. Harriman needed improvement in the areas of Learning Environment and Communication, Collaboration and Partnership and Professional Development and Responsibilities.

16. Erick Schwartz is employed as a health and physical education teacher in the elementary schools in Elmwood Park. While he and Mr. Harriman had worked together before on Field Day activities, due to a dispute that will be outlined below, Mr. Harriman was directed by Mr. Saper, principal of Gilbert School, not to participate in Field Day at the school and instead to cover Mr. Schwartz's classes at Gantner School. Mr. Schwartz told Mr. Harriman that it would not be necessary for Harriman to teach his classes at Gantner, because he had made prior arrangements to cover them. Despite this communication, Mr. Harriman came to Gantner and told Allison Jackter, principal of the school, that he was there to cover Mr. Schwartz's classes. Ms. Jackter thought that there was a scheduling misunderstanding and tried to question Mr. Harriman about the situation. Mr. Harriman responded by yelling out "poor communication." There were teachers, students and parents in the area, when Mr. Harriman shouted out. Ms. Jackter wrote a memorandum memorializing what had occurred. Mr. Harriman wrote a response, which was copied to all the Board members, labeled

"The real truth to your write-up letter dated June 8, 2011." In it he accused Ms. Jackter of forming a "wedge" between him and Mr. Schwartz. He also accused her of nagging.

17. Mr. Harriman sent several text messages to Mr. Schwartz asking him to write a letter supporting Mr. Harriman on this issue. When Mr. Schwartz refused to do so, Harriman became verbally abusive toward him.

118. On May 23, 2011, upon Mr. Saper's return to Gilbert School after doing District business, he received a number of student complaints regarding Mr. Harriman's behavior during gym class that day. Among the complaints was one from a student who said that Mr. Harriman yelled at her and called her mother on his cell phone during class to report her bad behavior.

19. Prior to this incident Mr. Saper and Ms. Jackter had both conducted staff meetings in which they discussed the use of cell phones during the school day. Staff members were only permitted to use cell phones in emergencies and were to give the administration advance notice that they were going to need to use the cell phone.

20. It was inappropriate for Mr. Harriman to call a parent during instructional time because it took his time and attention away from instructing the students.

21. Mr. Saper called Mr. Harriman into his office to find out Mr. Harriman's side of the story regarding the complaints from the students. Mr. Harriman came into the office and in an abrupt tone said "what now?" Instead of discussing the matter, Mr. Harriman told Mr. Saper "better back off" and "better stop harassing him." Mr. Saper sent a memo to Mr. Harriman on May 26, 2011, regarding the meeting. In response, Mr. Harriman sent Mr. Saper a memorandum in which he stated that Mr. Saper's behavior was "highly unbecoming of an elementary Principal and building supervisor." He stated that Mr. Saper had been unfair and dishonest in his evaluations of him and was interfering with Harriman's job. He also stated that "a supervisor is supposed to have at least some answers once in

a while.” He accused Mr. Saper and Ms. Jackter of scheming against him and of Ms. Jackter “meddling” in Field Day activities and disrupting his established program. He said that Mr. Saper could not manage the school and said that he (Harriman) was keeping daily logs about Mr. Saper’s activities at the school and would submit the logs to the “proper authorities” at the end of the year.

22. On May 25, 2011, Mr. Harriman asked a six-year-old student to go by himself to the teachers’ faculty room to get a bottle of water for him. Young students were not permitted in the teachers’ lounge and were not supposed to leave the classroom alone.

23. Field Day was held at the Gantner Avenue Elementary School on May 23, 2011. Mr. Harriman made up the packet of information necessary for the day’s activities and gave it to Ms. Jackter for review. She gave her approval to the plan. However, a number of teachers came to Ms. Jackter with questions about the fact that there was no map for the locations of the afternoon events.⁴⁶ When Ms. Jackter questioned Mr. Harriman about the problem, he yelled at her in front of staff, students and parents.

24. Mr. Harriman did provide a copy of the map for the afternoon activities.

25. The weather on Field Day was misty. Initially Ms. Jackter decided that the activities should proceed outside. She made the decision without consultation with Mr. Harriman. When it began to rain, she called the students inside without Mr. Harriman’s input. Mr. Harriman protested the decision and stated that it would be dangerous to run relay races in the school halls. Ms. Jackter then told Mr. Harriman to adjust the activities so that they could be performed inside. After lunch it stopped raining and the activities were moved outside again.

26. Ms. Jackter asked Mr. Harriman to meet with her at the end of the day to discuss issues that had arisen during the day, including his attitude toward her

⁴⁶ On the stand, Ms. Jackter admitted that she had overlooked the omission of the map when she reviewed the packet prior to Field Day.

and the missing information from the packet. Mr. Harriman became very angry and yelled at Ms. Jackter, saying that she was wrong. His voice became so loud that her secretary had to close the doors to the principal's office so that people in the main office would not hear him.

27. During the course of the meeting Mr. Harriman made a gesture that made Ms. Jackter feel uncomfortable. It appeared to her that Mr. Harriman placed his hand on his genitals, on top of his pants and moved his hand around. Ms. Jackter spoke to Dr. Tomko about what Mr. Harriman had done. As a result Dr. Tomko filed an affirmative action complaint with the affirmative action officer. Due to the fact that the affirmative action officer went out on maternity leave and the pendency of this action, an investigation was never performed.

28. In a memo to Dr. Tomko, Mr. Harriman described Ms. Jackter's allegations as being "fantasy," which "makes it more comical."

29. On May 26, 2011, after a meeting with Mr. Harriman, Ms. Jackter sent a memo to him telling him to plan to meet with her the following week with a union representative. Despite her memo, Mr. Harriman did not make said arrangements, and even after another memo, did not comply with her request.

30. In response to Ms. Jackter's memo about Field Day, on June 8, 2011, Mr. Harriman sent an extensive memo to Ms. Jackter, with copies to the superintendent and all members of the Board of Education, in which he stated, "our Field Day was nearly a disaster and your unwarranted meddling and micro-management that day . . . I have never had such an uncooperative, untrustworthy and dishonest administrator." He stated that she was "envious of [his] megaphone." He also accused her of scheming with Mr. Saper to harass him and of sabotaging Field Day. He then went on to say that since he could not trust her he would only communicate with her by using a dry board to answer her questions.

31. On June 6, 2011, Ms. Jackter, who was Mr. Harriman's direct supervisor at Gantner, went to the gym where Mr. Harriman was supposed to be teaching a group of fifth-grade students. Upon her arrival she saw an aide and a security guard in the gym, but she did not see Mr. Harriman. She questioned the staff members but they were not sure of Mr. Harriman's whereabouts. Students were in the gym playing basketball. Ms. Jackter observed the door to the gym opened and went to investigate. She saw Mr. Harriman and a fifth-grade student, about twenty to thirty feet from the door, placing cones on the field. Ms. Jackter remained in the gym for four to five minutes. When Mr. Harriman returned to the gym, Ms. Jackter confronted him. The respondent misrepresented that he had not left the gym, but instead was simply propping open the door, in order to get fresh air into the gym.

32. On June 17, 2011, Mr. Harriman sent a memo to Ms. Jackter, with copies to all the Board of Education members, disputing the principal's rendition of the facts and accusing her of being negligent by allowing a non-student to participate in Field Day.

33. Dr. Tomko arranged for a meeting with Mr. Harriman and Connie Sudol, the president of the Elmwood Park Education Association, to discuss Mr. Harriman's conduct vis-à-vis principals Jackter and Saper. Following the meeting Dr. Tomko sent a letter to Mr. Harriman which included a "90-Day Action Plan." The plan was to run from July 5, 2011, to November 4, 2011. Even though school was not in session, Dr. Tomko included the summer months because he had directed Mr. Harriman to take an anger-management course, which was given during the summer. Mr. Harriman was also directed not to make insubordinate comments to his supervisors.

34. Mr. Harriman never enrolled in an anger-management class. In addition, he sent multiple rebuttals to his supervisors, with copies to the Board, claiming that the 90-Day Action Plan was invalid. He failed to comply with the action plan in any way.

35. On September 5, 2011, Mr. Harriman was asked by Ms. Jackter to attend a meeting to discuss a 504 Plan for a student in one of his gym classes. Initially Mr. Harriman refused to attend without union representation, even though the meeting was not addressed to any behavior on his part. Only after Dr. Tomko sent him an email directing him to attend the meeting, did he do so. Mr. Harriman responded to Dr. Tomko's email by saying that he would never meet with Saper, Jackter or Tomko one-to-one.

36. On September 6, 2011, Mr. Harriman sent a letter to the Board of Education in which he said that Dr. Tomko's 90-Day Action Plan was invalid and the write-ups against him were fabricated. He also asserted that he would be filing a defamation suit against Dr. Tomko based on the actions he had taken against the respondent during the summer. He did not copy Dr. Tomko on the letter.

37. Mr. Harriman's sending the letter to the Board directly contravened the organizational chart of the District and undermined the superintendent's relationship with the Board.

38. On September 6, 2011, Mr. Harriman sent a memo to Dr. Tomko. In the memo he told Tomko to "stop cautioning me to refrain from doing this and that. One sub-definition of the word 'caution' is 'warning of harm or evil.' This is considered a written 'threat' Mr. Tomko, and I do not respond passively to threats." Mr. Harriman also declared that the 90-Day Action Plan was invalid and that Tomko was instigating trouble through your "novice Principals."

39. As part of the 90-Day Action Plan, Mr. Harriman was to attend an anger-management course. In a memo to Dr. Tomko on September 6, 2012, Mr. Harriman stated that the superintendent was unjustified when he threatened to enroll him in an anger-management course. Mr. Harriman went on to state that he had no anger-management problems and would not attend the course. While at the hearing Mr. Harriman stated that he was looking into finding an anger-management course but, as of June 2012, he had not signed up for a course.

40. In a memorandum dated September 9, 2011, Mr. Harriman again stated to Dr. Tomko that his action plan was "invalid" and "without grounds or merit." Further, it stated, "the two novice Principals and yourself need to be more professional, kind and considerate."

41. On December 2, 2011, while seated in the cafeteria Mr. Harriman injected himself in his abdomen with insulin.⁴⁷ While he put the top of his laptop computer up to shield people from seeing the procedure, there were students eating in the cafeteria and Mr. Saper saw him injecting himself. (On a prior occasion, Mr. Saper thought he had seen Mr. Harriman injecting himself and asked the school nurse to speak to him about going to a private area to give himself an injection. At that time Mr. Harriman denied that he had injected himself.) After the students left the cafeteria, Mr. Saper approached Mr. Harriman and asked him if he had injected himself. Mr. Harriman responded that "no one could see it." Mr. Saper told him that in the future he was to eat and complete his work in the faculty room, not the cafeteria.

42. Mr. Saper followed up with a memorandum dated December 5, 2011. In the memo Mr. Saper told Mr. Harriman to "never check his blood sugar or inject in the cafeteria or anywhere else when students are present unless it was a medical emergency." If Mr. Harriman needed medical space he could use the nurse's office or he would be provided with another private space.

43. At the time that Mr. Saper approached Mr. Harriman in the cafeteria, the respondent did not say that he was giving himself an injection because of a medical emergency. It was only later during another meeting that Mr. Harriman claimed that he had given himself an injection at the time because he was experiencing faintness because of low blood sugar.⁴⁸

⁴⁷ Mr. Harriman is a diabetic who injects himself four times a day.

⁴⁸ Ms. Corrigan testified that a glucose injection, which Mr. Harriman claimed he had given himself because of his low blood sugar, would only be used by professionals when a patient was at the point of unconsciousness. If a diabetic was experiencing symptoms of low blood sugar, he would take a glucose tablet or orange juice to elevate his glucose level.

44. At that meeting Mr. Saper asked the school nurse, Mrs. Corrigan, to come in to verify that she had told Mr. Harriman not to inject himself while students were around. Mr. Harriman began to yell at Mrs. Corrigan, who then left the meeting upset.

45. On December 5, 2011, Mr. Saper wrote a memo outlining what had occurred in the cafeteria and at the meeting that followed regarding the injection. On December 9, 2011, Mr. Harriman wrote a memo titled "My Rebuttal." He titled the memo "From Kevin Harriman, Highly Qualified Elementary Physical Education/Health Teacher." In the memo he denied that students were present when he injected himself. (However, an aide wrote a memo to Mr. Saper stating that she was sitting with students, who were eating their lunch, near Mr. Harriman and the respondent had a small, black, rectangular zip-up case in his hands.) Mr. Harriman also claimed that Mr. Saper had no regard for the health and well-being of his teachers. Mr. Harriman stated that he would not eat in the faculty room because 99 percent of the teachers were women and he would not sit there where they discussed baby showers, weddings, engagements and the like.

46. Beginning in September 2011, Mr. Harriman was assigned to gate duty from 8:30 to 8:45 a.m. at Gilbert Avenue School, when he was scheduled to teach at the school. Mr. Harrison Werner, a security officer at the school, was also assigned to gate duty. As part of their duty, they were supposed to supervise the drop off of students for school and to ensure their safety. Mr. Werner had been told by Mr. Saper that he was not to open the doors of the cars lined up to drop off their children, but not at the gate, because it would be unsafe and would cause congestion.

47. Mr. Werner observed Mr. Harriman walking up and down the block on which the cars were lined up opening the car doors and letting students out onto

the main street that was adjacent to the school, rather than at the school gate. Mr. Werner was warned by Mr. Saper not to open the car doors.⁴⁹

48. On December 9, 2011, Mr. Werner went to Mr. Saper and reported to him that Mr. Harriman was opening car doors all along the street.

49. Mr. Saper met with Mr. Harriman to discuss why it was unsafe to continue this practice and instructed Mr. Harriman not to open car doors in the future. Mr. Harriman responded by questioning where it was written that he could not open a car door for a student. He also threatened Mr. Saper by saying that he had a seven-year log on him and Saper would be hearing from Harriman's lawyer.

50. On Saturday, December 10, 2011, after the meeting regarding opening car doors, Mr. Harriman called Mr. Werner on his cell phone and questioned him about the car-door incident and Mr. Saper. Mr. Harriman became loud and abusive toward Mr. Werner. He also stated that Mr. Saper could not be trusted and talked about Saper's private life in a disparaging manner.

51. Following the telephone call, Mr. Werner sent Mr. Saper an email stating what Mr. Harriman had said to him. Mr. Saper then sent Mr. Harriman a memo saying that his actions toward Mr. Werner were destructive and had a negative impact on the school environment. After Mr. Harriman received the memo he went up to Mr. Werner "nose to nose" and called him a snitch and a mole. He also screamed at him in the presence of parents and students.

52. Mr. Harriman told a parent, Mrs. Tester, who was waiting in line to drop off her child, that he could not open her car door to take out her daughter because of Mr. Saper's directive. At a meeting between Mr. Saper, Mr. Thornton, a union representative and Ms. Murphy on December 12, 2011, regarding the car-door situation, Mr. Harriman said that he could say what he wanted to say to whomever he wanted to and write to the School Board if he chose to do so.

⁴⁹ Mr. Werner admitted that prior to this warning, he had on occasion opened up car doors.

53. In a rebuttal dated December 12, 2011, Mr. Harriman stated that Saper “could care less about [students] falling out of the backseat of their parents’ car and breaking an ankle.” Mr. Harriman accused Mr. Saper of “cowardly planting MOLES such as . . . Harrison Werner.”

54. On December 19, 2011, Dr. Tomko had a District courier, Michael Wartel, deliver a memorandum to Mr. Harriman at the Gilbert Avenue School. Mr. Wartel did not know what was inside the envelope. However, when he delivered the envelope, Mr. Harriman said, “more paperwork from Tomko, Jackter and Saper; they are harassing me and I am taking them to court on this.”

55. On December 21, 2011, Mr. Wartel and Ms. Jackter were standing in the hallway of the school near the entrance. Ms. Jackter called out to Mr. Harriman. Although Mr. Harriman was just a few feet from Jackter and Wartel, he did not respond to her and exited the building without acknowledging her. Mr. Wartel commented that he could not believe that Harriman did not answer Jackter. Later on Mr. Harriman came into the main office and reported that someone had parked in his assigned parking space. When Ms. Jackter tried to respond to him and tell him to park in a visitor’s space, Mr. Harriman walked away as she was speaking. Ms. Jackter followed Mr. Harriman and told him that it was not acceptable for him to walk away from her.

ARGUMENTS OF THE PARTIES AND ANALYSIS OF THE LAW

Tenure Charges

The tenure of education personnel is authorized by the Education Tenure Act, N.J.S.A. 18A:28-1 to -18. According to N.J.S.A. 18A:6-10, no person under tenure of office, position, or employment shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause. Tenure is a status in a particular position created by statute, not the agreement of the parties, therefore, it is a “statutory right imposed upon a teacher’s contractual employment’ [that] may not

be forfeited or waived.” Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 77 (1982) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962); citing Red Bank Educ. Ass’n v. Red Bank Bd. of Educ., 78 N.J. 122, 141 (1978)). Tenure was designed to protect employees “from dismissal ‘for unfounded, flimsy or political reasons.’” Wright v. Bd. of Educ. of E. Orange, 99 N.J. 112, 118 (quoting Zimmerman, *supra*, 38 N.J. at 71). Lack of fitness is usually demonstrated by a series of incidents, but it also may be found when there is a single incident that is sufficiently flagrant. Redcay v. State Bd. of Educ., 130 N.J.L. 369, 371 (Sup. Ct. 1943), *aff’d*, 131 N.J.L. 326, 327 (E. and A. 1944). In re Tenure Hearing of DePasquale, 92 N.J.A.R.2d (EDU) 537, 540, held that a single dishonest act by a public employee can be sufficient to remove an employee from his position. In addition, the Commissioner found that a board of education is entitled to truthfulness from its employees in all matters. See In re Tenure of Lefakis, 1976 S.L.D. 816.

While tenure was designed to protect employees, teachers are responsible to act in a professional manner and to serve the welfare of the students in their care. In the final agency decision in In re Tenure Hearing of Sammons, School District of Black Horse Pike Regional, Camden County, 1972 S.L.D. 302, 321, the Commissioner stated:

[T]he teachers of this State . . . are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal.

Among the charges lodged against Mr. Harriman was “conduct unbecoming.” This conduct was defined by the administrative law judge in In re Tenure Hearing of Motley, State-Operated School District of Newark, EDU 7421-97, Initial Decision (May 5, 1999), *modified*, Comm’r (August 4, 1999), *aff’d*, State Bd. (December 1, 1999), <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>:

"Unbecoming conduct" is an elastic term broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and [confidence] in the operation of [public] services." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). Behavior rising to the level of unbecoming conduct "need not be predicated upon a violation of any particular rule or regulation, but may be based merely upon a violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Despite the apparent vagueness of this standard, "it fairly and adequately conveys its meaning to all concerned." Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1957). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), certif. den., 65 N.J. 292 (1974).

It is the obligation of the District to prove the tenure charges by a preponderance of the credible evidence. The Commissioner, in In re Tenure Hearing of Grundfest, School District of Madison, EDU 5326-98, Comm'r (June 20, 2000), rev'g Initial Decision (March 29, 2000), aff'd, State Bd. (November 1, 2000) <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>, outlined what a board of education had to prove in order to meet its burden in a tenure charge:

Sustaining tenure charges for unbecoming conduct, however, is a very serious matter. The ramifications for respondent would be not only the loss of his tenured employment, but also the automatic referral of the matter to the State Board of Examiners for possible revocation of his teaching certificate, and the possible loss of his pension benefits. Since the penalty for respondent would be severe, it is the Board's responsibility and its burden to prove by a preponderance of credible evidence [the tenure charges against respondent].

Arguments of the Respondent

Mr. Harriman put forth a number of arguments in defense of his position that he should not forfeit his tenure. He asserted that he had been treated for depression since

June 2010 and was taking medication for anxiety. While this did not entirely excuse his actions, it was a partial explanation of his problems at work and "his harsh way of speaking with his superiors." He also asserted that at the same time that he was working at the two elementary schools in question, he was working for principal Dominick Silla at Sixteenth Avenue School, and there was never an issue with this principal. The respondent asserted that this pointed to the fact that the events in question had more to do with his troubled relationship with these administrators than with his inability to perform his job. Mr. Harriman also claimed that many of the incidents cited in the charges were just blown out of proportion and he was simply defending himself against unwarranted attacks. Further, Mr. Harriman's long record of being an excellent educator and positive role model should also be taken into account in determining whether he should be dismissed. Finally, even though Jackter, Saper and Tomko were his supervisors, they should not "be so thin-skinned as . . . to allow these differences of opinion between themselves and their staff" to be a reason for Mr. Harriman's dismissal.

Charge 1

Mr. Harriman is accused in Charge 1 of being engaged in deceptive and untruthful conduct. Among the counts is that Mr. Harriman made a false representation in a memo to Mr. LaGrotta that he had been advised by Principal Nazzaro to add an addendum to the evaluation of Mr. Galler. The testimony of Mr. Nazzaro was clear and straightforward that he did not advise Mr. Harriman to write the memo. In fact, he told Mr. Harriman that if he wanted to fire Mr. Galler he should have mentioned it in his evaluation. Mr. Harriman's response that he did not copy Mr. Nazzaro on his memo to Mr. LaGrotta because Mr. Nazzaro was busy with graduation and retirement does not ring true. What is more credible is that Mr. Harriman did not want Mr. Nazzaro to see the memo to Mr. LaGrotta because the memo contradicted what Mr. Nazzaro had told him. In addition, since there were no additional wrestling responsibilities after the March evaluation, there would be no reason to change his evaluation based on performance issues.

Determinations often turn on credibility. Credibility is the value that a finder of the facts gives to the testimony of a witness. The process of evaluating the credibility of witnesses entails: (a) observing demeanor; (b) evaluating the ability to recall specific details; (c) considering the consistency of the testimony under direct and cross-examination; (d) determining the significance of any inconsistent statements or evidence; and (e) otherwise developing a sense of the witness's candor. This requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. See Carbo v. U.S., 314 F.2d 718 (9th Cir. 1963), cert. denied sub. nom. Palermo v. U.S., 377 U.S. 953, 84 S. Ct. 1625; 12 L. Ed. 2d 498 (1964).

In evaluating the weight, trustworthiness and reliability of the evidence, factors such as motive, bias, confirming witnesses or statements, corroborative evidence, and common sense must be considered. Frequently, the trier of fact relies on the innate sense of whether the testimony has the ring of truth. Based on the evidence, including his own evasive answers, I **CONCLUDE** that Mr. Harriman's testimony with regard to this evaluation memo does not ring true.

Count Two of Charge 1 deals with the incident in June 2011 when Mr. Harriman allegedly deceived Principal Jackter about covering the classes for another teacher, Eric Schwartz. The evidence regarding this count is not as clear as that regarding the previous count. Mr. Schwartz testified credibly that he notified Mr. Harriman that he did not have to cover his classes at Ms. Jackter's school. However, Mr. Saper did send a memo to Mr. Harriman telling him to cover Mr. Schwartz's classes and Mr. Saper was his supervisor. On the other hand, Mr. Saper was not Mr. Harriman's supervisor at Ms. Jackter's school, where Mr. Harriman was supposed to go to cover the classes. Based on the conflicting testimony and exhibits, I cannot conclude that the District has proved by a preponderance of the credible evidence that Mr. Harriman was deceptive regarding this incident.

In Count Three, Mr. Harriman is charged with leaving a physical education class unattended, and lying about it when he was questioned by Ms. Jackter. While Mr. Harriman argued that he was just propping open the door of the gym, Ms. Jackter

testified that she saw Mr. Harriman outside with a student placing cones on the field. She remained in the gym for four to five minutes waiting for Mr. Harriman to return to his class. Certainly, it would not take four to five minutes to prop open a door. Mr. Harriman's position was worsened by his statement in his rebuttal to Ms. Jackter's memo of June 17, 2011, when he accused her of negligently allowing a non-student to take part in a school activity. From the circumstances, I **CONCLUDE** that Mr. Harriman was caught in a difficult circumstance. Rather than admitting that he was outside for a few minutes, he tried to deny and bluster his way through the situation.

Count Four alleged that Mr. Harriman lied when he stated that he was directed by Mr. Saper to combine Mrs. Valentine's classes. The District did not deal with this issue, and I **CONCLUDE** that the District abandoned this count. There were other charges regarding complaints from students in Mrs. Valentine's class, but this will be dealt with below.

Charge 2

The District charged that Mr. Harriman acted in an inappropriate, defiant and insubordinate manner, repeatedly demonstrating a blatant disregard of and open defiance of administrative directives. Insubordination has been found when a teacher has willfully refused to comply with a supervisor's directive. See In re Tenure Hearing of Ingram, EDU 9068-01, Initial Decision (May 17, 2002), adopted, Acting Comm'r (June 27, 2002), <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>, aff'd, State Board (November 6, 2002), <<http://www.nj.gov/education/legal/>>. Insubordination can also be shown if a teacher fails to perform duties or to comply with district policies. See In re Certificates of Resto, EDE 3869-04 (October 31, 2005), <http://www.nj.gov/education/legal/>. In In re Tenure Hearing of Toorzani, EDU 9713-11, Initial Decision (December 28, 2011), <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>, adopted, Acting Comm'r (February 12, 2012), <<http://www.nj.gov/education/legal/>>, the administrative law judge (ALJ) found that a teacher had been insubordinate where she had "criticized the administration and colleagues repeatedly by challenging their honesty and integrity, depriving them of the dignity to which they are entitled, creating an uncomfortable work environment and

impairing the ability of the individual targets of her behavior to effectively discharge their duties.” The ALJ noted:

Insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of an educational facility. Insubordination is always a serious matter, especially in an educational setting where the complexity of providing a comprehensive curriculum and education to students requires interaction with the various components of the process such as staff, supervisors, administrators, students and parents/guardians.

In Count One, Mr. Harriman was charged with failing to follow established procedures for notification of his absences. This involved one incident on May 21, 2003, when he called into the substitute service, but failed to notify his principal. While Dr. Tomko testified that, despite the written directive that absences should be reported to the substitute service and not the principal, the policy had been orally changed by the prior superintendent of schools because of issues with the call-in. He further testified that there had been faculty meetings in which this new “policy” had been disseminated. However, there was no proof presented that Mr. Harriman had attended the meetings or that the written policy had ever been changed. The District pointed to the case of In re Tenure Hearing of Mapp, EDU 8333-02, Initial Decision (June 20, 2003, aff’d, Comm’r (Aug. 11, 2003), <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>, for the proposition that failure to follow proper call-out procedures constituted unbecoming conduct. However, in that case Ms. Mapp was charged with multiple absences and tardiness. Here we have one incident of the respondent relying on a written policy that may or may not have been countermanded by an oral directive. I **CONCLUDE** that the evidence is not strong enough to sustain a charge of insubordination based on this incident.

Mr. Harriman is charged in Count Two with acting unprofessionally and inappropriately in response to a decision by the NJSIAA regarding the seeding of Elmwood Park’s wrestling team that Mr. Harriman coached. There was testimony that Mr. Harriman was so disrespectful to the director of the Association and the statistician

that Mr. Baly complained to Dr. Tomko that Mr. Harriman had upset his secretary, and had told the statistician that this was "bullshit" and was confrontational toward him, refusing to back down from his position that the seeding by the Association was incorrect. As a result of his behavior, it was recommended that Mr. Harriman attend a compliance meeting. Even though Mr. Harriman denied being disrespectful and claimed that the encounter ended with Baly and Harriman agreeing to disagree, Mr. Harriman testified that he did apologize to Mr. Baly at the compliance meeting. The weight of the evidence clearly demonstrated that Mr. Harriman pressed his position to the point of being combative and argumentative toward professionals who could, though they did not, have imposed sanctions on the District.

Count Three charged that notwithstanding a specific administrative directive that every coach speak individually about only senior students at the first athletic Booster Club dinner, Mr. Harriman did otherwise. When confronted, Mr. Harriman said that "he didn't see the big deal." However, as explained by Dr. Tomko and Mr. Saper, there was a reason that they had decided to limit the remarks to seniors. The reason was to give the seniors a special highlight at the event and to leave the underclassmen something to look forward to. Also, since the other coaches followed the instructions, some of their athletes were not recognized, while others were. Mr. Harriman's explanation that it was a miscommunication was belied when he did the same thing the following year.

Count Four dealt with the awarding of the Most Valuable Player (MVP) award to a student who had been banned from the championship match with Lodi due to his cursing at a teacher. There was testimony of both Dr. Tomko and Mr. Saper that they had urged Mr. Harriman to change his choice. Although Mr. Harriman asserted that the reason given by the administrators to change the choice was that they wanted to honor an Elmwood Park student rather than a student from the other school, it was clear that Mr. Harriman was unwilling to consider the arguments made by his supervisors. In addition, Mr. Harriman basically manipulated the situation by presenting the student awards at a Recreation wrestling dinner, rather than at the Booster dinner. (Count Five) Mr. Harriman and the rest of the coaches had been directed to present the awards only at the Booster dinner. Yet despite that directive, to which the other coaches adhered, Mr. Harriman presented the District awards at the Recreation dinner, prior to the

authorized dinner. Thus the award became a fait accompli. Mr. Harriman's assertion that he only presented a most improved player award, which was a Recreation award, was directly contradicted by Lieutenant Foligno, who attended the Recreation awards dinner and who was a disinterested party to these proceedings.

Count Six dealt with Mr. Harriman's failure to comply with an administrative directive by Ms. Jackter to meet her. Mr. Harriman testified that he had spoken to his union representative and left it in her hands to deal with the issue. Mr. Harriman's explanation appears rather thin. Considering the fact that Ms. Jackter requested on at least two occasions that they meet, it was strange that he did not at least follow up with Ms. Jackter to see if a meeting was necessary and to find out if the union representative had met with her on the issue.

In Count Seven the District alleged that Mr. Harriman inappropriately stored a student's information in his cell phone and called the mother during instructional time and threatened to repeat the action if the student failed to behave in class. Mr. Harriman changed his story several times, but the final version was that he had made the telephone call and left a message. While there were conflicting arguments as to whether Mr. Harriman disregarded a policy about making personal cellular telephone calls during school hours, the bigger issue was that he took time away from his classroom instruction and took his attention away from his students to make a telephone call to a student's parent. As a teacher, Mr. Harriman was under an obligation to supervise his class, and making a cell phone call to a parent in the midst of class definitely diverted the respondent from the task at hand, namely, teaching and supervising his students.

Count Eight stated that Mr. Harriman directed a student to go to the faculty room to retrieve a bottle of water. According to Mr. Saper, young students were supposed to travel only in twos and were not permitted in the faculty lounge. Mr. Harriman testified that he needed the water to take a pill and that other students had performed similar tasks for teachers. The violation appears to be de minimis, and the procedure outlined by Mr. Saper to obtain the water appeared to be cumbersome at best. Therefore, I **CONCLUDE** that as to Count Eight, the respondent's behavior was not insubordinate.

Counts Nine through Fourteen dealt with the 90-Day Action Plan and the repercussions that followed. It is clear from the testimony and exhibits that Mr. Harriman declared the plan invalid and notified the Board of Education of such. In addition, he refused to attend the anger-management class directed in the plan.⁵⁰ Mr. Harriman was openly defiant toward Dr. Tomko, telling him that he would never meet with him and certain other members of the administration. Mr. Harriman also disputed the superintendent's definition of insubordination, accused him of colluding with other administrators to trump up charges against him, admonished Dr. Tomko not to make threats against him, and claimed that the superintendent was "instigating trouble with me again through your novice Principals." Mr. Harriman refused to take any responsibility for his actions, and instead warned, "The two novice Principals and yourself need to be more professional, kind and considerate." While Mr. Harriman admitted that on reflection, his rebuttals might have been a bit strong, he declared that he was detailed oriented and he was just presenting the details in his statements. Mr. Harriman rationalized that he had a right to respond in the manner he did because he was being wronged. He appeared to have no conception that his manner was completely insubordinate, confrontational and disrespectful of all authority.

Therefore, I **CONCLUDE** that as to Counts Two, Three, Four, Five, Six, Seven, Nine, Ten, Eleven, Twelve, Thirteen and Fourteen of Charge Two, Mr. Harriman's behavior was inappropriate, defiant and insubordinate.

Charge 3

Mr. Harriman was charged with treating his supervisors in a contumacious, discourteous and overtly disrespectful, and personally demeaning manner from 2010 to the present. This charge dealt with his behavior toward Ms. Jackter and Mr. Harriman. It has been held that disdainful behaviors and speech towards administrators is considered conduct unbecoming. In In re Tenure Hearing of King, EDU 4241-00,

⁵⁰ At the hearing, Mr. Harriman claimed that he was looking into anger-management programs. Considering that he had been directed almost one year prior to attend a program, his excuse does not appear to be reasonable.

Comm'r (February 25, 2002), <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>, the Commissioner affirmed the ALJ's determination that Ms. King's inappropriate remarks, use of profanity and unacceptable behavior constituted unbecoming conduct and were grounds for dismissal. Teachers act as role models for their students. Therefore, they are held to a high standard of personal conduct and are supposed to act appropriately toward their superiors. See In re Tenure Hearing of Deal, 96 N.J.A.R.2d (EDU) 703. In order for a school to operate in a proper fashion, not only must the teachers be able to teach well, but they must also be able to interact with their fellow teachers, employees and administrators. As was pointed out in In re Bradley v. Board of Education of Newark, 1990 S.L.D. 790, aff'd, St. Bd., 1991 S.L.D. 2521:

An employee is not entitled to the protection of tenure . . . when by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected. When the responsibility for the conditions unfavorable to the effective operation of the schools rests with the employee, then, the Commissioner holds, the protection of tenure is forfeit.

[Citing In re Maratea, 1966 S.L.D. 77, 106.]

Mr. Harriman's attitude was demonstrated in his behavior during Field Day on May 23, 2011. He obviously felt that Field Day should be left in his hands, and any attempt on Ms. Jackter's part to alter the program was met with a negative response. As a result, Mr. Harriman reacted by telling her that she was wrong and yelling at her in front of staff and parents (Counts One and Two). In addition, his pronouncement that he would only communicate with Ms. Jackter through the use of a white board showed how completely untenable his position had become and how impossible it was to have any meaningful dialogue between teacher and administrator.

As to Count Three, which alleges that Mr. Harriman placed his hands on his genitals for a prolonged period of time, I am not comfortable with either rendition of the event. I do not believe that Mr. Harriman's rendition, that his hands were crossed across his chest the entire time he was meeting with Ms. Jackter, except when he was adjusting his shorts from the outside of his thigh, is entirely accurate. On the other

hand, I am not sure that Mr. Harriman's actions were as provocative as Ms. Jackter assumed. What bothers me most is that once Ms. Jackter expressed her concern, the proper response would have been that his actions may have been misinterpreted, but he did not wish to make her feel uncomfortable. Instead, Mr. Harriman again went on the offensive and described Ms. Jackter's response as comical and a fantasy. In dealing with Mr. Saper, Mr. Harriman again went on the offensive.

When Mr. Saper called Mr. Harriman into the office to discuss the complaints that students had brought to the principal, instead of discussing them in a civil manner, he immediately "went off," raised his voice, and told Mr. Saper to back off and stop harassing him. This is certainly not the proper way to deal with one's supervisor. Mr. Harriman's rebuttal to Mr. Saper's memo regarding the incident was confrontational and accusatory. He described the principal's actions as "highly unbecoming of an elementary school Principal and building supervisor." He demeaned Mr. Saper by saying, "A superior is supposed to have at least some answers once in a while," and chastised him for his inability to manage the school and accused him of being dishonest. Mr. Harriman's remarks that he was keeping a daily log, which he was going to submit to the proper authorities, could only be considered a threatening action. The tone of Mr. Harriman's rebuttal was unprofessional and insulting. (Counts Four and Five.)

Mr. Harriman's memo to Ms. Jackter dated June 8, 2011, was equally insulting and disrespectful. (Count Six.) His statements that Field Day was almost a disaster because of her micro-management and that he had never had such an uncooperative, untrustworthy and dishonest administrator could only be considered provocative. His remarks about her being envious of his megaphone border on the bizarre; his statements that the principal was dishonest, was trying to sabotage Field Day and was scheming against him were accusatory and insubordinate.

While I previously found that Mr. Harriman's covering of Mr. Schwartz's classes may have resulted from a misunderstanding and miscommunication, the respondent's response to the situation was inappropriate. Mr. Harriman should not have yelled at his principal, and definitely not in front of staff and parents. Further, his rebuttal memo of

June 20, 2011, in which he accused Ms. Jackter of instigating trouble between him and Mr. Schwartz was uncalled for. (Count Seven.)

Count Eight dealt with the encounter on November 9, 2011, when Ms. Jackter questioned Mr. Harriman about a physical altercation that occurred between two of his students. Mr. Harriman became physical in describing what had occurred by showing how he separated the boys. It appears that Ms. Jackter might have been hypersensitive to his actions, either due to her own predisposition regarding physical contact or based on her prior dealings with Mr. Harriman. In either case, I **CONCLUDE** that the charge of physical contact on this occasion between Mr. Harriman and Ms. Jackter was not proven.

As to the charge in Count Nine that Mr. Harriman injected himself in the stomach with insulin in the cafeteria in the presence of students and staff, Mr. Harriman has not denied that he gave himself an injection. His explanation was that he was having a medical emergency and needed glucose. There was testimony that Mr. Harriman had previously been told by Ms. Corrigan not to inject himself in the cafeteria. Ms. Corrigan also testified that a diabetic would not inject himself with glucose, but rather would have taken orange juice or a glucose tab to raise his level. If the diabetic needed a shot of glucose, then he would have been in such a condition that he would have been unable to administer the shot himself. Further, when Mr. Harriman was confronted by the principal, he did not tell Mr. Saper that he was having a medical emergency. Rather, he just responded that no one had seen him administer the shot. Mr. Harriman's account—that the students were not in the area; that they could not see him because his computer cover was raised; and that they were not eating lunch at the time he gave himself the shot—was likewise contradicted by the written statement of an aide, who said that Mr. Harriman had his insulin kit open at the table while she was sitting with students at lunch. Mr. Harriman may have had his reasons for not wanting to go to another location to administer his shot, but this directly countermanded the directive of his supervisor.⁵¹

⁵¹ Mr. Harriman testified that he did not like to go into the faculty lounge because the teachers were all females and he did not want to listen to discussions about showers, weddings, etc.

Counts Ten, Eleven and Twelve dealt with the "gate duty" incident. Mr. Harriman questioned Mr. Saper's directive that he not open the car doors of parents who were dropping off their children for school. Mr. Saper's reasoning that he was concerned about the students possibly falling out of the cars may or may not be valid. That is really beside the point. Once Mr. Harriman was aware that Mr. Saper did not want the car doors opened, that should have been the end of it.⁵² Instead, Mr. Harriman became confrontational and wanted to know where it was written that he could not open a car door. He then threatened Mr. Saper again about releasing his seven-year log and told the principal that he would hear from his lawyer. In his rebuttal, Mr. Harriman accused Mr. Saper of not caring about his students' safety and of being insecure and jealous. He also accused him of planting moles (Harrison Werner) in the school. Mr. Harriman had again blown the situation way out of proportion and had lost all professional prospective. Mr. Harriman's calling Mr. Werner, the security guard, on Saturday and lighting into him and calling him a snitch was just another example of how the respondent had lost all sense of decorum and professionalism.

The charge of breaking confidentiality by Mr. Harriman's telling a parent, Mrs. Tester, that he could no longer open her car door to discharge her daughters appears to be a little far-fetched. Obviously, the whole "gate duty" situation had gotten out of hand, by Mr. Harriman again conjuring up harassment charges. However, I do not see that the respondent had broken confidentiality by telling a parent that he could no longer open her car door. Therefore, as to Count Twelve, I **CONCLUDE** that respondent is not guilty of acting in a contumacious and disrespectful manner.

Count Thirteen deals with Mr. Harriman's interaction with Michael Wartel, a District courier and former law enforcement officer. Mr. Wartel testified that when he delivered a package to Mr. Harriman from Dr. Tomko, the respondent declared, "More paperwork from Tomko, Jackter and Saper; they are harassing me and I am taking them to court on this." Mr. Wartel testified that he knew nothing about the contents of the package that he was delivering. Mr. Harriman claimed that it was Mr. Wartel who

⁵² Mr. Saper said that he had instituted the policy in September, but it is not clear that Mr. Harriman was aware of the policy until December, and Mr. Werner admitted to opening car doors during the period from September to December.

said that the respondent was being harassed. However, Mr. Harriman presented no evidence to explain why Mr. Wartel would have made up this story. Based on past history and the lack of any proof of prejudice on Mr. Wartel's part, the messenger's version of the event is more credible. The same could be said of the events outlined in Count Fourteen. Mr. Wartel and Ms. Jackter both testified that Mr. Harriman walked past the principal as he was exiting the building, even though the principal called to him. Mr. Harriman claimed that he was not near the principal and had on earphones and therefore did not hear her call him. Both Mr. Wartel and Ms. Jackter denied that Mr. Harriman was wearing earphones, and described the respondent walking close by them.⁵³ Ms. Jackter later described Mr. Harriman's ignoring her when he came into the main office later in the day. At best, Mr. Harriman's actions could be described as childish; at worst, they were disrespectful and discourteous toward a supervisor.

It is clear from the testimony and the written statements from Mr. Harriman that he did not think that he should have to answer to administrators who were younger than he. Rather than attempting to be helpful to these novices, he believed that he had no obligation to either adhere to their directives or to give any deference to their position in the District. It is also apparent from the testimony and exhibits that he considered them incompetent, meddling micro-managers and unworthy of his respect and he had no problem putting his beliefs into print. He showed similar disrespect for Dr. Tomko, the superintendent of schools. I therefore **CONCLUDE** that as to Charge Three, Counts One, Two, Four, Five, Six, Seven, Nine, Ten, Eleven, Thirteen and Fourteen, the District has proved that Mr. Harriman treated his supervisors in a contumacious, discourteous, and overtly disrespectful, and personally demeaning manner.

Penalty

The penalty in a tenure case is often a judgment call. There are cases that have called for the termination of tenure, and cases that have permitted a lesser penalty. The respondent has argued that his depression and medication for anxiety should be considered as a partial explanation of his "harsh way of speaking with his superiors."

⁵³ In fact, Mr. Wartel testified that Mr. Harriman walked between Ms. Jackter and him in the narrow hallway.

Further, he points to his years of “unblemished service” and his dedication to his students and to the teaching profession. The District has basically acknowledged that it is not questioning his teaching ability. While this is a very important factor in judging whether a person should retain tenure, there are other factors that have to be considered. A school system cannot operate if the staff and administrators are constantly at odds with one another. In this case, the disagreements reached mammoth proportions, with administrators spending inordinate amounts of time responding to voluminous “rebuttals” authored by the respondent. At some point the system ceases to function, when there is outright warfare amongst the teacher and administrators. If one or possibly two administrators had problems with Mr. Harriman, then it could be attributed to a personality clash. However, in this case there was intense friction between Mr. Harriman and Ms. Jackter, Mr. Saper, Dr. Tomko, Mr. Schwartz and Mr. Werner.⁵⁴ What was telling also was that even at the hearing Mr. Harriman did not seem to have a good understanding of how his actions had led to the tenure charges. He seemed to think that the charges arose totally out of a conspiracy against him and not out of any behavior on his part. The fact that he got multiple write-ups during a short period of time did not reflect on him at all, but rather was the result of a campaign by administrators to ruin him. When he talked about the tone of his rebuttals, he explained that he was detail oriented, which led him to write the three-page diatribes. Mr. Harriman testified that he was no longer taking medication for his depression, and yet his behavior exhibited a continuing disconnect regarding the actions that had led him to his present situation. While it is unfortunate that a qualified teacher should lose his tenure, a teacher cannot continue to function in a District when he is adversarial with almost all of the people with whom he interacts. Unfortunately, that is the situation in this case.

CONCLUSIONS

Based on the reasoning above, I **CONCLUDE** that the District has sustained its burden of proving the tenure charges against Mr. Harriman.

⁵⁴ It might be of note that the administrator that Mr. Harriman did not have problems with was Principal Silla, who had been in the system for many years more than Mr. Harriman. However, when it came to the newer administrators and teachers, Mr. Harriman had trouble accepting their authority.

Further, I **CONCLUDE** that the appropriate penalty is termination of tenure.

ORDER

It is hereby **ORDERED** that the tenure charges against Mr. Harriman are sustained and that the respondent's tenure be terminated.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug 31 2012
DATE

Date Received at Agency:

Date Mailed to Parties:
db/sej

Carol I. Cohen
CAROL I. COHEN, ALJ

8/31/12
8/31/12

APPENDIX

WITNESSES

For Petitioner:

Marie Corrigan
Michael Foligno
Alison Jackter
Michael Nazzaro
David Saper
Erik Schwartz
Richard Tomko
Michael Wartel
Harrison Werner

For Respondent:

Kevin Harriman

EXHIBITS

For Petitioner

- P-1 Memorandum, dated May 6, 2003, to Kevin Harriman, from Michael Nazzaro
- P-2 Memorandum, dated May 22, 2003, to Kevin Harriman, from Michael Nazzaro
- P-3 Memorandum, dated February 10, 2006, to Kevin Harriman, from David Saper
- P-4 Memorandum, dated May 26, 2006, to Joseph F. Casapulla, from Richard Tomko
- P-5 Memorandum, dated June 2, 2006, to Joseph F. Casapulla from Richard Tomko
- P-6 Elmwood Park Public Schools, Personnel Summative Evaluation for Kevin Harriman, by David Saper, dated March 15, 2011
- P-7 Memorandum dated May 26, 2011. to Kevin Harriman from Allison Jackter
- P-8 Memo dated May 26, 2011, to Kevin Harriman, from David Saper
- P-9 Memorandum dated June 2, 2011, to David A. Saper from Kevin Harriman
- P-10 Memorandum dated June 6, 2011, to Kevin Harriman from Allison Jackter

- P-11 Memorandum dated June 7, 2011, to Kevin Harriman from David Saper
- P-12 Memorandum dated June 8, 2011, to Allison Jackter from Kevin Harriman
- P-13 Memorandum dated June 8, 2011, to Kevin Harriman from Allison Jackter
- P-14 Memorandum dated June 10, 2011, to Kevin Harriman from Allison Jackter
- P-15 Memorandum dated June 14, 2011, to Kevin Harriman from David Saper
- P-16 Memorandum dated June 17, 2011, to Allison Jackter from Kevin Harriman
- P-17 Memorandum dated June 20, 2011, to Allison Jackter from Kevin Harriman
- P-18 Letter dated July 5, 2011, to Kevin Harriman from Richard D. Tomko
- P-19 Memorandum dated July 5, 2011, to Bhumika Patel from Richard Tomko
- P-20 Letter dated August 5, 2011, to Rose Ann Spina from Richard D. Tomko
- P-21 Email correspondence dated September 3, 2011, to Kevin Harriman from Richard Tomko
- P-22 Email correspondence dated September 5, 2011, to Kevin Harriman from Richard Tomko
- P-23 Email correspondence dated September 5, 2011, to Richard Tomko from Kevin Harriman
- P-24 Letter dated September 6, 2011, to Elmwood Park Board of Education Members from Kevin Harriman
- P-25 Memorandum dated September 6, 2011, to Richard Tomko from Kevin Harriman
- P-26 Email correspondence dated September 8, 2011, to Richard D. Tomko from Kevin Harriman
- P-27 Letter dated September 8, 2011, to Kevin Harriman from Richard Tomko
- P-28 Letter dated September 9, 2011, to Kevin Harriman from Richard Tomko
- P-29 Memorandum dated November 9, 2011, to Richard Tomko from Allison Jackter
- P-30 Memorandum dated December 5, 2011, to Kevin Harriman from David A. Saper
- P-31 Memorandum dated December 9, 2011, to Kevin Harriman from David A. Saper
- P-32 Memorandum dated December 9, 2011, to David A. Saper from Kevin Harriman
- P-33 Email correspondence dated December 10, 2011, to David Saper from Harrison Werner
- P-34 Memorandum dated December 12, 2011, to Kevin Harriman from David Saper
- P-35 Memorandum dated December 12, 2011, to Kevin Harriman from David Saper
- P-36 Memorandum dated December 12, 2011, to David Saper from Kevin Harriman
- P-37 Letter dated December 16, 2011, to Kevin Harriman from Richard D. Tomko

- P-38 Letter dated December 20, 2011, to Kevin Harriman from Richard Tomko
- P-39 Letter dated December 20, 2011, to David Saper from Maria Romero
- P-40 Memorandum dated December 21, 2011, to Kevin Harriman from Allison Jackter
- P-41 Memorandum dated December 21, 2011, to Kevin Harriman from David A. Saper
- P-42 Policy 1110 – Organizational Chart adopted January 26, 2010.
- P-43 Policy 1110 – Organizational Chart adopted September 27, 2011
- P-44 Policy 1100 – District Organization adopted January 26, 2010
- P-45 Policy 3322 – Staff Member's Use of Cellular Telephones adopted January 26, 2010
- P-46 Handwritten letter to Saper dated May 25, 2011, from Kevin Harriman
- P-47 Letter from William Moffet to Harriman dated September 12, 2011
- P-48 Staff Orientation
- P-49 2011 Orientation Agenda

For Respondent:

- R-1 Procedure for Calling In-Absences: Substitute Service
- R-2 September 12, 2011, letter from Board President to Harriman
- R-3 Grievance dated August 8, 2011

OAL DKT. NO EDU 9831-11
AGENCY DKT. NO. 220-8/11

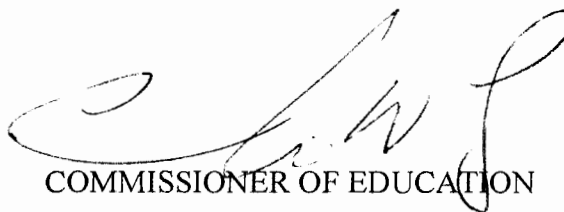
IN THE MATTER OF THE TENURE :
HEARING OF MARIANNE MARMORA, :
SCHOOL DISTRICT OF THE CITY OF : COMMISSIONER OF EDUCATION
JERSEY CITY, HUDSON COUNTY. :
DECISION

The record of this matter, the parties' Settlement Agreement and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C. 1:1-19.1*.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

Date of Decision: 10/15/12
Date of Mailing: 10/15/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09831-11

AGENCY DOCKET NO. 220-8/11

**IN THE MATTER OF THE TENURE HEARING OF
MARIANNE MARMORA, SCHOOL DISTRICT OF
THE CITY OF JERSEY CITY, HUDSON COUNTY.**

Lester Taylor, Esq. for petitioner (Floria Perrucci Steinhardt & Fader.)

Philip Feintuch, Esq., for respondent (Feintuch, Porwich & Feintuch)

Record Closed: September 20, 2012

Decided: September 20, 2012

BEFORE **JOANN LaSALA CANDIDO, ALJ:**

This matter was transmitted to the Office of Administrative Law (OAL) on August 18, 2011, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was scheduled and conducted on September 7, 2011 during which time the parties agreed to hearing dates. On March 28, 2012 petitioner's counsel submitted a letter of withdrawal. The file was returned to the agency as a withdrawal. However on April 9, 2012 this matter was returned to the OAL in order to satisfy the Cardonick criteria set forth at N.J.A.C. 6A:3-5.6.

A telephone status conference was scheduled and conducted on May 16, 2012 wherein the parties agreed to submit a Stipulation of Withdrawal and Board Resolution. On September 11, 2011 the Stipulation of Withdrawal and the Board's resolution approving the settlement was received. On September 20, 2012 the OAL received the certified extract of the Board's meeting minutes indicating the resolution and record of the Board's vote regarding same, which is attached hereto for reference.

Based upon a review of the record as well as the proposed settlement agreement, and the representation of the parties on the record of this matter, I make the following **FINDINGS**:

1. The Settlement is in the public interest as it conserves the Board's resources and delivers a final result, whereby petitioner has agreed to withdraw the tenure charges filed against respondent.
2. Litigation costs associated with a scheduled multiple day hearing has been considered against the monetary terms of the Settlement.
3. If a hearing becomes necessary, the District has identified school personnel who are potential witnesses.
4. Under the proposed settlement, petitioner will withhold respondent's 2012-2013 salary increment.
5. Under the best of circumstances, the hearing needs to be conducted and then the administrative law judge would have forty-five days to prepare an initial decision and the Commissioner would have an additional forty-five days for review and issuance of a final decision.
6. If the tenure matter proceeds to hearing, both parties would incur costs of paying their attorneys for a likely lengthy hearing.
7. Marianne Marmora has had the opportunity of counsel in this matter and has represented that she fully understands her rights and implications of this.
8. The settlement fully disposes of all issues in controversy.

Based upon the foregoing, I **CONCLUDE** that the terms of stipulation are in the public interest.

It is **ORDERED** that the parties comply with the terms of stipulation and that these proceedings are hereby concluded.

Having reviewed the contents of the attached Stipulation of Withdrawal and Release, I **FIND**:

1. The parties have voluntarily agreed to the stipulation as evidenced by their signatures and/or the signatures of their representatives.
2. The stipulation fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 20, 2012
DATE

Date Received at Agency:

Date Mailed to Parties: **SEP 25 2012**

ljb

Jo L Lasala Candido
JOANN LASALA CANDIDO, ALJ
9-25-12
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

LESTER E. TAYLOR, III, ESQUIRE
FLORIO PERRUCCI STEINHARDT & FADER, L.L.C.
218 Route 17 North
Rochelle Park, New Jersey 07662
(201) 843-5858
ltaylor@florioperrucci.com
Attorneys for Petitioner, Jersey City Public Schools District

IN THE MATTER OF THE TENURE
HEARING OF MARIANNE
MARMORA, JERSEY CITY PUBLIC
SCHOOLS DISTRICT, HUDSON
COUNTY

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No.: EDU 09831-2011 N
Agency Docket No.: 220-8/11

STIPULATION OF WITHDRAWAL

This Stipulation of Withdrawal (hereinafter "Agreement") is made and entered into this 29 th day of May 2012, by and between the Jersey City Public School District, (hereinafter referred to as "Petitioner") and Marianne Marmora (hereinafter "Respondent"). Petitioner and Respondent may be collectively referred to herein as the "Parties."

The Parties to this Agreement mutually understand and agree to the following:

WHEREAS, on or about August 3, 2011, Petitioner filed tenure charges against Respondent with the Commissioner of the New Jersey Department of Education ("Commissioner") alleging charges of unbecoming conduct and other just cause, pursuant to N.J.S.A. 18A:6-10.

WHEREAS, on or about August 17, 2011, Respondent, by and through her attorney Philip Feintuch, Esq., filed a response to the above-referenced charges with the Commissioner.

WHEREAS, the Parties to this Agreement have engaged in pre-trial discovery and desire to resolve this matter in lieu of potentially protracted and costly litigation.

WHEREAS, the Parties to this Agreement have engaged in good faith negotiations and hereby agree to resolve the instant matter in dispute according to the following terms:

1. Petitioner shall withhold Respondent's 2012-2013 salary increment.
2. Petitioner, Jersey City Public School District, shall withdraw the tenure charges filed in the instant matter subject to the provisions of Paragraph 1.
3. In accordance with N.J.A.C. 6A:3-5.6 and In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846):
 - a. See attached tenure charges filed with the Commissioner on or about August 3, 2011;
 - b. After voluntary settlement negotiations and given the nature of the charges, i.e., alleged unbecoming conduct, and due consideration of Respondent's long and heretofore successful career as a teacher and in light of the fact that at no time in Respondent's extensive experience in the District has she suffered any sort of disciplinary action nor loss of increment, the parties believe it is fair and reasonable to resolve the instant dispute in the manner described in Paragraphs 1 and 2.
 - c. Both Parties have had sufficient time to review the instant Agreement and accordingly, both Parties enter the instant

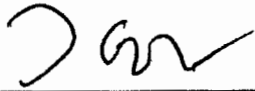
Agreement freely and voluntarily and fully understand and consent to the terms and conditions referenced herein;

- d. The charged party, i.e., Respondent, Marianne Marmora, has had sufficient time to consult with her attorney, Philip Feintuch, Esq., fully understands her rights in the instant matter, and freely and voluntarily waives her right to a hearing and/or to otherwise set forth a defense to the instant charges;
 - e. The instant Agreement is in the public interest as it will avoid the time and expense of potentially protracted and costly litigation; and
 - f. As a teaching staff member, Respondent has been advised that the Commissioner of Education has a duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.
4. Respondent, in consideration of the instant Agreement, hereby waives and releases Petitioner, and its officers, employees, agents, assigns, etc. from any and all causes of action, known or unknown, from the beginning of time up to and including the effective date of this Agreement.
5. The Parties to this Agreement specifically understand and agree that the instant Agreement is subject to ratification and approval by the Jersey City Public Schools Board of Education, the Honorable JoAnn LaSala Candido, A.L.J., and the Commissioner of the New Jersey Department of Education.

6. To the extent allowed by law, the Parties to this Agreement shall keep the terms of the instant Agreement confidential.
7. By entering the instant Agreement, Petitioner and Respondent acknowledge that this Agreement is not an admission on either party's part of any wrongdoing or liability and hereby wish to avoid the time, expense, and uncertainty of protracted litigation. Accordingly, this Agreement may not be admissible in any forum as an admission, but only in an action to enforce this Agreement.

In consideration of the terms stated herein, both Parties hereby enter the instant Agreement freely and voluntarily.

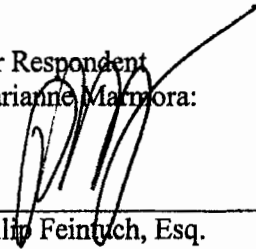
For Petitioner
Jersey City Public School District:



Lester E. Taylor, Esq.

Date: 5/29/2012

For Respondent
Marianne Marmora:



Philip Feintuch, Esq.

Date: 5/24/2012

Agenda Item Details

Meeting Jun 19, 2012 - Regular Meeting, 6 p.m.
Category 9. Legal
Subject 9.08 Approval of Settlement of Litigation
Access Public
Type Action (Consent)

Public Content

WHEREAS, the Jersey City Board of Education (hereinafter the Board) is the Petitioner and M.M., a tenured teaching staff member, is the Respondent in a contested case and controversy before the Commissioner of Education (Commissioner) and Office of Administrative Law (OAL); and

WHEREAS, on May 29, 2012, the Board and M.M. knowingly and voluntarily entered into a Settlement Agreement resolving all issues between the parties in this case; and

WHEREAS, both parties have acknowledged that the Settlement Agreement would be subject to ratification and approval by the Board; and

WHEREAS, the Board desires to resolve this matter amicably and without the need of further litigation in accordance with the terms of Settlement Agreement; now therefore

BE IT RESOLVED, that the Jersey City Board of Education does hereby approve and authorize the settlement agreement for M.M. as resolution of this matter.

Originator: R. Scott Eveland, General Counsel

Last Modified by Anna Marie Carpenito on June 16, 2012

Resolution 9.08

WHEREAS, the Jersey City Board of Education (hereinafter the Board) is the Petitioner and M.M., a tenured teaching staff member, is the Respondent in a contested case and controversy before the Commissioner of Education (Commissioner) and Office of Administrative Law (OAL); and

WHEREAS, on May 29, 2012, the Board and M.M. knowingly and voluntarily entered into a Settlement Agreement resolving all issues between the parties in this case; and

WHEREAS, both parties have acknowledged that the Settlement Agreement would be subject to ratification and approval by the Board; and

WHEREAS, the Board desires to resolve this matter amicably and without the need of further litigation in accordance with the terms of Settlement Agreement; now therefore

BE IT RESOLVED, that the Jersey City Board of Education does hereby approve and authorize the settlement agreement for M.M. as resolution of this matter.

Upon motion of Ms. Ranade, seconded by Vice President Adames, that Resolutions 6.02 through 13.29 be considered as a Consent Agenda.

Yeas—Ms. Gangadin, Ms. Harrison-Arnold, Ms. Lester, Ms. Ranade, Mr. Waterman, Vice President Adames, President Mack—7.

Nays—Mr. Valentin—1.

**THIS IS TO CERTIFY THAT THE FOREGOING
IS A TRUE COPY OF A RESOLUTION ADOPTED
BY THE BOARD OF EDUCATION OF JERSEY
CITY AT A MEETING HELD ON 6/19/12**

Richard Rorebey
BOARD SECRETARY

Agenda Item Details

Meeting Jun 19, 2012 - Regular Meeting, 6 p.m.
Category 9. Legal
Subject 9.08 Approval of Settlement of Litigation
Access Public
Type Action (Consent)

Public Content

WHEREAS, the Jersey City Board of Education (hereinafter the Board) is the Petitioner and M.M., a tenured teaching staff member, is the Respondent in a contested case and controversy before the Commissioner of Education (Commissioner) and Office of Administrative Law (OAL); and

WHEREAS, on May 29, 2012, the Board and M.M. knowingly and voluntarily entered into a Settlement Agreement resolving all issues between the parties in this case; and

WHEREAS, both parties have acknowledged that the Settlement Agreement would be subject to ratification and approval by the Board; and

WHEREAS, the Board desires to resolve this matter amicably and without the need of further litigation in accordance with the terms of Settlement Agreement; now therefore

BE IT RESOLVED, that the Jersey City Board of Education does hereby approve and authorize the settlement agreement for M.M. as resolution of this matter.

Originator: R. Scott Eveland, General Counsel

Last Modified by Anna Marie Carpenito on June 16, 2012

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12

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#414-12

JANINE WALKER CAFFREY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF	:	DECISION
THE CITY OF PERTH AMBOY,	:	
MIDDLESEX COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – who is employed under a three year contract as the respondent Board’s superintendent of schools – challenged the May 7, 2012 action of the Board to place her on a paid administrative leave of absence, contending that the Board improperly invoked the Doctrine of Necessity and failed to comply with the procedural requirements of the Open Public Meetings Act (OPMA), *N.J.S.A. 10:4-6 et seq.* The Board contends that the Commissioner of Education is without jurisdiction in this matter or that, in the alternative, its actions were in all respects legal and proper; the Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact, and the matter is ripe for summary decision; the Commissioner has incidental jurisdiction to determine matters arising under the OPMA as they relate to school law controversies; the Board properly invoked the Doctrine of Necessity because it was unable to act on petitioner’s suspension given the conflicts of interest on the part of several Board members; the question of whether petitioner should remain actively in service was a vital public issue; and the Board properly noticed and advertised the May 7, 2012 meeting. Accordingly, the ALJ granted summary decision to the Board; ordered that the Board’s May 7, 2012 resolution to place petitioner on a paid administrative leave was lawful; and dismissed the petition.

Upon careful and independent review, the Assistant Commissioner – to whom this matter was delegated pursuant to *N.J.S.A. 18A:4-34* – rejected the Initial Decision of the OAL, finding that it did not fully address all of the issues in this case as it only examined the procedural mechanism utilized to hold a vote of the full membership of the Board on the issue of petitioner’s employment status. The Assistant Commissioner also specifically noted that the precedential value of prior case law in this area has been significantly impacted by subsequent statutory and regulatory enactments. Accordingly, the Assistant Commissioner remanded the matter to the OAL for a determination regarding whether the Board’s decision to place the petitioner on paid administrative leave was arbitrary, capricious or unreasonable.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 25, 2012

OAL DKT. NO. EDU 7205-12
AGENCY DKT. NO. 122-5/12

JANINE WALKER CAFFREY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF	:	DECISION
THE CITY OF PERTH AMBOY,	:	
MIDDLESEX COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the petitioner Janine Walker Caffrey and the Board of Education. The Administrative Law Judge (ALJ) found that the Board properly invoked the Doctrine of Necessity when it voted on May 7, 2012 to put the petitioner on paid administrative leave. As a result, the ALJ granted summary decision in favor of the Board and dismissed the petition of appeal.¹

The Board did not take exception to the ALJ's Initial Decision, but instead urged the Commissioner to issue a final decision adopting the Initial Decision and incorporating the arguments made in its brief below. The Board also asked the Commissioner to take judicial notice of the Board's September 22, 2012 resolution putting the petitioner on paid administrative leave for the remainder of her contract term.

The petitioner filed exceptions asserting that the Initial Decision should not be adopted because the ALJ erroneously determined that the Board properly invoked the Doctrine

¹ The ALJ also dismissed the other counts in the amended petition relating to the Open Public Records Act and the School Ethics Act.

of Necessity. The petitioner specifically argued that the relevant case law requires a determination that there is a pressing public need before the doctrine can be invoked by a board of education. The petitioner further maintains that there is no evidence of a pressing need to place the petitioner on administrative leave, nor is there any evidence that allowing the petitioner to continue her duties as superintendent was contrary to the wishes of most people in the district. As a result, the petitioner argues that the Board was not authorized to invoke the Doctrine of Necessity to enable the conflicted board members to vote on petitioner's employment status. Therefore, the petitioner asserts that the Initial Decision should be rejected and the matter should be remanded to the OAL for a hearing on the issue of whether there was a pressing public need enabling the Board to invoke the Doctrine of Necessity.

Upon a comprehensive review of the record in this matter, the Assistant Commissioner – to whom this matter has been delegated to pursuant to *N.J.S.A. 18A:4-34* – finds that the Initial Decision did not fully address all of the issues in this case. The Initial Decision examined the procedural mechanism utilized by the Board – i.e. the Doctrine of Necessity – to hold a vote of the full membership of the Board concerning the petitioner's employment status. The Initial Decision, however, did not address whether the Board's decision to place the petitioner on an indefinite period of paid administrative leave was arbitrary, capricious or unreasonable.

In 2008, the Commissioner promulgated regulations designed to ensure fiscal accountability and efficiency for all boards of education. See *N.J.S.A. 18A:17-20.2b*; *N.J.A.C. 23A:1.1*. In connection with the need for fiscal efficiency, specific regulations were adopted to establish parameters that govern the early termination of a superintendent's employment contract. *N.J.S.A. 18A:17-20.2b*; *N.J.A.C. 23A:3.2*. Early termination agreements

for the involuntary separation of the superintendent are not only subject to Commissioner review, but the board of education must also show that the separation is “in the best interest of the district’s students and/or district operation.” *N.J.A.C.* 23A:3.2(a) and (b). Further, the regulations expressly limit the compensation that can be paid to a superintendent under a separation agreement. *N.J.A.C.* 23A:3.2(g).

In the case at bar, the Board has voted through the Doctrine of Necessity to place the petitioner on paid administrative leave for an indefinite amount of time while designating another individual to complete the duties of the superintendent.² The circumstances surrounding the Board’s decision regarding the petitioner’s employment are analogous to a scenario where a board of education enters into an early termination agreement for the involuntary separation of a superintendent. The Board’s decision to put the petitioner on paid administrative leave under these circumstances cannot escape scrutiny simply because a formal separation agreement has not been negotiated. The need for fiscal accountability and the assurance that the Board is acting in the best interest of the districts’ students remains paramount. Therefore, an analysis is required to determine if the Board’s decision to place the petitioner on paid administrative leave was arbitrary, capricious or unreasonable. It should also be noted that the case law addressing situations where a board of education has put a superintendent on paid administrative leave has been significantly impacted by the promulgation of the regulations that demand financial accountability for all boards of education. See, e.g. *Gerald W. Kohn v. Board of Education of the City of Vineland, Cumberland County*, Commissioner Decision

² On May 7, 2012 the Board voted to put the petitioner on paid administrative leave for an unknown amount of time. As the Board notes in its submission, on September 22, 2012, the Board voted to put the petitioner on paid administrative leave for the duration of her employment contract. Petitioner has also challenged the September 22, 2012 vote in the matter of *Janine Walker Caffrey v. Board of Education of the City of Perth Amboy, Middlesex County*, Agency Dkt. No.296-9/12.

No. 303-01, decided September 14, 2001; *Harrington v. Board of Education of the Township of Clinton*, 95 N.J.A.R. 2d (EDU) 535.

Accordingly the Initial Decision is rejected; and this matter is remanded to the OAL for a determination regarding whether the Board's decision to place the petitioner on paid administrative leave is arbitrary, capricious or unreasonable.³

IT IS SO ORDERED.⁴



ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 10/25/12

Date of Mailing: 10/26/12

³ The Commissioner's ultimate final decision in this matter will address the procedural use of the Doctrine of Necessity, as well as whether the Board's decision to place the petitioner on paid administrative leave is arbitrary, capricious or unreasonable.

⁴ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 07205-12

AGENCY DKT. NO. 122-5/12

JANINE WALKER CAFFREY,

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY
OF PERTH AMBOY, MIDDLESEX COUNTY,**

Respondent.

Andrew Babiak, Esq., for petitioner

David B. Rubin, Esq., for respondent

Record Closed: July 26, 2012

Decided: September 11, 2012

BEFORE **ELLEN S. BASS, ALJ:**

STATEMENT OF THE CASE

Petitioner, Janine Walker Caffrey (Caffrey), is the superintendent of schools for the Perth Amboy School District. She challenges the action of the Perth Amboy Board of Education (the Board), taken on May 7, 2012, to place her on an administrative leave of absence, contending that the Board improperly invoked the Doctrine of Necessity

and failed to comply with the procedural requirements of the Open Public Meetings Act (OPMA). N.J.S.A. 10:4-6 et seq. She furthermore asserts that the Board improperly interfered with her authority relative to the appointment of a district transportation director. The Board replies that the Commissioner of Education (the Commissioner) is without jurisdiction to entertain Caffrey's claims or that, in the alternative, its actions were in all respects legal and proper.

PROCEDURAL HISTORY

Caffrey filed a two-count petition of appeal and application for emergent relief before the Commissioner on May 2, 2012, challenging Board action, taken on April 25, 2012, to place her on administrative leave with pay. On May 8, 2012, the Commissioner granted the application for emergent relief, and reinstated Caffrey as superintendent of schools. In the interim, on May 7, 2012, the Board had again met and placed Caffrey on a leave of absence. In light of its having taken action that it felt corrected any prior procedural irregularities, the Board filed a motion for reconsideration with the Commissioner on May 9, 2012.

On May 14, 2012, Caffrey filed an amended petition of appeal adding three more counts, including two counts that challenged the action of the Board taken on May 7, 2012. Upon review of the amended petition, the Commissioner denied the Board's motion for reconsideration, and transmitted the matter to the Office of Administrative Law on May 18, 2012.

The Board filed a motion for summary decision on June 26, 2012, and Caffrey filed a brief in opposition on July 23, 2012. The Board responded to her opposition via letter dated July 25, 2012, at which time the record closed.¹

¹ The parties agree that the decision on the emergent application disposed of all claims raised in the second count of the petition. They further agree that the action taken by the Board on May 7, 2012, renders the claims of the first count moot. Moreover, the first count avers that a personnel committee comprised of four board members constituted an effective quorum of the Board. But the Commissioner's decision makes it plain that only a majority of the full membership of the Board, or five members, could take the personnel actions at issue here, thus disposing of Caffrey's claim that the four-member committee meeting should have been advertised under the OPMA. Accordingly, the pending motion seeks dismissal of counts three, four, and five of the petition.

FINDINGS OF FACT

The salient facts are uncontroverted, and I **FIND**:

Caffrey was appointed by the Board to serve as its superintendent of schools via a three-year contract, commencing on July 1, 2011, and ending June 30, 2014. The Board is comprised of nine elected members. All agree that four of the sitting members of the Board may not participate in any action related to Caffrey's employment due to conflicts of interest. On or about April 19, 2012, Caffrey filed a complaint with the School Ethics Commission in which she alleged that the president of the Board, Samuel Lebreault, had violated the Board Member Code of Ethics.² Thus, Lebreault likewise may not vote on any matter related to Caffrey's employment. This leaves the Board unable to act on any issue pertaining to the employment of its chief executive officer, its superintendent of schools.

Caffrey and her Board are clearly at odds. Indeed, the decision of the Commissioner on the emergent application recognizes "the present discord between the parties," and offers the services of "a neutral mediator to help facilitate an amicable resolution in this matter." The particulars of the parties' conflict are irrelevant for purposes of the pending motion for summary decision, except to note that their relationship had become increasingly contentious. Feeling that a "cooling off period" during which to contemplate the direction of the parties' employment relationship would be useful, the Board acted on April 25, 2012, to place Caffrey on a paid leave of absence. The Board deemed its resolution to have carried with four affirmative votes, and one abstention.³

² Although all agree that the complaint was filed at that time, it should be noted for the record that the amended petition mistakenly attaches a complaint against a different Board member. The complaint against Lebreault was later amended, on or about May 22, 2012; a copy of the amended complaint accompanies the Board's brief in support of its motion for summary decision.

³ On the evening of April 25, 2102, Lebreault was as yet unaware that ethics charges had been lodged against him by Caffrey and thus was likewise unaware of any conflict of interest that would preclude his participation. Accordingly, he voted that evening.

Caffrey responded with her emergent application, asserting that a resolution suspending her could carry only upon the affirmative vote of a majority of the full membership of the Board. She further asserted that Lebreault should have recused himself, and that for this additional reason, the action of the Board placing her on a leave of absence was ultra vires. The Commissioner agreed with Caffrey that the school laws mandated that five members of the Board vote in favor of the controverted resolution.

By the time the Board met on May 7, 2012, it was clear that a majority of its members could not vote on the issue of Caffrey's employment status. Accordingly, the Board passed a resolution invoking the Doctrine of Necessity. The resolution stated "that the five board members, as noted above, are prohibited from evaluating, taking action or otherwise discussing the performance of the Superintendent, and the Board therefore invokes the Doctrine of Necessity in order to evaluate and take personnel action regarding the Superintendent Dr. Janine Caffrey." (Caffrey affidavit Exhibit A.) The resolution cited the School Ethics Commission's Public Advisory Opinion A03-98 (April 1, 1998) and confirmed that per that decision, it was publicly specifying the nature of each individual member's conflict of interest. Upon invoking the Doctrine, a resolution again suspending Caffrey with pay passed with six affirmative votes. Caffrey contends that the Doctrine of Necessity was improperly invoked by the Board because there was no public hue and cry calling for her suspension. Moreover, she points out that the resolution stated that it would be posted publicly for thirty days "preceding" its passage. The Board did not post it; hence Caffrey urges its action was procedurally flawed.

Notice of the May 7, 2012, meeting was forwarded to two newspapers via email by Business Office Representative Evelyn Hernandez on May 4, 2012. Hernandez typically utilizes email to forward notices for publication. The newspapers, *The Home News Tribune* and *The Perth Amboy Guardian*, were designated at the Board's reorganization meeting of May 9, 2011, as the publications to be utilized for public notices. *The Home News Tribune* published the notice on May 6, 2012. The notice stated that the Board would be meeting "to discuss personnel matters, matters

protected by attorney-client privilege and other Board business. There may be formal Board action at this meeting.” (Exhibit H to amended petition.) The notice did not use the word “agenda” in describing the intended focus of the meeting. Caffrey asserts that the Board violated the requirements of the OPMA by not timely publishing the notice, or properly publishing a formal agenda for the May 7, 2012, meeting. She urges that these alleged procedural errors invalidate the Board’s action that evening.

Among the events cited by Caffrey in her ethics complaint against Lebreault were the following:

. . . Mr. Lebreault directed the acting superintendent (Vivian Rodriguez) and the human resources manager (Bernice Marshall) to repost the position of transportation manager. The posting had been previously closed, and the first round of interviews were held just prior to the April 25, 2012, special Board meeting when the superintendent was placed on a leave of absence. Ms. Marshall and others who were present for the first round of interviews, including ten candidates, identified four highly qualified candidates and were ready to move forward with a second round of interviews. Despite that fact, Mr. Lebreault directed the reposting of the position and further directed Ms. Marshall to contact three named individuals, to inform them that the position was about to be posted

[(Attachment to Rubin Brief.)]

The ethics complaint alleged that Lebreault’s action violated N.J.S.A. 18A:12-24.1(b), (d), and (e). She supports this contention with three documents, a May 7, 2012, memorandum from Marshall to Business Administrator Derek Jess; a May 2, 2012, memorandum to all principals regarding job postings; and a May 7, 2012, memorandum from Marshall to Richard Grobelny, expressing concerns about the interview process for the transportation coordinator position.

I **FIND** that Count Three of the petition makes identical allegations; again raising claims of impropriety relative to the hiring of a transportation coordinator, and stating in paragraph seven:

The process of selecting finalists for the transportation director position and recommending them to the Board had neared completion. However, on or about May 4, 2012, the Board directed the District's human resources manager to halt the process and re-start it so that three specific candidates who had not originally applied for the position could be considered.

The amended petition attaches and relies upon the same three memoranda that accompanied the ethics complaint, and asserts that the Board's actions impeded Caffrey's ability to fulfill "her statutory responsibilities to manage fiscal operations and ensure the efficient expenditure of funds," and that she was "thwarted by the Board in selecting a qualified candidate for the transportation director position." Lebreault's name is not mentioned in the petition; nonetheless, plainly, the events alleged in the ethics complaint are again at issue. Indeed, the documents that accompany both this petition and the ethics complaint concern the hiring process, and refer to Lebreault by name.

CONCLUSIONS OF LAW

In accordance with N.J.A.C. 1:1-12.5, summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The regulation mirrors R. 4:46-2(c), which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party

offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, *supra*, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, *supra*, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts which require a plenary hearing, and the Board is entitled to judgment as a matter of law. Relative to the allegations in Counts Four and Five of the petition, I reject the Board's jurisdictional arguments, but further **CONCLUDE** that the actions of the Board were in all respects compliant with the requirements of the OPMA, N.J.S.A. 10:4-1 et seq., and that the Board properly invoked the Doctrine of Necessity. Relative to the allegations in Count Three of the amended complaint, I **CONCLUDE** that this count raises claims more properly adjudicated via the pending proceeding before the School Ethics Commission and should be dismissed.

The Commissioner's Jurisdiction to Hear Petitioner's
OPMA and Doctrine of Necessity Claims

The Commissioner's jurisdiction is defined by statute, and is limited to "controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9; Bd. of Educ. of East Brunswick Twp. v. Twp. Council of East Brunswick, 48 N.J. 94, 102 (1966). It has been recognized that, "[t]he sweep of the Department's interest and the Commissioner's jurisdiction does not extend to all matters involving boards of education." Archway Programs v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 424 (App. Div. 2002). Claims against local school boards that "do not arise under the

school laws but rather from statutory or common law [are] typically and appropriately adjudicated in the courts.” Archway, supra, 352 N.J. Super. at 425.

But it is well-established that the Commissioner has additional incidental jurisdiction to determine claims arising under the OPMA as they relate to school law controversies. Sukin v. Northfield Bd. of Educ., 171 N.J. Super. 184, 187 (App. Div. 1979). Pursuant to N.J.S.A. 10:4-15, any action by a public body that does not conform to the requirements of the OPMA is reviewable in the Superior Court via an action in lieu of prerogative writs. That section was not intended to confer exclusive jurisdiction in the Superior Court, however. Where an administrative agency has primary jurisdiction to determine the underlying controversy between the parties, our courts have recognized that the Superior Court should not undertake to decide the issues presented under the OPMA, but should refer those issues to the appropriate administrative agency. Sukin, supra, 171 N.J. Super. at 187 (citing Asbury Park Bd. of Educ. v. Asbury Park Ed. Ass’n, 155 N.J. Super. 76, 78 (App. Div. 1977)). I **CONCLUDE** that this incidental jurisdiction is sufficiently broad as to encompass the claims here.

Caffrey asserts that the Board acted outside the requirements of the school laws and the OPMA when it placed her on a paid leave of absence. When filed, her petition fell squarely within the Commissioner’s jurisdiction. The second count averred that any action taken by the Board to place her on a leave required a roll-call majority vote of the full membership of the Board; a claim conceptually grounded in the school laws.⁴ The first count alleged that the committee process that preceded Board action violated the OPMA; but under Sukin, these claims were properly before the Commissioner for consideration as ancillary to and arising from the same facts as Caffrey’s school law claims. The remaining counts of the petition were then added via amendment.⁵

⁴ A variety of school law provisions require that local board action be taken by a roll-call majority vote of the full membership of the board. Personnel action is frequently the subject of such a requirement. See e.g.: N.J.S.A. 18A:25-1, 27-1, 25-6; 17-5, 17-13, and 17-15.

⁵ Department of Education rules allowed Caffrey to freely amend her pleading prior to its transmittal to the OAL. N.J.A.C. 6A:3-1.7.

Caffrey successfully enjoined Board action suspending her; the Commissioner agreed that there had been an insufficient number of affirmative votes to carry the suspension motion. The Board now asks to dismiss the OPMA and Doctrine of Necessity claims, in essence arguing that Caffrey's victory knocked the jurisdictional underpinnings out from under her petition. But Caffrey correctly invoked the Commissioner's jurisdiction; to now dismiss the claims that survive after she prevailed would be an absurd result, particularly since Caffrey would be well out of time to reassert her OPMA claims in a judicial forum.⁶ The fact that counts were added to the petition after the Commissioner's May 8, 2012, ruling does not alter this conclusion. The claims of the petition are all interrelated and indeed, importantly, pre- and post-amendment to the petition, the fundamental issue presented by this controversy remains the same; that is, was Board action placing Caffrey on a leave of absence procedurally proper?

The allegations that the Board misapplied the Doctrine of Necessity are likewise properly before the Commissioner as incidental to Caffrey's school law claims. Moreover, the Department of Education has confirmed its independent interest in ensuring that the Doctrine is properly relied upon by local boards. Indeed, citing the School Ethics Act, N.J.S.A. 18A:12-21, the School Ethics Commission passed a February 23, 2003, resolution describing with particularity the procedures through which the Doctrine should be invoked. <<http://www.state.nj.us/education/ethics/don/>>; see also Advisory Opinion, A03-98 (April 1, 1998).

Finally, our courts have recognized that adjudication of a controversy best occurs in one litigation and in only one court—a concept embodied in the entire controversy doctrine. Cogdell v. Hosp. Ctr., 116 N.J. 7, 15 (1989). Having this matter remain with the Commissioner for adjudication avoids piecemeal decision making, waste and delay, and is efficient. DiTrollo v. Antiles, 142 N.J. 253, 267 (1995). “It is well-established that court fashioned doctrines for handling litigation have utility and relevance in administrative proceedings.” Ostergren v. Bd. of Tr. of the TPAF, 96 N.J.A.R.2d (TYP) 249 (citing E.I. du Pont de Nemours v. State, 283 N.J. Super. 331, 351(App. Div.

⁶ See N.J.S.A. 10:4-14(a), which requires that challenges under the OPMA be filed within forty-five days.

1995)). For this additional reason, this matter properly remains in the administrative forum.

In sum, I **CONCLUDE** that Caffrey has properly invoked the Commissioner's jurisdiction relative to her OPMA and Doctrine of Necessity claims.

The Doctrine of Necessity

Caffrey asserts that a Board may not invoke the Doctrine absent a "pressing public need for action." She thus contends that absent a demonstrated "public insistence" that she be placed on suspension, the Board could not act to invoke the Doctrine. But Caffrey misapprehends the scope and purpose of the Doctrine of Necessity, and her argument is without merit. I **CONCLUDE** that the Board properly invoked the Doctrine at its May 7, 2012, meeting.

Public bodies, boards of education included, must promptly and effectively serve their constituents. In discharging their responsibilities, individual board members must act exclusively on the public's behalf, unencumbered by other interests that might cloud their judgment, or create an appearance of conflict. If a pending issue presents such a conflict, an individual board member thus must recuse himself; but on those rare occasions where a majority of the members share the conflict, the public body becomes paralyzed. The Doctrine of Necessity thus provides a vehicle through which to permit the public body to do that which is necessary to fulfill its statutory obligations.

Both parties cite the decision in Allen v. Toms River Regional Board of Education, 233 N.J. Super. 642 (Law Div. 1989), which comprehensively reviews the existing law on the scope of the Doctrine. Noting that it is seldom used, the court explained that the doctrine "[allows] an official to participate in public business notwithstanding an otherwise disqualifying conflict." Id. at 644. It is a doctrine that is "narrowly circumscribed" but that "still has vitality in a limited group of cases." The court defined the scope of the Doctrine as follows:

It will be invoked in those circumstances in which there is a pressing public need for action (that is, the matter cannot be laid aside until another date), there is no alternative forum which can grant the same relief and the body is unable to act without the members in conflict taking part.

[Id. at 651.]

The Doctrine should be used with caution. In upholding its use under the facts before it, the Allen court noted that there was a “public clamor” with respect to the matter at issue, the school budget, creating a pressing need for the public body to act. Ibid.

Here, it is uncontroverted that the Perth Amboy Board was unable to act on Caffrey's suspension unless conflicted members participated, and that there was no alternative forum that could act in the Board's stead. Accordingly, all that remains in contention is whether this Board has satisfied the requirement that there be a “pressing public need for action.” Caffrey has focused somewhat myopically on the “public clamor” language in Allen. I disagree that a factual record documenting public outrage is a prerequisite to finding that the Doctrine was properly invoked. Indeed, under Caffrey's view, the Board would be powerless to act unless a public outcry legitimized its concerns about her continued service as superintendent. But this case is not about the legitimacy of the Board's dissatisfaction with Caffrey; rather, the narrow issue presented is whether, in light of the Board's dissatisfaction, the Doctrine of Necessity permitted it to act.⁷ I **CONCLUDE** that it did. The Board/superintendent relationship is a clear matter of pressing public interest; the quality of that relationship will impact the delivery of public education services to the children of Perth Amboy. Moreover, education is not a public service that can wait; youth is fleeting, and every second children spend in school must maximize their growth and potential.

The public has entrusted the decision to hire, fire or suspend the superintendent to its elected Board of Education. As the Board correctly argues, the Board cannot base its decision whether to retain its superintendent on which camp better packs the

⁷ The Commissioner has recognized that a board may act to suspend a sitting superintendent with pay. Harrington v. Clinton Bd. of Educ., 95 N.J.A.R.2d (EDU) 535.

boardroom the night that her performance is to be discussed; nor would an empty boardroom invalidate the Board's concerns about its relationship with Caffrey. Once the Board acts, if the public is dissatisfied, it has a remedy each Election Day. Accordingly, Caffrey's argument that the public must vocally press for her suspension before the Doctrine can be invoked is unavailing.

I thus **CONCLUDE** that the question of whether Caffrey should remain actively in service was a vital public issue, and that I can readily so determine based on the record before me. Absent invocation of the Doctrine this Board would have been powerless to act on her employment status unless and until a new election changed the composition of its membership.⁸ I **CONCLUDE** that this is precisely the sort of stalemate that the Doctrine was intended to prevent.

Finally, Caffrey urges unsuccessfully that the Board improperly invoked the Doctrine of Necessity because it did not post its resolution for thirty days prior to its passage, per the resolution language. I deem persuasive the Board's contention that this was a typographical error. The March 5, 2003, memorandum from the then Executive Director of the School Ethics Commission, enclosing the February 23, 2003, resolution states that "boards that must invoke the Doctrine of Necessity [must] adopt a resolution at a public meeting stating the nature of the conflicts of interest, post the resolution for 30 days and provide the Commission with a copy." <http://www.state.nj.us/education/ethics/don/>. Plainly, the Board sought to comply with the requirement that the posting take place subsequent to the passage of the resolution, and it merely misspoke.

I **CONCLUDE** that the claims contained in count four of the amended petition are without merit and should be dismissed.

⁸ The Board aptly urges that simply by continuing to file ethics complaints against sitting Board members, Caffrey could stymie the Board from acting on her employment status indefinitely.

The Alleged Violations of the OPMA

Caffrey asserts that the Board failed to give “adequate notice” of the May 7, 2012, meeting, as that term is defined by law. The Board’s obligations were governed by N.J.S.A. 10:4-8 (d), which defines “adequate notice” as follows:

“Adequate notice” means written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken and which shall be (1) prominently posted in at least one public place reserved for such or similar announcements, (2) mailed, telephoned, telegraphed, or hand delivered to at least two newspapers which newspapers shall be designated by the public body to receive such notices because they have the greatest likelihood of informing the public within the area of jurisdiction of the public body of such meetings, one of which shall be the official newspaper, where any such has been designated by the public body or if the public body has failed to so designate, where any has been designated by the governing body of the political subdivision whose geographic boundaries are coextensive with that of the public body and (3) filed with the clerk of the municipality when the public body’s geographic boundaries are coextensive with that of a single municipality, with the clerk of the county when the public body’s geographic boundaries are coextensive with that of a single county, and with the Secretary of State if the public body has Statewide jurisdiction

I **CONCLUDE** that the Board properly noticed and advertised its meeting of May 7, 2012. The petition avers that notice of the May 7, 2012, meeting was not delivered to at least two newspapers; the Hernandez certification readily disposes of this argument. Caffrey urges that the Board did not designate two newspapers for publication purposes; counsel’s letter enclosing a board resolution so designating *The Home News Tribune* and *The Perth Amboy Guardian*, makes it plain that this is not the case. The petition alleges that only one newspaper actually published the notice. But the Board correctly replies that the OPMA only requires that the notice be timely transmitted to the newspapers; actual publication is not required by the statute. Bernard Twp. v. Dep’t of Comty. Affairs, 233 N.J. Super. 1, 26 (App. Div. 1989); see also Worts v. Upper Twp., 176 N.J. Super. 78, 81 (Ch. Div. 1980). Caffrey suggests that electronic transmission of notices to designated newspapers via email is of questionable validity; but the OPMA

has entered the internet age. N.J.S.A. 10:4-9.1. I **CONCLUDE** that an email transmission to a designated newspaper complies with the letter, intent and spirit of the OPMA.⁹

In addition, Caffrey challenges the content of the notice, urging that that it “does not indicate what the agenda will be nor does it indicate that action could be taken relative to [Caffrey’s] employment.” The Board did not have to specifically use the word “agenda,” as Caffrey appears to contend. I **CONCLUDE** that the notice’s statement that the Board was meeting “to discuss personnel matters, matters protected by attorney-client privilege and other Board business” and the statement that “[t]here may be formal Board action at this meeting,” gave the public adequate notice under the requirements of law. Moreover, our courts have recognized that when the anticipated topic for a special meeting is a personnel matter the privacy rights of an employee may be implicated, and a general reference to personnel matters in a special meeting notice will suffice as “adequate notice” within the intent of N.J.S.A. 10:4-8(d). La Fronz v. Weehawkin Bd. of Educ., 164 N.J. Super. 5, 6 (App. Div. 1978), certif. denied, 79 N.J. 491 (1979); see also McGovern v. Rutgers, 418 N.J. Super. 458, 47-71 (App. Div. 2011), rev’d on other grounds, 2012 N.J. Lexis 779 (2012), where the court distinguished La Fronz precisely because a confidential personnel matter was not at issue.

I **CONCLUDE** that the claims contained in Count Five of the amended petition are without merit and should be dismissed.

Count Three of the Petition

The Board argues that Count Three of the petition should be dismissed because identical claims are simultaneously pending in petitioner’s ethics complaint against

⁹ N.J.S.A. 10:4-9.2 makes it plain that electronic notice cannot substitute for the “adequate notice” required by the OPMA, but this Board did not substitute an internet notice for notice in its designated newspapers, it merely sent the information needed for publication to the newspapers electronically. There is no contention that the email was not received by the publications in question.

Board President Lebreault. I agree that these claims are one and the same and more properly brought before the School Ethics Commission.

Indeed, the petition pending before me asserts that the Board interfered with Caffrey's ability to select a qualified transportation director, averring that "[i]n fulfilling her statutory responsibilities to manage fiscal operations and ensure the efficient expenditure of funds, [she] was thwarted by the Board in selecting a qualified candidate for the transportation director position." Caffrey further asserts that "the Board directed the District's human resources manager to halt the process and re-start it so that three specific candidates who had not originally applied for the position could be considered."

But Lebreault is plainly the object of her concern, as Caffrey's ethics complaint asserts that he violated N.J.S.A. 18A:12-24.1 and N.J.S.A. 18A:12-24 by "directing the acting superintendent (Vivian Rodriguez) and the human resources manager (Bernice Marshall) to repost the position of transportation manager . . . and further directed Ms. Marshall to contact three named individuals, to inform them that the position was about to be posted." The events at issue are transparently identical in both the petition and the ethics complaint; the accompanying documents all refer to Lebreault, and not the Board as a whole. The May 7, 2012, memorandum, (G-1) states "[o]ne can only assume that the reason this position has been reposted is because Board members, specifically the Board president, have a desire to influence the hiring process." The May 10, 2012, memorandum (G-3) states "Lebreault then provided the [sic] Marshall with three names of these candidates and directed her to alert them of the new posting." Accordingly, it is clear that this petition raises claims that are redundant with those before the Ethics Commission.

The Commissioner has recognized the School Ethics Commission's exclusive jurisdiction over conduct proscribed by the School Ethics Act. Castriotta v Bd. of Educ. of the Twp. of Roxbury, EDU 09217-10, Initial Decision (April 4, 2011), modified, Comm'r (May 18, 2011), <<http://lawlibrary.rutgers.edu/oal/search.html>>. Even though Count Three of the amended petition does not mention the Act, the determining factor is whether the alleged conduct, if proven, would violate the Act. Ibid. By filing her

ethics complaint, Caffrey has conceded that she is alleging an Ethics Act violation in the instant petition. Her citations to N.J.S.A. 18A:12-24.1 and N.J.S.A. 18A:12-24 are on directly on point; indeed, the Board member Code of Ethics proscribes interference with administration, and local school board members are obliged not to administer the schools but rather, "to see that they are well run." N.J.S.A. 18A:12-24.1(d).

Even assuming, for argument's sake, that the Commissioner has concurrent jurisdiction over the claims raised in Count Three, these claims are better heard before the School Ethics Commission. Our courts have recognized that "comity and deference to cognate tribunals are designed to assure that a controversy, or its most critical facets, will be resolved by the forum or body which, on a comparative scale, is in the best position by virtue of its statutory status, administrative competence and regulatory expertise to adjudicate the matter." Boss v. Rockland Elec. Co., 95 N.J. 33, 40(1983) (citing Hinfey v. Matawan Reg'l Bd. of Educ., 77 N.J. 514, 531-32 (1978)). I agree with the Board that the School Ethics Commission is "in the best position" to adjudicate the claims in Count Three of this petition, that simultaneous litigation of the same facts would risk inconsistent determinations, and is inappropriate. Boss, supra, 95 N.J. at 40.

I **CONCLUDE** that the allegations in Count Three should be dismissed.

ORDER

Based on the foregoing, I **ORDER** that the petition be **DISMISSED** as follows:

The claims raised by Counts Four and Five of the petition of appeal are **DISMISSED**; and I **FURTHER ORDER** that the Board may place Caffrey on a paid administrative leave per its May 7, 2012, resolution. The claims contained in Count Three of the petition are **DISMISSED** as more properly adjudicated before the School Ethics Commission. The claims in Count One and Count Two of the petition were fully addressed by the Commissioner's May 8, 2012, interim decision and/or rendered **MOOT** by the action of the Board taken on May 7, 2012.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

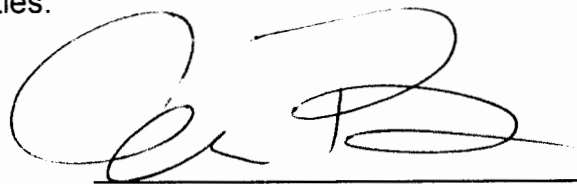
September 11, 2012

DATE

Date Received at Agency:

Date Mailed to Parties:

SEP 12 2012



ELLEN S. BASS, ALJ

September 11, 2012
Laura Sanders

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ANITRA MARTIN, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF JERSEY CITY, : DECISION
HUDSON COUNTY, :
RESPONDENT. :
_____ :

SYNOPSIS

Petitioner – an early childhood education teacher employed in respondent’s school district since 1990 – appealed the determination of the respondent Board to withhold her 2011-2012 salary increment, alleging that the Board’s actions were arbitrary, capricious and unreasonable. The Board contended that the increment withholding was justified based upon deficiencies in petitioner’s teaching performance as documented in all of her evaluations throughout the previous school year.

The ALJ found, *inter alia*, that: petitioner was observed and evaluated twice during the 2010-2011 school year, by two different evaluators; petitioner was given prior notice of the standards and expectations by which she would be evaluated; both evaluations concluded that petitioner’s performance needed improvement in numerous areas; and although petitioner received notice in November 2010 of the need to improve in numerous areas, her May 2011 evaluation did not demonstrate improvement in those areas. The ALJ concluded that the petitioner failed to prove, by a preponderance of the evidence, that the Board’s decision to withhold her increment was arbitrary, capricious or unreasonable. Accordingly, the ALJ dismissed the petition.

Upon independent review and consideration, the Commissioner concurred with the ALJ that the petitioner failed to sustain her burden of establishing that the Board’s action was arbitrary, capricious, unreasonable, or an abuse of its discretion. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
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October 25, 2012

OAL DKT. NO. EDU 12388-11
AGENCY DKT. NO. 280-9/11

ANITRA MARTIN,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF JERSEY CITY,	:	DECISION
HUDSON COUNTY,	:	
	:	
RESPONDENT.	:	

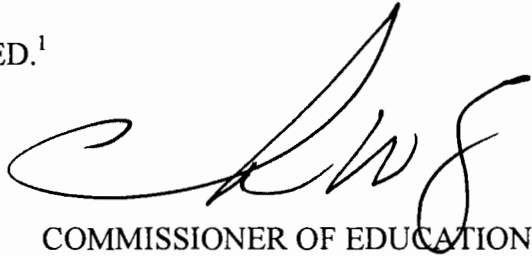
The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon careful consideration, the Commissioner determines to adopt the ALJs recommended decision as he finds that the Board's action in withholding the petitioner's 2011-2012 increment was a valid exercise of its discretionary authority. In so determining, the Commissioner is mindful that it is well-established that the scope of the Commissioner's review in increment withholding matters is not to substitute his judgment for that of those who made the evaluation, but to determine whether they had a reasonable basis for their conclusions. (*Kopera v. West Orange Bd. of Ed.*, 60 N.J. Super. 288 (App. Div. 1960). As such, there are *only two* determinations to be made when reviewing the Board's decision to withhold the increment of a teaching staff member, *i.e.*, 1) whether the underlying facts were as those who made the evaluation claimed, and 2) whether it was unreasonable for them to conclude as they did based on those facts. Moreover, it is likewise well-established that the burden of proving unreasonableness lies with the petitioner. (*Kopera* at 296-297)

With this applicable legal standard in mind, the Commissioner's review persuades him that the record here amply establishes that the Board's action in withholding petitioner's increment was based on validly perceived deficiencies in her performance during the 2010-2011 school year. Consequently, the Commissioner agrees with the ALJ that petitioner has failed to sustain her burden of establishing—by a preponderance of the credible evidence—that the Board's action was arbitrary, capricious, unreasonable, or an abuse of its discretion.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.¹



COMMISSIONER OF EDUCATION

Date of Decision: 10/25/12

Date of Mailing: 10/26/12

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12388-11

AGENCY DKT. NO. 280-9/11

ANITRA MARTIN,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF

JERSEY CITY, HUDSON COUNTY,

Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich & Fenintuch, attorneys)

Lester E. Taylor, Esq., for respondent (Florio, Perrucci, Stenhardy & Fader,
attorneys)

Record Closed: March 21, 2012

Decided: September 7, 2012

BEFORE **EVELYN J. MAROSE, ALJ:**

STATEMENT OF THE CASE

Petitioner, Anitra Martin (Martin), asserts that the Board of Education (BOE) of the City of Jersey City, Hudson County, was arbitrary, capricious and unreasonable when it withheld her salary increment for the 2011-12 School Year. The BOE asserts that petitioner's increment was withheld for good cause pursuant to N.J.S.A. 18A:29-4.

The New Jersey State Department of Education transmitted this matter to the Office of Administrative Law, where it was filed on October 14, 2011. A hearing was held on March 21, 2012, at which time the record closed. Due to a voluminous caseload, a request to extend the time for the issuance of this Initial Decision until September 17, 2012, was made.

FACTUAL DISCUSSION AND FINDINGS

The parties jointly submitted four documents, marked J-2 through J-5, and stipulated to the following facts, pursuant to N.J.A.C. 1:1-15.11:

1. The Jersey City Public School District (District) is a duly constituted corporate body, organized pursuant to N.J.S.A. 18A:10-1, which operates a kindergarten through twelfth grade District, for the residents of the City of Jersey City.
2. Martin is a ten-month, tenured pre-kindergarten teacher, at P.S. #22 of the District.
3. Martin was hired by the District as an elementary teacher, effective September 1, 1990.
4. On or about November 22, 2010, Martin received a Formative Observation report dated November 18, 2010, wherein the evaluator, Ismael E. Aponte, Principal P.S. #22 (Principal Aponte), gave Martin an overall rating of Needs Improvement (NI) in Planning and Preparation, Students and Learning, and Instruction. There were also aspects of the Classroom Evaluation for which Principal Aponte gave Martin a NI rating. (J-2.)
5. On or about June 6, 2011, Martin received a Formative Observation report dated May 11, 2011, wherein the evaluator, Thomas Macagnano (Assistant Principal Macagnano), gave Martin an overall rating of NI in Instruction and the Classroom Environment. There were also aspects of Planning and

Preparation and Students and Learning, where Assistant Principal Macagnano gave Martin a NI rating. (J-3.)

6. On or about June 7, 2011, Martin received a Summative Evaluation and Professional Development Plan dated June 7, 2011, wherein the evaluator, Principal Aponte gave Martin an overall rating of NI in Planning and Preparation, Students and Learning and Instruction. (J-4.)
7. In the June 7, 2011, Professional Development Plan, Principal Aponte recommended the withholding of Martin's increment. (J-4.)
8. By letter dated August 24, 2011, Martin received notification from the District that her increment was being withheld for the 2011-12 school year, based upon performance. (J-5.)
9. Martin's current salary for the 2011-12 School Year is \$95,760.00. (J-5.)

Petitioner testified on her own behalf. Principal Aponte and Assistant Principal Macagnano testified for the District.

DISTRICT'S EVIDENCE

Principal Aponte

Principal Aponte has worked for the District for thirty-three years and has been a principal for thirteen years. Evaluating teachers and non-instructional staff is part of his job responsibilities. Prior to his assignment to an administrative position, Principal Aponte taught third and fifth grade.

Martin was initially assigned to P.S. #22, where Aponte was the principal, in the 2010-11 School Year. She was assigned to teach four-year-old children in pre-kindergarten, using High Scope Curriculum (High Scope). High Scope has been used District wide for many years. The District has offered various training programs, including summer workshops, in High Scope, which Martin has attended.

Principal Aponte had a “get to know you meeting” with Martin, on the first day of the 2010-11 School Year, as was his policy for new teachers to his school. He also interacted with Martin at faculty meetings during the school year. There were monthly general staff meetings, where topics such as school expectations for the classroom environment were reviewed and bi-weekly grade-level meetings where the focus was teaching certain grade levels.

In accordance with District policy, during the 2010-11 School Year, Martin was evaluated twice, after observation, and received an annual written summative evaluation. Prior to observing her, Principal Aponte held a pre-conference with Martin. During that meeting, he provided her with a copy of the form that would be used in the evaluation, so that she would know what the areas of focus would be when she was observed. There were four domains - Planning and Preparation, Students and Learning, Instruction and The Classroom Environment—and a rating scale of Satisfactory (S), Needs Improvement (NI), Unsatisfactory (U) or Not Applicable (N/A). (J-1, J-2.)

As of result of her November 18, 2010, observation, Principal Aponte evaluated Martin as needing improvement in the domains of “Planning and Preparation,” “Students and Learning,” and “Instruction.” He evaluated Martin as satisfactory in domain of “The Classroom Environment.” Each of the four domains was broken down into sub-categories, for which Martin received a rating.

In the “Planning and Preparation” subcategories, Principal Aponte rated Martin in need of improvement in the areas of “Demonstrates Knowledge of Content and Pedagogy,” “Selects Instructional Objectives,” and “Plans Effective Instructional Activities.” She was rated as satisfactory in “Demonstrates Knowledge of Instructional Materials and Resources” and “Designs Coherent and Continuous Instruction.” In all of the “Students and Learning” subcategories—“Demonstrates Knowledge of Students,” “Assesses Student Learning using a Variety of Evaluation Techniques,” “Links Appropriate Assessment to Instructional Objectives,” “Uses Assessment Results for Instructional Planning,” and “Maintains Accurate Records on Student Progress and Performance,” Martin was rated in need of improvement. In one sub-category of

"Instruction," "Demonstrates Flexibility and Responsiveness," Martin was rated as satisfactory. In the four sub-categories of "Instruction" - "Communicates the Lesson Clearly and Accurately," "Employs Effective Questioning and Discussion Techniques," "Engages Students In Learning," and "Provides Feedback to Students," Martin was rated as in need of improvement. In three sub-categories of "The Classroom Environment" — "Creates an Environment of Respect and Rapport with Pupils and Staff," "Monitors Student Behavior," and "Utilizes Designed Space Effectively," Martin was rated satisfactory. In two sub-categories of "The Classroom Environment" — "Establishes a Culture for Learning" and "Implements and Maintains Classroom Procedures," Martin was rated in need of improvement. (J-2.)

The following comments were either noted in Martin's November 18, 2010, Formative Observation Form or testified to by Principal Aponte in connection with her November evaluation:

- 1.) Martin was aware of the areas in which she would be evaluated. She was a tenured teacher with many years of experience, including numerous years teaching pre-kindergarten.
- 2.) During her pre-evaluation conference, Martin expressed no concerns regarding how and in what manner she would be evaluated.
- 3.) Martin's lesson planner was too generic and was not fully congruent to the lesson observed when she was evaluated.
- 4.) Martin's lesson planner indicated the same objective for numerous days. Even if Martin intended to teach the same skill for several days, she should have planned different activities to teach that skill in order to provide the variety needed to keep the student's attention and so indicated in her lesson planner.
- 5.) Martin's dialogue with the children during her observation was not satisfactory. Numerous times, she asked questions and then answered the questions herself. In addition, many of the questions that she directed to her students required only yes or no answers. Thus, the responses that she did generate by her questioning did not provide enough information as to the children's own interests, thoughts, and knowledge. She was not

obtaining feedback essential to determine if the students were capturing the content of her lesson or activity.

- 6.) When working with a non-English speaking student, Martin, who was a seasoned teacher, failed to use any non-verbal strategies to interact with that child. Instead, she simply directed the child to speak to her in English.
- 7.) Martin did not exert any effort to engage the children to expand their learning. She was satisfied to allow students to do the same thing, the same way.
- 8.) Martin did not sufficiently display her student's work throughout their classroom. She displayed one sample of each student's work, which was not enough.
- 9.) Martin failed to provide Principal Aponte with written anecdotes that she was required to make about her students, as part of their "COR" assessments. Principal Aponte specifically requested that Martin provide him with the "COR" assessment forms at the time of her evaluation, when he spoke with her on November 8, 2010, at her pre-evaluation conference. More than a week later, on November 18, 2010, there were still no COR entries for November. (J-2.)

Principal Aponte went out on medical leave in January 2011. Martin received a May Formative Observation by Assistant Principal Macagnano, who functioned as principal when Principal Aponte was on medical leave. Principal Aponte did complete Martin's annual Summative Evaluation, dated June 7, 2011, which he testified reflected both his November Formative Observation and Assistant Principal Macagnano's May Formative Observation.

In her annual Summative Evaluation, Principal Aponte rated Martin as in need of improvement in three categories — "Planning and Preparation," "Students and Learning," and "Instruction." He rated her as satisfactory in two categories — "The Classroom Environment" and "Professional Attitude and Manner." By way of comments, Martin was noted to possess two strengths. She established a natural rapport with the children and utilized classroom materials that were developmentally appropriate for young children. However, again, she was noted to need improvement in

numerous areas, including planning and preparing lessons appropriately, providing meaningful instruction utilizing the district curriculum, and developing meaningful skill-based activities during small group, large group, and outdoor play incorporating subject area disciplines at all times. Sixteen specific suggestions for improvement were identified.

In June 2011, Principal Aponte recommended Martin for re-employment for the 2011-12 School Year, but did not recommend that she receive her increment.

Assistant Principal Macagnano

Assistant Principal Macagnano worked for the District for sixteen years. Initially he taught sixth grade; however, for the past seven years he was an assistant principal. In January 2011, when Principal Aponte was on medical leave, Assistant Principal Macagnano was assigned to P.S. #22 as Building Administrator. Upon Principal Aponte's return and until May 2011, Assistant Principal Macagnano remained at P.S. #22 developing a program and services for anti-bullying. In May 2011, he was also assigned a list of staff to evaluate, including Martin.

Assistant Principal Macagnano initially met Martin during one of his first years at the District. They worked together briefly when both were teaching at P.S. #9. Since he has been an Administrator, he has seen Martin at various meetings and during daily rounds.

Prior to evaluating Martin in May 2011, Assistant Principal Macagnano met with Martin for a pre-evaluation conference. He reviewed the domains that would be evaluated, the performance expectations and requested that she have her lesson plans and "COR" evaluations up to date. The goal of the meeting was to prevent surprises at the time of the observation and evaluation. Assistant Principal Macagnano did not review any prior evaluations of Martin prior to conducting the May evaluation.

After observing Martin on May 11, 2011, Assistant Principal Macagnano completed the same Formative Observation Form used by Principal Aponte. Assistant

Principal Macagnano evaluated Martin as needing improvement in the domains of "Instruction" and "The Classroom Environment." He evaluated Martin as satisfactory in the domains of "Planning and Preparation" and "Students and Learning."

In the "Planning and Preparation" subcategories, Assistant Principal Macagnano rated Martin in need of improvement in the areas of "Demonstrates Knowledge of Content and Pedagogy" and "Selects Instructional Objectives." She was rated as satisfactory in "Plans Effective Instructional Activities," "Demonstrates Knowledge of Instructional Materials and Resources," and "Designs Coherent and Continuous Instruction." In the "Students and Learning" subcategories — "Demonstrates Knowledge of Students," "Assesses Student Learning using a Variety of Evaluation Techniques," and "Maintains Accurate Records on Student Progress and Performance" Martin was rated as satisfactory. In the sub-categories of "Links Appropriate Assessment to Instructional Objectives" and "Uses Assessment Results for Instructional Planning" Martin was rated in need of improvement. In the three sub-categories of "Instruction"—"Employs Effective Questioning and Discussion Techniques," "Provides Feedback to Students," and "Demonstrates Flexibility and Responsiveness," Martin was rated as in need of improvement. In two sub-categories — "Communicates the Lesson Clearly and Accurately" and "Engages Students In Learning," Martin was rated as satisfactory. In two sub-categories of "The Classroom Environment" — "Creates an Environment of Respect and Rapport with Pupils and Staff" and "Utilizes Designed Space Effectively," Martin was rated satisfactory. In three sub-categories of "The Classroom Environment" — "Establishes a Culture for Learning," "Monitors Student Behavior," and "Implements and Maintains Classroom Procedures", Martin was rated in need of improvement. (J-3.)

The following comments were either noted in Martin's May 11, 2011, Formative Observation Form or testified to by Assistant Principal Macagnano in connection with her May evaluation:

- 1.) After Martin had finished a small-group lesson, she moved to the block area where, in the house area, several students were repeating inappropriate

“adult conversations” about having a party where beer would be served and about who was bringing the beer. It was inappropriate for Martin to observe the mimicking behaviors the children had seen at home or on television or in the movies, as she did, without re-directing the dialogue to an appropriate party for children to plan. For example, Martin should have re-directed the children toward planning an appropriate beverage and snack for children to bring to a party.

- 2.) The students were not mindful of classroom procedures during the evaluation period. Martin’s class decorum should have been more developed than observed during the May observation. Students were seen going back and forth from various play areas without continuity of routine. Several students were not involved in an activity, but rather were walking around with blocks on their head.
- 3.) While the play centers were labeled, the materials at the play centers were sparse. In response to cross-examination relating to this comment, Assistant Principal Macagnano stated that play center materials are supplied by the District and, to his knowledge no materials were requested and not received by Martin. (J-3.)

Assistant Principal Macagnano was not involved in the preparation of Martin’s Summative Evaluation, dated June 7, 2011, nor was he involved in the decision to withhold Martin’s increment for the 2011-12 School Year. (J-4.)

MARTIN’S EVIDENCE

Martin

Martin worked as a teacher in the District for twenty-two years. The 2010-11 School Year was the first time that she was assigned to P.S. #22. She was trained and used the High Scope Curriculum for many years.

Martin acknowledged that she did not have the COR assessments she made of her students in the computer by November 18, 2010, but asserts that she had them in by the end of November. Memorializing student anecdotes was not a new procedure, but the COR assessment program was relatively new. Martin was never told by the District Director of the Early Childhood Department or given a written directive by the Early Childhood Department that COR assessments had to be in the computer daily, weekly, or by a particular period of time, such as the end of the month. She states that, at the time of her November evaluation, a teacher could put her COR evaluations in the computer at her leisure.

Martin states that, in accordance with the High Scope Curriculum, she teaches to the interest of the children, which sometimes results in repetitive activities for numerous days, and might appear as a repetitive entry in her plan book. During the November and May observations, Martin believes that all of her students were actively participating in class activities. During the May observation, Martin did not hear the children's discussion regarding "who was bringing the beer." If she did, she would have addressed the dialogue. Martin denied having only one piece of artwork from her children displayed in her classroom.

Martin has no knowledge of what is considered in determining whether a District teacher gets an increment.

Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses, in addition to the stipulated facts, I **FIND** the following pertinent **FACTS**:

Based upon Martin's ratings detailed in her November 2010 and May 2011 Formative Observations and noted in her June 2011 Summative Evaluation, Principal Aponte did not recommend that Martin receive an increment in the 2011-12 School Year. Principal Aponte did recommend that Martin be rehired. The District Board of Education approved her re-hire and did not provide her with a salary increment. Prior to both of her Formative Observations, Martin was provided with the form that would be used by the administrators in observing and evaluating her and took part in a pre-

observation/evaluation, in-person conference with the evaluator so that the expectations that would be addressed in the evaluation would be “no surprise.” One observation was conducted in the fall of 2010 and one observation was conducted in the late spring of 2011. As detailed below, though both observations are not identical, they are similar in that both indicate numerous observable areas where Martin needs to show improvement. Martin produced no evidence of any bias or wrongful motive by the two administrators who independently evaluated her, after two separate classroom observations. Accordingly, I **FIND** that Martin was given notice of the standards and expectations by which she would be evaluated in the 2010-11 School Year.

Prior to her first evaluation in November 2010, Principal Aponte told Martin that he wanted her COR assessments to be in the computer by the day of her November 18, 2011 observation. Martin admitted that she did not have any COR assessments in the computer by November 18, 2010. Accordingly, I **FIND** that Martin failed to comply with Principal Aponte’s request.

Martin stated that her teaching is driven by the interests of her children and that duplication and repetition are permissible when teaching in accordance with High Scope. Principal Aponte found that Martin’s lesson planner contained numerous repetitive entries of the same objective for various days. Accordingly, I **FIND** that Martin’s lesson planner did not indicate that she planned various ways to teach the children the same activities or different activities.

The District observed Martin in November 2010 and May 2011 and provided her with written evaluations detailing her need to improve her performance in numerous areas. (J-2, J-3.) In the domain of “Planning and Preparation,” both evaluations were consistent in detailing her need to improve in “Demonstrates Knowledge of Content and Pedagogy” and “Selects Instructional Objectives.” In the domain of “Students and Learning,” both evaluations were consistent in detailing her need to improve in “Links Appropriate Assessment to Instructional Assessment” and “Uses Assessment Results for Instructional Planning. In the domain of “Instruction,” both evaluations were consistent in detailing her need to improve in “Employs Effective Questioning and Discussion Techniques,” “Provides Feedback to Students,” and “Demonstrates

Flexibility and Responsiveness.” In the domain of “The Classroom Environment,” both evaluations were consistent in detailing her need to improve in “Establishes a Culture for Learning” and “Maintains Classroom Procedures.” Accordingly, I **FIND** that while Martin received notice in November 2010, of the need to improve in the foregoing areas, her performance in these areas was not observed to be satisfactory by May 2011.

On June 7, 2011, the District provided Martin with a Summative Evaluation and Professional Development Plan, wherein she was rated as in need of improvement in the domains of “Planning and Preparation,” “Students and Learning,” and “Instruction.” Seven areas needing improvement and sixteen suggestions for improvement were also specifically detailed in the June Summative Evaluation. Accordingly, I **FIND** that Martin received notice of numerous areas in which her performance was not satisfactory during the 2010-11 School Year. (J-4.)

LEGAL ANALYSIS AND CONCLUSIONS

A salary increment is a reward for meritorious service, not an entitlement. N. Plainfield Educ. Ass’n v. Bd. of Educ., 96 N.J. 587, 593 (1984). Any board of education may with withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year. N.J.S.A. 18A:29-14. A local school board’s decision to withhold a salary increment is a matter of management prerogative and is entitled to a presumption of correctionness. Fogerty v. State-Operated Sch. Dist. of the City of Jersey City, 97 N.J.A.R.2d (EDU) 439; Kaska v. Bd. of Educ. of the City of Trenton, 95 N.J.A.R.2d (EDU) 55. Nevertheless, a school board cannot withhold a salary increase from tenured employee with according that employee the minimum procedural due process. See Basile v. Bd. of Educ. of the Borough of Elm Park, 1 N.J.A.R. 199 (Dept of Educ. 1980).

Martin argues that the decision to withhold her increment was arbitrary, capricious and unreasonable. She states that she had no knowledge of what is considered in determining whether a District teacher gets her increment. She asserts that none of her ratings for the 2010-11 School Year were unsatisfactory and that the repetitive activities indicated in her planner and observations indicate her

implementation of the High Scope Curriculum. She asserts that her evaluations by Principal Aponte and Assistant Principal Macagnano were inconsistent and thus cannot form a reasonable basis to withhold her increment.

I **CONCLUDE** that Martin failed to prove, by a preponderance of the evidence, that the District's decision to withhold her increment was arbitrary, capricious and unreasonable. By statute, among other things, a board of education can withhold an increment for inefficiency or other good cause. The standard is not a showing of unsatisfactory ratings. Martin was provided with a pre-conference prior to her two observations and evaluations and with a blank copy of the form that would be used to evaluate her performance in the classroom. She was evaluated by two different evaluators, at two different times. No evidence was presented that any evaluator was biased against Martin or motivated in any manner to provide an untruthful evaluation. As argued by Martin, the two evaluations are not identical. In fact, were the two evaluations identical, I might view them with suspicion. However, as note above, the evaluations are consistent in numerous areas. Martin had the opportunity to improve in all areas that were specifically noted as needing improvement in her November 18, 2010, observation. However, the second administrator noted, six months later, on a different day, that he observed the need for improvement in many of the same areas that Martin was made aware of in November. The fact that the May observation did not note a failure to have the COR assessments in the computer or a desire for a more detailed lesson planner does not outweigh Martin's failure to improve in many areas in which this teacher with twenty-two years of experience was on notice of the need to improve.

ORDER

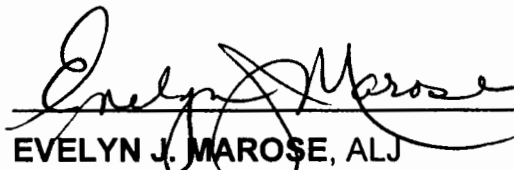
It is **ORDERED** that petitioner's challenge of the withholding of her increment for the 2011-12 School Year is hereby **DENIED**.

I hereby **FILE** my Initial Decision with the **DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **DIRECTOR OF THE DEPARTMENT OF EDUCATION**, which by law is authorized to make a final decision in this matter. If the Director of the Division of Medical Assistance and Health Services does not adopt, modify or reject the decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR OF THE DEPARTMENT OF EDUCATION, Mail Code #3, P.O. Box 712, Trenton, New Jersey 08625-0712**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 7, 2012
DATE


EVELYN J. MAROSE, ALJ

Date Received at Agency:

9/7/12

Date Mailed to Parties:

9/7/12

sej

APPENDIX

WITNESSES

For Petitioner:

Anitra Martin

For Respondent:

Ismael E. Aponte, Principal

Thomas Macagnano, Assistant Principal

EXHIBITS

Joint:

- J-1 Not admitted
- J-2 November 18, 2010, Formative Observation Form
- J-3 May 11, 2011, Formative Observation Form
- J-4 June 7, 2011, Summative Evaluation
- J-5 August 24, 2011, letter to Martin, re: withholding increment for 2011-12 School Year

For Petitioner:

None

For Respondent:

- R-1 November 18, 2010, Formative Observation Form (J-2)
- R-2 June 7, 2011, Summative Evaluation (J-4)
- R-3 August 24, 2011, letter to Martin, re: withholding increment for 2011-12 School Year (J-5)
- R-4 May 11, 2011, Formative Observation Form (J-3)

#416-12

TERESA STALLONE,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
CAMDEN COUNTY TECHNICAL	:	
SCHOOL DISTRICT,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured principal in respondent's district, contended that her compensation was reduced in violation of her tenure rights when her position as principal of adult education at the district's Camden campus was eliminated – along with the entire adult education program – for reasons of economy and efficiency, in July 2011. Petitioner's full-time position was principal of the district's Gloucester campus; she had simultaneously held the part-time position of principal of adult education in Camden, which was an evening school. The Board asserted that petitioner had served in two separate positions in the school district, and that once her position as principal in Camden was eliminated for reasons of economy, the district properly reduced her salary by the amount she would have been paid for her service in that position.

The ALJ found, *inter alia*, that: the record shows that petitioner held two separate positions in the district, each of which were listed separately in the initial approval of the positions; the two positions had separate job descriptions and involved separate schools within the district; the fact that the district's payroll system generated one paycheck for petitioner does not negate the underlying nature of the positions she occupied, and the fact that she received a set amount of salary for each position; the district's action in this matter eliminated an entire school and, as a consequence, petitioner's second job – for which she had been paid \$10,000 on an annual basis; when that position was eliminated, petitioner no longer had a right to that part of her compensation. Accordingly, the ALJ concluded that the district did not reduce petitioner's salary in violation of her tenure rights and dismissed the petition.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision as the final decision in this case. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 25, 2012

OAL DKT. NO. EDU 13690-11
AGENCY DKT. NO. 308-10/11

TERESA STALLONE,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
CAMDEN COUNTY TECHNICAL	:	
SCHOOL DISTRICT,	:	
	:	
RESPONDENT.	:	

The petitioner in this controversy contends that her compensation was reduced in violation of her tenure rights. After review of the record, the Initial Decision of the Office of Administrative Law and the parties' exceptions, the Commissioner is constrained to disagree with petitioner.

As the Administrative Law Judge pointed out in the Initial Decision, petitioner served in two separate positions in respondent's district – each of which had separate job descriptions and separate salaries. The record shows that, as of 2009, one of the positions was principal of adult education at respondent's evening school, with an annual salary of \$10,000. (See, Exhibit I to the Statement of Facts in respondent's motion for summary disposition) The other position was principal of the regular day school on the Gloucester Township campus of respondent's district, at an annual salary of \$121,500. (*Ibid.*) The two separate job descriptions reflected, *inter alia*, the differences in the size and nature of the programs and student bodies associated with the respective divisions of the Camden County Technical School District in

which petitioner served. (*See*, Exhibits K and L to the Statement of Facts in respondent's motion for summary disposition)

In 2011, respondent eliminated the adult education program and the positions of the staff that served same. (*See*, Exhibit N to the Statement of Facts in respondent's motion for summary disposition) On September 9, 2011, respondent's Business Administrator sent a notice to petitioner that respondent would cease paying her the \$10,000 that had been her compensation for administering the eliminated program. (*See*, Exhibits M and O to the Statement of Facts in respondent's motion for summary disposition) It is this action that petitioner challenges.

The Commissioner has already determined, in *Ciamillo v. Board of Education of the Borough of Ridgefield*, Commissioner Decision No. 312-05, decided August 31, 2005, *affirmed*, State Board of Education, January 4, 2006, that the elimination – for economic reasons – of one of two positions held by an employee may properly result in the elimination of the compensation that was designated therefor. However, petitioner posits that the instant case is distinguishable from *Ciamillo* because the petitioner in *Ciamillo* had two jobs requiring separate certifications/endorsements, whereas petitioner Stallone's two jobs were both positions requiring a principal endorsement.

More specifically, petitioner seeks to persuade the Commissioner that her two jobs in respondent's district are really one position. Pointing to *N.J.S.A.* 18A:28-5, which allows an employee to credit towards tenure as a principal any and all service as a principal that an employee has completed within a district over a three plus year period, she argues that her service in the two principal jobs in respondent's district should also be regarded collectively for compensation purposes. Acceptance of her assertion that her two jobs were actually one position then, according to petitioner, implicates the prohibition in *N.J.S.A.* 18A:6-10 against reducing a

tenured employee's salary without a showing of inefficiency, incapacity, unbecoming conduct or other just cause.

Petitioner's arguments are unavailing. The rules for attaining tenure are separate and distinct from the rules which govern reductions in force (RIF). Petitioner's job as administrator of the adult school – which job preceded her position as principal of the regular day school on the Gloucester campus of respondent's district and encompassed a set of responsibilities significantly different from those in petitioner's Gloucester principalship – was eliminated in 2011. The salary for the eliminated position – which salary had been set forth in the minutes of respondent's May 2009 Board meeting – was accordingly discontinued. The elimination of the adult school job did not implicate the Gloucester job in any way. And allowing petitioner's total compensation to remain the same would have reaped the anomalous result of cutting a position for cost saving while still paying for it.

In summary, the discontinuance of the salary that petitioner had been paid for her position administering respondent's adult school was a proper action in the wake of the elimination of the adult school program. The Initial Decision is accordingly adopted as the final decision in this case and the petition is dismissed.

IT IS SO ORDERED.¹



COMMISSIONER OF EDUCATION

Date of Decision: 10/25/12

Date of Mailing: 10/26/12

¹ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION ON MOTION FOR
SUMMARY DECISION**

OAL DKT. NO. EDU 13690-11

AGENCY DKT. NO. 308-10/11

TERESA STALLONE,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
CAMDEN COUNTY TECHNICAL
SCHOOL DISTRICT, CAMDEN COUNTY,**

Respondent.

Robert M. Schwartz, Esq., for petitioner

Patrick F. Carrigg, Esq., for respondent (Lenox, Socey, Formidoni, Giordano,
Cooley, Lang & Casey, attorneys)

Record Closed: August 10, 2012

Decided: September 10, 2012

BEFORE **PATRICIA M. KERINS, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arises from petitioner Teresa Stallone's contention that her compensation was reduced in violation of her tenure rights. Her salary loss resulted

from the elimination of her position as the principal of adult education at the Camden County Technical Institute (Camden), a position she held simultaneously with her position as principal of the Gloucester Township Campus (Gloucester) of respondent Camden County Technical School District (District).

Stallone filed a Petition of Appeal with the Department of Education on October 20, 2011 and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case on November 14, 2011. A telephone prehearing conference was held on January 4, 2012, by Administrative Law Judge (ALJ) Williams and a Prehearing Order issued on January 5, 2012. The matter was reassigned on April 26, 2012, and the parties each filed Motions for Summary Decision.

FACTUAL DISCUSSION

Most of the facts in this matter are not in dispute. Since 1982, petitioner has held various positions with the district. On May 21, 2008, the district appointed petitioner as a director/principal of adult education at Camden¹. On May 20, 2009, petitioner was appointed as principal of Gloucester, effective July 1, 2009. At that same meeting, the district resolved to maintain petitioner in her position as principal of Camden. Thus, as of July 1, 2009, petitioner simultaneously held two separate positions in two different schools within the district. District agenda material list her move from her previous assignment as principal of Camden, with a salary of \$121,500, to her new assignment as principal of Gloucester, with a salary of \$121,500, and as principal of adult education at Camden, with a salary of \$10,000, for the 2009-2010 school year. Each position was listed separately, with its own term and salary specified. Additionally, each position had its own job description and responsibilities. On April 21, 2010, Camden County renewed petitioner's dual employment at a salary of \$145,764 for the 2010-2011 school year.

¹ Petitioner may have had a dual title of principal/director at the Technical Institute, but for ease of reference that position is referred to as "principal." Also, the Camden County Technical School District consistently used that in its resolutions.

On March 16, 2011, respondent approved a resolution, effective July 1, 2011, eliminating Camden, and several of its positions, including petitioner's job as principal, "for reasons of both economy of cost savings and efficiency." At the same meeting, the district authorized a review of petitioner's salary "to determine if a reduction is warranted" as a result of the elimination of her position.

On September 9, 2011, the district notified petitioner that it planned to discuss at its next meeting whether "[t]o reduce your present salary by \$10,000.00 since your position with the TI Program no longer exists. The \$10,000 represents the additional compensation paid to you for serving in the position of Principal for the TI Program." On September 21, 2011, Camden County resolved to reduce petitioner's salary for the 2011-2012 school year by \$10,000 to \$135,764, effective July 1, 2011.

LEGAL DISCUSSION

Summary decision is appropriate in matters before the OAL when there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). In this matter, each party has requested summary decision by way of motion and the underlying facts related to petitioner's employment are not in dispute.

The purpose of tenure is "to aid in the establishment of a competent and efficient school system by affording teaching staff members 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528-29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App.Div.1949)). Generally, tenured teaching staff members "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause." N.J.S.A. 18A:28-5. However, notwithstanding the tenure laws, a school board may reduce the number of teaching staff members for reasons of economy. N.J.S.A. 18A:28-9; Maywood Bd. of Educ. v. Maywood Educ. Assoc., 168 N.J. Super. 45, 55 (App. Div. 1979). If any staff member is dismissed as a result of such a reduction, commonly known as a reduction-in-force, or RIF, that person remains upon a preferred eligible list in the order of

seniority for reemployment whenever a vacancy occurs in a position for which he or she is eligible. N.J.S.A. 18A:28-12.

In this matter, petitioner argues that respondent violated her tenure rights under N.J.S.A. 18A:28-5 by reducing her salary by \$10,000 upon the elimination of her position at Camden. According to petitioner, she is entitled to her former salary of \$145,764 despite the closing of Camden because she remains a tenured principal, and "if a tenured staff member is not reassigned outside of her tenurable position, then her compensation cannot be reduced." Essentially, she argues that her position was one job, not two. Stallone submits that "she received one check for each pay period for compensation for her service as principal – assigned to two schools and that "the compensation was reported to TPAF [Teachers' Pension and Annuity Fund] as one salary." In addition to the fact that the district issued one paycheck, she also cites the language of her initial appointment for the 2009 school year as a "reassignment". She argues those facts lead to the conclusion that she held one position as principal, and the district merely removed a duty from her list of job responsibilities.

The district maintains that it properly eliminated petitioner's position as principal at Camden and reduced her salary. According to the district, petitioner served in two positions, and once her position as principal at Camden was eliminated for reasons of economy and efficiency, "[i]t logically follows that she should no longer receive the \$10,000.00 she was formerly compensated specifically for the TI position."

While petitioner's employment history appears unique, a review of the record supports the conclusion that she held two separate positions at the district. Those positions were listed separately by the district in the initial approval of the positions. Further, each position had its own job description and involved two separate schools within the district. The fact that the district's payroll system generated one paycheck for Stallone does not negate the underlying nature of the positions she occupied. The district's action did not just remove a duty from Stallone's roster of responsibilities, it eliminated an entire school and Stallone's second job with it. Further, petitioner's assertion that the language of the district agenda item listing Stallone's employment move as a "reassignment" changes the character of her positions is unavailing. While

she was reassigned to another tenured principal position within the district for the 2009-10 school year, she also was named to a second position with a separate salary stipend.

A review of judicial and administrative case law supports the conclusion that respondent did not violate petitioner's tenure rights by reducing her salary after the elimination of the Camden position. In Ciamillo v. Bd. of Educ. of the Bor. of Ridgefield, EDU 1805-04, Initial Decision (July 15, 2005), adopted, Comm'r (August 31, 2005), affirmed, State Bd. (January 4, 2006) <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>, the Commissioner addressed the propriety of a reduction in the salary of a tenured teaching staff member who simultaneously held two positions, one of which was eliminated upon a RIF. In that case, Ciamillo served for several years as a "Guidance Consociate Teacher" in addition to his position as a guidance counselor. As the Commissioner explained, "petitioner's annual salary notices from the 1996-1997 school year through the 2003-2004 school year showed petitioner's base salary as per petitioner's placement and step on the salary guide, and separately set forth the amount of remuneration petitioner was to receive for summer and for extra work as a Consociate Teacher."

Due to economic reasons, the duties of Guidance Consociate Teacher were incorporated into a vice principal position. As a result, the school board reduced petitioner's pay, and "[t]he reduction in pay from 2002-2003 to 2003-2004 represented primarily the absence of any stipend for consociate work." The school board did not subsequently appoint anyone else as Guidance Consociate Teacher and acknowledged that Ciamillo had tenure rights in that position.

In adopting the ALJ's decision, the Commissioner stated:

[t]his controversy arose in the context of a reduction in force (RIF). It is undisputed that the Guidance Consociate Teacher position was eliminated for economic reasons, and no one else was subsequently given the position. N.J.S.A. 18A:28-9 allows such a RIF. While N.J.S.A. 18A:28-12 entitles petitioner to be on a preferred eligibility list for reemployment if the position is restored, petitioner has no statutory right to retain the salary he had before the RIF.

Thus, the Commissioner clarified that a teaching staff member who simultaneously holds two separate tenured positions may be reduced in salary when one of those positions is eliminated as part of a RIF. Here, as in Ciamillo, petitioner was not reemployed in her position with at Camden after the RIF. Thus, petitioner "has no statutory right to retain the salary [she] had before the RIF." Petitioner may have been paid one salary, but it was clear from the resolution appointing petitioner to both positions that she received a set amount of salary for each position. In particular, the salary for her service as principal of the Camden was clearly set at \$10,000 in the resolution authorizing her two positions. When that position was eliminated, she no longer had a right to that part of her total compensation. Since her salary as principal of Gloucester was not reduced, respondent did not violate petitioner's tenure rights.

The district did not reduce petitioner's salary in violation of her tenure rights as it did not have to pay that portion of petitioner's salary associated with the principal position at Camden once that position was eliminated.

ORDER

Petitioner's appeal of the action of respondent reducing her salary is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept 10, 2012
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency:

9-10-12

Date Mailed to Parties:

9-10-12

/lam

#417-12

BARBARA CORRENTI, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE : DECISION
 TOWN OF KEARNY, HUDSON COUNTY, :
 RESPONDENT. :

SYNOPSIS

Petitioner – a district employee since 1979 – challenged the respondent’s decision not to appoint her to the position of Director of Student Personnel Services during a Board meeting in June 2008. Petitioner was employed by the district as a teacher of home economics at the high school level for nearly 20 years, and as a guidance counselor for more than 8 years. She was appointed to the position of Department Chairperson of Basic Skills in September 2007. Beginning in February 2008, petitioner applied on four occasions for the position of Director of Student Personnel Services; she was interviewed twice, but was not offered the job. Petitioner asserted that the Board’s action in denying her the position was arbitrary, capricious and in violation of *N.J.S.A. 18A:27-4.1*. Respondent Board moved to dismiss the appeal, contending that the Commissioner does not have the authority to appoint an individual whom the local board has already considered and decided not to appoint. The ALJ denied respondent’s motion to dismiss, and the matter proceeded to hearing.

The ALJ found, *inter alia*, that: as in non-tenured employment renewal matters, the petitioner in this case bears the burden of proving that the Board’s action in failing to select her for the Student Personnel Services position was arbitrary, capricious or unreasonable; the Board members who voted against petitioner’s appointment explained that their decision was largely based on the fact that petitioner had served in the position of Department Chairperson of Basic Skills for less than a year, and the break in continuity would not be in the best interest of the District; Board members also expressed concern about how much of petitioner’s experience was relevant to the Student Personnel position, as well as petitioner’s level of professionalism and self-control; and, in sum, the credible evidence supported the conclusion that each Board member made a rational and reasonable decision regarding the hiring of petitioner for the position in question. Accordingly, the ALJ concluded that petitioner failed to meet her burden of showing that the Board’s hiring decision was arbitrary or capricious.

Upon careful and independent review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter for the reasons stated therein.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 25, 2012

OAL DKT. NO. EDU 9517-08
AGENCY DKT. NO. 193-7/08

BARBARA CORRENTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWN OF KEARNY, HUDSON COUNTY,	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner adopts the Initial Decision as the final decision for the reasons set forth therein.¹

IT IS SO ORDERED.²


COMMISSIONER OF EDUCATION

Date of Decision: 10/25/12
Date of Mailing: 10/26/12

¹ The Commissioner notes that the third sentence of the second paragraph on page 11 of the Initial Decision should read: "Petitioner bears the burden of proving by a preponderance of the credible evidence that respondent's actions were arbitrary, capricious or unreasonable."

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*).



STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. No EDU 09517-08

Agency DKT. No-193-7/08

BARBARA CORRENTI,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWN OF KEARNY, HUDSON COUNTY,

Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich and Feintuch, attorneys)

Kenneth J. Lindenfelser, Esq., for respondent Board of Education of the Town of Kearny, Hudson County and co-counsel **David Rubin, Esq.,** for respondent¹

Record Closed: July 10, 2012

Decided: September 10, 2012

BEFORE **MUMTAZ BARI-BROWN, ALJ:**

¹ On January 25, 2012, David Rubin, Esq. entered an appearance and notified OAL he has been appointed General Counsel to Kearny Board of Education, formerly held by Kenneth J. Lindenfelser, Esq.

Petitioner Barbara Correnti contends the action of Respondent, Board of Education of the Town of Kearny (Board), the position of Director of Student Personnel Services was arbitrary and capricious and violated N.J.S.A 18A:27-4.1.

On August 8, 2009, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Thereafter, the Board moved to dismiss the petition and contended the Commissioner did not have authority to appoint an individual, whom the local board had already considered and voted not to appoint. After review of the moving papers, I denied the Board's motion for summary decision and scheduled hearings. At the request of the parties the matter was adjourned several times for good cause. Hearings were held on January 10, 2011, February 8, 2012 and February 9, 2012. The parties submitted post hearing briefs and the record closed on July 10, 2012. Based on the administrative law judge's voluminous case load, an extension of time to complete the initial decision was granted. N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-18.8.

FACTS

Based on the relevant evidence and stipulation of the parties, I **FIND** as **FACT**:

1. Petitioner, Barbara Correnti was employed in the Kearny School District in 1979.
2. From 1979 to 1997, Correnti was employed as a teacher of home economics.
3. From January to June 1998, Correnti was employed as a guidance counselor.
4. September 1998 to June 1999 Correnti resumed her duties as a teacher.
5. From September 1999 to August 2007, Correnti returned to the position of guidance counselor.
6. In September 2007, Correnti was appointed Department Chairperson of Basic Skills (Reading) and supervised State testing for HSPA, end of

course biology test, assigned for two periods per day to in-school suspension to counsel students.

7. Testing at the high school level coincided with counseling duties and assessing the counseling progress including graduation requirements.
8. In June 2008, the position of Director of Student Personnel Services (DSPS) became vacant.
9. Correnti applied for the position of DSPS on four occasions; February, March, June and July 2008.
10. Correnti was interviewed by the interview committee on two dates.
11. The committees and the Superintendent recommended Correnti for the position of DSPS.
12. Correnti was the only person the Superintendent recommended for the position of DSPS.
13. Henry Russo, a board member for more than 16 years recommended Correnti for the position.
14. On June 16, 2008, the Board convened for a regular board meeting. The agenda listed four candidates, including Correnti to the position of DSPS.
15. Prior to the vote, the Board convened for a closed session.
16. The Board returned to open session and voted not to appoint Correnti for the position of Director, by a count of six "no" and three "yes".
17. On or about July 2, 2008, Correnti filed a verified petition with the Commissioner of Education and claimed the Board failed to disclose the reasons it did not act on the Superintendent's recommendation to appoint her to the position; therefore, the Board's action was arbitrary and capricious.
18. Petitioner requests the Commissioner order respondent to appoint her to the position of Director of Student Personnel Services.²

² The parties also stipulated to the following: The person who filled the position was interviewed in August and not recommended; thereafter the person was recommended in September. The position of Director was not posted for the interim position in September. D.C. was placed in the position as interim Director in September 2008. D.C. was appointed in January 2009. These facts were also considered during Respondent's motion to dismiss the petition because the Commission had no authority to veto the board's action to not appoint Correnti to the position of Director, currently held by D.C.

ISSUE

The issue is whether a school board's action to not appoint Correnti to the position of Director of Student Personnel Services constituted arbitrary and capricious conduct in violation of N.J.S.A 18A:27-4.1.

SUMMARY OF EVIDENCE

Background

The Board has employed Correnti for thirty years in positions of a home economics teacher at Kearny High School, a guidance counselor, and as the Department Chairperson of Basic Skills (Reading). She received satisfactory or better evaluations throughout her tenure. In 2008, Correnti applied for the position of Director of Student Personnel Services and interviewed for the position in June and August. (P-16, P-17.) The duties of the Director of Student Personnel Services included supervising the guidance counselors, students' academic records, curriculum planning, program studies, college information, IR&S team, and scheduling. The applicants for the position included petitioner and seven candidates from outside the District. The parties do not dispute that Correnti was fully qualified and met all the posted requirements for the position.

The interview committee consisted of the Superintendent, Assistant Superintendent, High School Principal, Director of Guidance, three Board members, and a teacher. At the Board meeting on June 16, 2008, Superintendent Mooney recommended petitioner's appointment as Director of Student Personnel Services. The appointment was defeated by a vote of 6-3.

In July 2008, the position of Director of Student Personnel Services was reposted. Correnti reapplied and was interviewed. The applicants for the position included petitioner, another internal candidate, and three or four candidates from outside the District. The position remained unfilled through September 2008, when the

District placed an Interim Director of Student Personnel Services in the position. That individual was appointed as Director of Student Personnel Services in January 2009.

On July 8, 2008, Correnti filed a Verified Petition with the Commissioner of Education and requested the Board be compelled to appoint her to the position of Director of Student Personnel Services. Correnti claimed the Board's decision to not appoint her during the Board's meeting on June 16, 2008, was arbitrary and capricious in violation of N.J.S.A. 18A:27-4.1.

Testimony

Robert Mooney, the Superintendent of Schools at the time the position became available, recommended Correnti for the position. However, on June 16, 2008, the Board voted to not appoint Correnti. Mooney recalled some discussion by the Board on whether Correnti was "a good fit" for the position. Other Board members expressed concerns that she had only recently been appointed Department Chairperson of Basic Skills (Reading), but they did not consider that an obstacle. Mooney acknowledged others could reasonably disagree with his recommendation to appoint Correnti to the position. He also conceded there would be a lapse in continuity anytime positions change within a school. Further, he believed there was no "right" size for a candidate pool. "If you had one great candidate, that was enough, but if you had none, you kept looking." He also believed that two years would be a reasonable evaluation period to provide an accurate view of an individual's performance in a particular position.

Henry Russo, the former Director of Guidance, supervised petitioner in the counseling department. He also served on the interview committee that recommended petitioner for the position of Director of Student Personnel Services. Russo testified he was surprised Correnti was not appointed. The duties of the Department Chairperson of Basic Skills (Reading) required supervising all testing to ensure its organization and coordination, and assigning staff to oversee the testing. He agreed with Correnti's

characterization of the Basic Skills position as “basically doing ministerial tasks regarding testing.”

John Campbell served as a member of the Board for twelve years. He was present at the Board meeting and voted in favor of Correnti's appointment. He could not recall a time the Superintendent recommended an individual for a position and the Board voted “no.” Also, during the first open meeting, he could not recall any discussion by Board members regarding Correnti. However, he agreed the Basic Skills Department could “suffer” if it lost a qualified individual.

Petitioner Barbara Correnti testified her “sole” job duty as Department Chairperson of Basic Skills (Reading) was “counting test booklets” for the New Jersey High School Proficiency Assessment. Due to her counseling background, however, she was also “assigned to the in-school suspension room two periods a day to counsel students.” When she applied for the position of Director of Student Personnel Services, she was in her first year as the Department Chairperson of Basic Skills (Reading). Her performance was evaluated and observed during a department meeting.

Under cross-examination, Correnti testified her duties also included: (1) evaluating six teachers in her department in accordance with the principal's guidelines and school policy, (2) consulting with the principal on testing materials, (3) securing, packaging and to distributing testing materials to the staff, (4) participating in interdisciplinary meetings, (5) over-seeing in-school suspensions, (6) collecting personal improvement plans from the staff in her department, (7) reading the improvement plans, (8) preparing newspaper releases of important activities taking place within the department, (9) evaluating lesson plans to ensure they followed curriculum guidelines, (10) assisting in the administration of the testing program, (11) assisting the coverage of absent teachers, and (12) coordinating the storage of department exams.

Respondent presented five of the Board members who voted against petitioner's appointment. On June 16, 2008, David Stevenson served on the Board and the

interview committee. Stevenson voted against her appointment because he was concerned about Correnti getting the new position within one year from her appointment as Department Chairperson of Basic Skills (Reading). He believed her move to Director of Student Personnel Services would not be in the best interest of the District and would be detrimental to the District. (P-29.) Also, he was concerned that her interview focused on her significant experience at the high school without distinguishing between the time she spent performing duties relevant to the Student Personnel Services position.

Stevenson further testified he went into the interviews completely open-minded. Moreover, Superintendent Mooney's recommendation played a role in his thought process. However, he believed he had not always voted in favor of the Superintendent's recommendations. He clarified statements made in his certification regarding his concern about petitioner's "mental stability." "I don't like the way I wrote that...I put, 'Mental stability'; I think that's a little heavy." At the hearing he referred to her "emotional abilities." Correnti appeared to be "angry" and "unprofessional" when things did not go her way. Stevenson knew Correnti very well professionally, socially, and personally. However, he felt she had an attitude during the interview and behaved "emotionally aggressive." For example, Correnti did not act the way he would want an administrator to present herself and he was concerned about her ability to "control her emotions." Although he heard from her colleagues about her "flying off the handle" and explosive reactions, his concerns came from his own observations of her conduct at school.

Lisa Schalago was elected to the Board in 2006 and reelected in 2009. Schalago was a student at Kearny High School when Correnti was a teacher, but had no reference to any evaluations of petitioner in a supervisor role. She voted for petitioner's appointment to the Basic Skills position but against her appointment to the position of Director Student Personnel Services. Schalago further testified she considered the best interest of the District and voted no on the appointment because Correnti had just been appointed to the Basic Skills position the same school year.

Another factor she considered was the lack of Correnti's performance evaluation. At the Board's meeting on June 16, 2008, she asked Superintendent Mooney for evaluations of petitioner's performance as the Department Chairperson of Basic Skills (Reading). Mooney responded that no evaluation of petitioner was available. A few days later, Schalago again asked Mooney for petitioner's evaluation; he again indicated that he did not have any in the file. Due to ethics rules, Schalago could not contact or directly obtain the evaluations from the school principal. Schalago testified, however, that if she had positive evaluations on that date she would have changed her vote.

Bernadette McDonald served on the Board for twelve years. She voted for Correnti's appointment to the Basic Skills position, but against her appointment to the position of Student Personnel Services. McDonald further testified she voted against petitioner because she felt that there was not a viable pool of candidates. McDonald wanted to re-post the job and she hoped that Correnti would re-apply for the position. Also, McDonald was concerned that the interview committee did not unanimously support petitioner's appointment.

Virginia Santos served on the Board between 2004 and 2010. She voted for petitioner's appointment to the Basic Skills position, but against her appointment as Director of Student Personnel Services. Santos felt that the District needed stability in the Basic Skills position. Indeed, the Board had just appointed petitioner to Basic Skills eight months earlier. Santos hoped that petitioner would implement new strategies to improve test scores. Also, Santos was concerned that petitioner might be using the position temporarily until she found something closer to her expertise and interest. She further testified that the administration had assured the Board that Correnti would stay in the Basic Skills position long-term.

Rosemary Marks, a former teacher and assistant superintendent in another school district, served one term on the Board in 2006. She voted in favor of petitioner's appointment to the Basic Skills position. However, Marks voted against her appointment as Director of Student Personnel Services because petitioner had just

started in the Basic Skills position and believed that position was of critical importance. Indeed, the Basic Skills position was important because the Chairperson supervised the people teaching students who were not meeting achievement objectives and students who needed to improve their skills. The result of moving Correnti from the Basic Skills position would be harmful to the students in the program and not in the District's best interest. Marks believed continuity is important. Although Marks believed petitioner was qualified for the Director position, she also believed petitioner was not in the Basic Skills position long enough to be "judged". Overall, Marks' main concern was consistency and continuity in the Basic Skills position. If the scores did not show improvement the State would impose "severe measures" and the District faced a possible reorganization of the entire school.

DISCUSSION

"A board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons." N.J.S.A. 18A:27-4.1(a). In Dore v. Board of Education of the Township of Bedminster, 185 N.J. Super. 447, 456 (App. Div. 1982), the Court stated, "Absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a [teaching staff member] who has no tenure and is regarded as undesirable by the local board." A board maintains the "right to reach its conclusion about a nontenured teacher on a broad base of input received from a variety of people, including members of the public, parents of students and a board member's own knowledge of a teacher even if that knowledge is acquired through having a child in the teacher's class." Id. at 454.

A non-tenured employee challenging his or her non-renewal has to "demonstrate that the Board's decision not to renew her contract was so far afield, so outside of the realm of rational, evidentially based decision-making as to fail to even stand as a reasonable determination." Kondratick v. Bd. of Educ. of the Borough of Hamburg, EDU

11195-07, Initial Decision, (June 29, 2009), adopted, Cmm'r, (September 29, 2009) <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>>.³

The burden of proof rests upon petitioner to show by competent and credible evidence that the Board's decision not to renew her contract was arbitrary, capricious or unreasonable [and] [t]he burden of proof for "[s]uch an allegation requires substantial proof that the Board acted improperly and to the exclusion of all other bona fide reasons."

[Ibid. (quoting Bigart v. Paramus Bd. of Educ., 1979 S.L.D. 123, 133) (emphasis in original).]

Here, Correnti bears the burden of proof by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); DYFS v. M.R., 314 N.J. Super. 390, 414 (App. Div. 1998); In re Allegations of Sexual Abuse at E. Park High Sch., 314 N.J. Super. 149, 168 (App. Div. 1998). This tribunal has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Thus, I have considered carefully the arguments of the parties and the relevant evidence.

Guidance is provided in Watson v. Bd. of Educ. of City of Asbury Park, Monmouth County, where a non-tenured teaching staff member challenged a local school board's decision not to renew her employment contract, and thus deny her tenure, as arbitrary and unreasonable. Watson v. Bd. of Educ. of City of Asbury Park,

³ Similarly, N.J.S.A. 18A:27-4.1(a)(b) provides in part: [a] board of education shall renew the employment contract of a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons.

Monmouth County, EDU 04990-03, Initial Decision (September 13, 2004), adopted, Comm'r (October 15, 2004), aff'd, State Bd. of Educ. (March 2, 2005) <http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>. The ALJ acknowledged the burden of proof rested on the teaching staff member, but required the local school board to present evidence to explain the basis for its decision. Id. The ALJ concluded, "Given the vast discretion in the school board under the statute, this record of documented performance at less than satisfactory levels over a period of time would, without question, be more than sufficient to insulate the board against any claim that its decision not to renew [the teaching staff member's] contract was arbitrary and unreasonable." Id. at 15.

Similarly, in Martin v. Board of Education of the City of Asbury Park, to prove a local school board decision was arbitrary and unreasonable, the teaching staff member must "demonstrate that the board's decision not to renew her contract was so far afield, so outside the realm of rational, evidentially based decision-making as to fail to even stand as a reasonable determination." Martin v. Bd. of Educ. of City of Asbury Park, Monmouth County, EDU 6349-04, Initial Decision, (September 13, 2004), adopted, Comm'r (October 15, 2004), aff'd, State Bd. of Educ. (March 2, 2005) <<http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>> (citing Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960)). The ALJ concluded the petitioner failed to satisfy the burden because the evidence revealed she "demonstrated difficulties in meeting the standards expected of a teacher" and in her interpersonal relationships with staff members. Ibid.

Here, although Petitioner challenges the Board's decision to not appoint her to a particular position, rather than a renewal decision, the above principles are applicable. Indeed, N.J.S.A. 18A:27-4.1(a) provides that a board of education shall not withhold its approval of appointments, transfers, or removals for arbitrary and capricious reasons. Petitioner argues that Stevenson, Santos, and Marks' decisions were arbitrary and capricious because continuity in the Department Chairperson of Basic Skills position was "not really an issue" since the position was "purely ministerial" and required minimal

training. (Petitioner's Brief at 8-9, 12.) Petitioner further contends Stevenson's reasoning was arbitrary and capricious because Correnti worked in the Guidance Department for ten years. She taught high school home economics, not preschool, which involved high school students instructing preschool children. Moreover, Petitioner maintains she had never been questioned about her mental stability or undergone psychiatric or psychological treatment. (Id. at 8.) Petitioner further argues that Schalago's decision was arbitrary and capricious because Correnti had received at least four evaluations during her time in the Basic Skills position and "the Board chose not to rely on them and instead simply declare[d] that the [p]etitioner had not been in the position long enough to get a sense of her performance." (Id. at 11.) Petitioner characterizes McDonald's decision as arbitrary and capricious because the pool of applicants in June 2008 was larger than the pool of candidates subsequently considered in August 2008. Further, the interview committee was not unanimous because it contained Board Members voting arbitrarily and capriciously. (Id. at 10.) Finally, Petitioner argues that Santos' reasoning was arbitrary and capricious because Correnti never committed to the Basic Skills position and only signed a one year contract. (Id. at 9.)

I have also considered carefully the testimony of the witnesses and their demeanors. Board members David Stevenson, Virginia Santos, and Rosemary Marks each explained that their decision to vote against Petitioner's appointment to Director of Student Personnel Services was at least in part because Petitioner served in the Basic Skills position for less than a year and the break in continuity would not be in the best interest of the District. I also have weighed the evidence with Petitioner's assertion that the position was a "purely ministerial" position that required "very minimal training" and she only signed a one year contract. Although Russo, former Director of Guidance agreed with Petitioner's characterization of the Basic Skills position as ministerial, Petitioner's description of her duties appears disingenuous. Indeed, under cross-examination, Petitioner conceded that her duties were more encompassing than merely "counting test booklets." They included numerous duties such as evaluating six

teachers in her department, in accordance with the principal's guidelines and school policy, and reviewing lesson plans to ensure they followed the curriculum guidelines.

Although Correnti signed a one year contract for the Basic Skills position, the Board's desire to have continuity in the position was logical, especially in light of the explanation provided by Marks. Marks explained her concern that petitioner had just started in the Basic Skills position and she believed that the position was of critical importance. Indeed, the department's teachers taught students who failed to meet achievement objectives, and the District needed immediate improvement to avoid state imposed penalties. Marks also believed that the change would be harmful to the Basic Skills program. She relied in part on educational research. Finally, Marks did not believe that Correnti was in the Basic Skills position long enough to be judged as a supervisor. Marks also explained that the District needed improvement by petitioner's second year in that position. If improvement did not occur by year three, the State might impose "severe measures" and if the school did not improve by year five, the District faced a possible reorganization of the entire school. Although Correnti only underwent one day of formal training for the Basic Skills position, she conceded that she learned something new in the position each day. Therefore, the desire for continuity in the Basic Skills position beyond one year was logical and reasonable.

Stevenson was also concerned that petitioner's interview focused on her significant experience at the high school without acknowledging that only a fraction of that time was spent in the guidance department. Stevenson candidly expressed his opinion and concern about Petitioner's emotional abilities and professionalism. His right to reach his conclusion about petitioner based on his own knowledge of her and input from a variety of people was not arbitrary, capricious, or unreasonable.

Petitioner argues that Schalago's rationale was arbitrary and capricious because petitioner had received at least four evaluations during her time in the Basic Skills position and "the Board chose not to rely on them and instead simply declare[d] that the [p]etitioner had not been in the position long enough to get a sense of her performance."

Board member Lisa Schalago explained that she voted against petitioner's appointment as the Director of Student Personnel Services because petitioner had just been appointed to a supervisory position that same school year and the Board lacked any evaluations of petitioner in a supervisor role. Schalago also explained that although she knew petitioner as a teacher, she did not know of her as a supervisor.

Notably, the record reveals one evaluation from April 2008, dated six days prior to the Board's meeting on June 16, 2008.⁴ Schalago testified that she asked Superintendent Mooney for evaluations of Petitioner's performance as a supervisor during the meeting. Mooney indicated that he had no evaluation. Schalago then followed up with Mooney on another occasion asking for an evaluation of Petitioner as a supervisor. Mooney was again unable to provide any evaluations. Although dated June 10, 2008, nothing in the record indicates Superintendent Mooney or the Board possessed the evaluation during the Board's meeting on June 16, 2008. Furthermore, Superintendent Mooney, who recommended Petitioner for the Student Personnel Services position, agreed that two years would be a reasonable evaluation period to provide an accurate view of the performance of an individual in a particular position. At that point, Petitioner had served in the Basic Skills position as a supervisor for less than a full year. Finally, Schalago simply did not feel that Mooney had a good feeling for the quality of staff. Schalago's concern about the lack of an evaluation of petitioner's performance in a supervisor role was not arbitrary, capricious, or unreasonable.

Board Member Bernadette McDonald voted against Petitioner's appointment to the Director position because there was not a viable pool of candidates. She would have preferred the position be re-posted and that Correnti re-apply. Further, McDonald believed it important that the interview committee did not unanimously support petitioner. I reject Petitioner's argument that McDonald's reasoning was irrational. Indeed, the candidate pool was larger during the initial posting than subsequent postings. Furthermore, Superintendent Mooney explained that if you had one great candidate, that was enough, but if you had none, you kept looking. On June 16, 2008,

⁴ The record reveals three copies of a an evaluation from April 2008, and an observation of one of petitioner's department meetings. (P-27, P-28.)

McDonald had no way to know that the number of applicants applying for the reposted position would be less than those during the initial posting. Simply put, she was not satisfied with any of the candidates in the initial pool and voted accordingly. McDonald's decision was not arbitrary, capricious, or unreasonable.

The credible evidence supports the conclusion that the Board did not rubber stamp the recommendation of the Superintendent. Rather, each board member made a rationale and reasonable decision to not appoint petitioner to the position of Director of Student Personnel Services. Essentially, since petitioner had recently been appointed Chairperson of Basic Skills for less than one year, they believed to replace her would be harmful to the students in the program and not in the best interest of the Board of Education of Kearny.

CONCLUSIONS

Based on the whole of the credible evidence, **I CONCLUDE** the board members who voted against Barbara Correnti's appointment to the position of Director of Student Personal Services provided reasoned explanations for their decision.

Therefore, **I CONCLUDE** Petitioner has failed to meet her burden of showing that the Board's decision to not appoint her to the position of Director of Student Personal Services was arbitrary or capricious.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 10, 2012

DATE

Date Received at Agency:

Date Mailed to Parties:
db


MUMTAZ BARI-BROWN, ALJ
September 10, 2012 (db)
September 10, 2012 (db)

APPENDIX

WITNESSES

Presented by Petitioner

Robert P. Mooney

John Campbell

Barbara Correnti

Presented by Respondent

David Stevenson

Lisa Schalago

Bernadette McDonald

Virginia Santos

Rosemary Marks

EXHIBITS

Joint

J-1 Stipulation of Facts

For Petitioner

P-1 Director of Student Personnel Services Certificate issued, July 2001

P-2 Supervisor Certificate issued, January 2009

P-3 Student Personnel Services Certificate, issued February 1998

P-4 Substance Awareness Coordinator Certificate, issued August 1994

P-5 Teacher of Home Economics Certificate, issued May 1979

P-6 Elementary School Teacher Certificate, issued September 1988

P-7 Teacher of Nursery School Certificate, issued September 1988

- P-8 Resume of Barbara Correnti
- P-9 Posting for position of Director of Student Personnel Services, February 29, 2008
- P-10 Barbara Correnti's letter of application for position of Director Student Personnel Services, dated March 3, 2008
- P-11 Posting for position of Director of Student Personnel Services, April 28, 2008
- P-12 E-mail from Ingrid Kiss dated May 29, 2008 advising of interview for Barbara Correnti on June 3, 2008
- P-13 Superintendent's Report of June 16, 2008
- P-14 Barbara Correnti's letter of application for position of Director of Student Personnel Services, dated June 14, 2008
- P-15 Barbara Correnti's letter of application for position of Director of Student Personnel Services, date July 7, 2008
- P-16 E-Mail from Ingrid Kiss dated July 17, 2008 advising of interview for Barbara Correnti on July 24, 2008
- P-17 E-mail from Ingrid Kiss dated August 8, 2008 advising of interview for Barbara Correnti on August 14, 2008
- P-18 Minutes of closed session meeting of Board of Education on January 20, 2009
- P-19 Minutes of public session of meeting of Board of Education on January 20, 2009
- P-20 Letter of recommendation by Alfred L. Somma on behalf of Barbara Correnti for supervisor certification, dated July 11, 2007
- P-21 E-Mail to Barbara Correnti from Alfred L. Somma congratulating her for her hard work and dedication, dated March 6, 2008

- P-22 Minutes of closed session meeting of Board of Education on August 18, 2008
- P-23 Minutes of closed session meeting of Board of Education on June 16, 2008
- P-24 Job Description for position of Director of Student Personnel Services, revised October 18, 1993
- P-25 Evaluation of Barbara Correnti, dated April 2009
- P-26 Department Chair Observation dated November 24, 2008
- P-27 Evaluation of Barbara Correnti, dated April 2008
- P-28 Department Chair Observation, dated January 23, 2008
- P-29 Certifications of Board Members

For Respondent

- R-1 Job Description, Department Chairperson

STUART B. WEISS,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE ESSEX	:	DECISION
COUNTY VOCATIONAL SCHOOL DISTRICT,	:	
ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

In 2003, the petitioner filed an appeal which asserted that the Board failed to pay full salary without loss of sick time for an injury sustained in the course of his employment. The matter was placed on the inactive list pending resolution of a related Worker's Compensation case. On April 24, 2012, petitioner was advised that the sick leave matter had been reactivated. A telephone conference was scheduled for July 23, 2012 for the purpose of discussing a settlement between the parties. Petitioner failed to make himself available for this conference, failed to reply to respondent's subsequent communication laying out settlement terms, and failed to respond to the ALJ's August 13, 2012 letter which directed him to advise whether he was accepting or rejecting the Board's settlement offer. Accordingly, the ALJ concluded that petitioner had abandoned the case, and returned the matter to the Department of Education.

The Commissioner concurred with the ALJ's findings, and determined that the case must be dismissed for failure to prosecute. Accordingly, the recommended decision of the OAL was adopted and the matter was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 26, 2012

OAL DKT. NO. EDU 9656-03
AGENCY DKT. NO. 168-5/03

STUART B. WEISS,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE ESSEX	:	DECISION
COUNTY VOCATIONAL SCHOOL DISTRICT,	:	
ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that – because petitioner failed to make himself available for the ALJ’s scheduled July 23, 2012 telephone conference with the parties and additionally failed to respond, either in writing or orally, to the ALJ’s August 13, 2012 letter directing him to advise whether he was accepting or rejecting the Board’s settlement offer in this matter – this case is appropriately dismissed for failure to prosecute.

Accordingly, the recommended decision of the OAL is adopted and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 10/26/12
Date of Mailing: 11/01/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

FAILURE TO APPEAR

OAL DKT. NO. EDU 09656-03

Agency No. 168-5/03

STUART B. WEISS,

Petitioner,

v.

**BOARD OF EDUCATION OF
ESSEX COUNTY VOCATIONAL
SCHOOL DISTRICT, ESSEX CO.,**

Respondent.

Stuart B. Weiss, pro se

M. Murphy Durkin, Esq., (Durkin & Durkin, attorneys) for respondent

Record Closed: September 10, 2012

Decided: September 12, 2012

BEFORE JESSE H. STRAUSS, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Stuart B. Weiss asserts that the Essex County Vocational School District Board of Education (District) has failed to pay full salary without loss of sick time for an injury sustained in the course of his employment (SLI claim).

After respondent filed a request for a hearing before the Office of Administrative Law (OAL), the Department of Education Bureau of Controversies and Disputes transmitted the matter to the OAL pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where, on October 17, 2003, it was filed for hearing and determination as a contested case. The matter was placed and remained on the Inactive List for successive periods of time pending the resolution of a related Workers Compensation case. Upon notice from Weiss's Workers Compensation counsel that it had been resolved and that he did not represent Weiss on the SLI claim, I removed the SLI matter from the Inactive List.

FINDINGS OF FACT

I **FIND** the following facts:

1. On April 24, 2012, I advised Weiss that the SLI matter had been reactivated and that the parties needed to move forward.
2. On May 17, 2012, Weiss advised that he intended to proceed with his claim and would represent himself.
3. I conducted a telephone conference on June 29, 2012, with Weiss and the District's counsel M. Murphy Durkin at which time Durkin represented that he would discuss with the Board of Education representatives a resolution of the SLI claim. I scheduled another telephone conference for July 23, 2012.
4. Although Durkin made himself available for the conference, Weiss did not.
5. Notwithstanding Weiss's non participation, Durkin communicated with him on August 10, 2012, advising him that the Board had agreed to settle the matter and invited Weiss to contact him.
6. On August 13, 2012, I communicated with Weiss acknowledging receipt of the settlement offer. I directed Weiss to notify me in writing within ten days if he were rejecting the settlement offer. I added, "if I do not hear from you, I will consider the matter to have been withdrawn for a failure to proceed." I also advised Weiss that if he rejected the settlement offer and so notified me, the matter would be set down for hearing.

7. Despite the passage of almost thirty rather than ten days, there has been no written or oral communication from Weiss.

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Weiss has abandoned this matter and that it should be returned to the transmitting agency.

N.J.A.C. 1:1-14.4(a) provides that, if, after appropriate notice, a party does not appear in any proceeding scheduled by a judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge may direct the Clerk to return the matter to the transmitting agency for appropriate disposition. As Weiss has taken no action to fulfill his obligations related to the completion of his appeal including an ordered response to my August 13, 2012, letter, I **CONCLUDE** that Weiss has abandoned this matter. Accordingly, the Clerk should return this matter to the Department of Education.

ORDER

It is **ORDERED** that the Clerk return this matter to the Department of Education for appropriate disposition.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 12, 2012
DATE

Geor W Strauss
JESSEH. STRAUSS, ALJ

Date Received at Agency:

9/12/12
Aura Berke

Date Mailed to Parties:

SEP 13 2012

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

V.L. and C.L., on behalf of minor children,	:	
R.S. and R.L.,	:	
	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
CITY OF RAHWAY, UNION COUNTY	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning parents challenged the Board's decision to move their children to a different school at the start of the 2012-2013 school year as a part of the Board's decision to redistrict students. Petitioners initially filed a motion for emergent relief, which was denied on July 31, 2012. A telephone status conference was conducted on August 13, 2012, at which time the petitioners advised that they did not want to proceed with this matter and would follow up with a letter of withdrawal.

The ALJ reported that – as of September 11, 2012 – no withdrawal letter had been received from the petitioners. Accordingly, the ALJ concluded that the matter is no longer a contested case before the Office of Administrative Law and therefore ordered the matter dismissed.

Upon a full and independent review, the Commissioner concurred with the findings and conclusion of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this case.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 26, 2012

OAL DKT. NO. EDU 8554-12
AGENCY DKT. NO. 169-6/12

V.L. and C.L., on behalf of minor children,
R.S. and R.L.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE
CITY OF RAHWAY, UNION COUNTY

RESPONDENT.

:
:
:
:
:
:

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner adopts the Initial Decision as the final decision for the reasons set forth therein. Accordingly, the petition is hereby dismissed.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 10/26/12

Date of Mailing: 11/01/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 08554-12

AGENCY DKT. NO. 169-6/12

V.L. AND C.L., ON BEHALF OF MINOR CHILDREN

R.S.AND R.L,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY

OF RAHWAY, UNION COUNTY

Respondents.

V.L. pro se

Mark Tabakin, Esq., for respondent City of Rahway Board of Education (Weiner
Lesniak, attorneys)

Record Closed: August 13, 2012

Decided: September 11, 2012

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the City of Rahway Board of Education's (Board) decision to move their children from Roosevelt Elementary School to Cleveland Elementary School at the start of the 2012-2013 school year as part of the board's decision to redistrict students. On June 25, 2012, petitioner filed a Motion for Emergent Relief allowing their children to remain at Roosevelt School. In support of the motion, petitioner submitted a verified petition and letters. Oral argument on the motion was scheduled for July 5, 2012. Respondent requested an adjournment to which petitioner consented. Respondents submitted a brief and certification on July 10, 2012. Petitioner submitted a letter from Central Jersey Behavioral Health, LLC on July 10, 2012. The motion was as held on July 11, 2012. An Order was rendered by the undersigned on July 11, 2012, denying the motion which is attached hereto for reference. Said Order was upheld by the Commissioner on July 31, 2012.

A telephone status conference was conducted on August 13, 2012, at which time the petitioner advised that she did not want to proceed with this matter any further. She stated that she would send a withdrawal letter. To date, I have not received a withdrawal letter from petitioner.

CONCLUSION AND ORDER

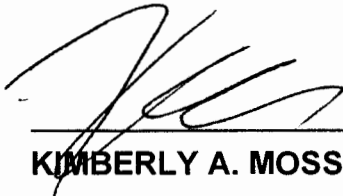
I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is therefore **ORDERED** that this matter be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

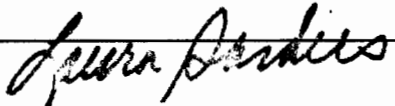
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9-11-12
DATE


KIMBERLY A. MOSS, ALJ

Date Received at Agency:


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: **SEP 12 2012**
ljb



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION FOR
EMERGENT RELIEF

OAL DKT. NO. EDU 08554-12
AGENCY DKT. NO. 169-6/12

V.L. AND C.L., ON BEHALF OF MINOR CHILDREN
R.S.AND R.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY
OF RAHWAY, UNION COUNTY

Respondents.

V.L. pro se

Mark Tabakin, Esq., for respondent City of Rahway Board of Education

Record Closed: July 11, 2012

Decided: July 11, 2012

BEFORE **KIMBERLY A. MOSS, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the City of Rahway Board of Education's (Board) decision to move their children from Roosevelt Elementary School to Cleveland Elementary School at the start of the 2012-2013 school year as part of the Board's decision to

redistrict students. On June 25, 2012, petitioner filed a Motion for Emergent Relief allowing their children to remain at Roosevelt School. In support of the motion, petitioner submitted a verified petition and letters. Oral argument on the motion was scheduled for July 5, 2012. Respondent requested an adjournment to which petitioner consented. Respondents submitted a brief and certification on July 10, 2012. Petitioner submitted a letter from Central Jersey Behavioral Health, LLC on July 10, 2012. The motion was as held on July 11, 2012. An Order was rendered by the undersigned on July 11, 2012, which is attached hereto for reference.

FACTUAL DISCUSSION

I **FIND** the following to be the **FACTS** of this matter.

Starting on or about 1976 and continuing through 2005 the Board voluntarily bussed students from their neighborhoods to more distant schools to achieve racial diversity. In 2005 regulations no longer required the Board to maintain a certain balance of racial groups within a school. On July 26, 2005, the Board adopted a redistricting plan which sought to reach three objectives (1) determine school assignments based on address, rather than race, (2) to create attendance areas that are closer to each elementary school and to reduce bussing of elementary students.

The bussing of a number of students living in the Cleveland School neighborhood to Roosevelt School continued after July 26, 2005, because Cleveland School did not have space to accommodate the additional students. Petitioner's children were among the children in the Cleveland School neighborhood that were bussed to Roosevelt School.

On June 29, 2009, the Board approved a proposed thirty-four million capital project proposal. On September 29, 2009, a referendum was approved by the citizens of Rahway regarding the thirty-four million dollar capital project proposal. Cleveland School has been renovated to accommodate a greater number of students due to the capital project proposal. R.S. and R.L. attended Roosevelt School through the 2011-

2012 school year. R.L. and R.S. would be enrolled in Cleveland School for the 2012-2013 school year. The elimination of bussing would save the Board between \$130,000 and \$180,000.

The Board implemented a district wide program of sixth grade realignment. It determined that sixth grade students experience a decline in standardized test scores and an increase in disciplinary infractions when students are moved to a middle school where they are exposed to older peers, intensified expectations and greater responsibility. The sixth grade students in Rahway will attend their respective elementary school instead of going to middle school. Twenty-four fifth graders who were bussed to Roosevelt School but were transferred to Cleveland School will complete the sixth grade at Cleveland School.

The Rahway school district has 3890 students. Of those students forty-two percent are Black, thirty-four percent are Hispanic, nineteen percent are White and five percent are other including Asian, Native American and Multicultural. The Districts overall demographics show that the racial and ethnic makeup of each school is reasonably reflective of the diverse population living within the area.

During the 2011-2012 school year, Roosevelt School's racial composition was nineteen percent White, forty-seven percent Black, twenty-nine percent Hispanic and five percent other. It is anticipated that Roosevelt School's racial composition for the 2012-2013 school year will be approximately twenty-two percent White, thirty-eight percent Black, thirty-two percent Hispanic and 6.4 percent other. During the 2011-2012 school year, the Cleveland School student body was seven percent White, forty-eight percent Black, forty-one percent Hispanic and four percent other. It is anticipated that Cleveland School's racial composition for the 2012-2013 school year will be approximately seven percent White, fifty-five percent Black, thirty six percent Hispanic and four percent other. Madison Elementary School has the highest percent of White students, thirty-three percent. The majority of the students at Madison School are minority students. There is no elementary school in Rahway that has a racial composition that is more than thirty-three percent white.

Petitioner alleges that the redistricting plan violates N.J.A.C. 6A:7-1.7, provisions for equality in school and classroom practices. Petitioner has not provided documentation that the purpose of the redistricting plan was to segregate students based on race. Petitioner has provided no documentation that minority students are underrepresented in all classes or programs including gifted and talented, accelerated and advanced classes. Petitioner has provided no documentation to substantiate her claim that Rahway does not include a multicultural curriculum in its instructions and methods and that the students understand the basic tenant of multiculturalism. Petitioner has not provided documentation that African American history as well as the history of other cultures is not infused in the curriculum and taught as part of the history of the United States.

Petitioner submitted a letter from Roy Hirschfeld of Central Jersey Behavioral Health, LLC stating that the children were anxious about losing their peer relationships and changing to a new school. It was his impression that it would be detrimental to change their aschool environment.

LEGAL DISCUSSION AND CONCLUSIONS

Petitioner did not meet the criteria of Crowe v. DeGioia for emergent relief. N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner's claim is settled;
3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in his favor.

It is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief requires a "clear showing of immediate irreparable injury," or a "presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law." Ibid. (citation omitted.)

Petitioner claims that her children will suffer irreparable harm because they will be going to a different school, Cleveland School, and that Cleveland School had a majority of minority students thereby subjecting her children to racial segregation. Petitioner has not shown that her children will suffer irreparable harm. Petitioner is requesting her children remain at Roosevelt School. Roosevelt School and Cleveland School both have a racial composition that has vastly more minority students than white students. In fact, all of the elementary schools in Rahway have more minority students than white students.

The letter petitioner submitted from Central Jersey Behavioral Health by Roy Hirschfeld stated that the children had anxiety about going to a new school and it was his **IMPRESSION** that it would be detrimental for them to change schools. He did not state that this was his opinion based on any degree of reasonable certainty. There is no clear showing of immediate irreparable harm.

I **CONCLUDE** that petitioner has failed to shoulder its burden of proving that her children will suffer irreparable harm.

Petitioner has not proved that there is a likelihood of prevailing on the merits of the underlying claim. The petitioner has not provided any documentation to support her claims. Actions of the Board or any administrative agency must be upheld unless it is deemed to be arbitrary, capricious or unreasonable. See Shuster v. Bd. of Ed. of Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676, *adopted* Comm'r. 96 N.J.A.R.2d (EDU) 677. Petitioner has not provided any evidence that the decision to send students who live in the Cleveland School neighborhood to Cleveland School was arbitrary, capricious or unreasonable. Petitioner's children were originally sent to Roosevelt School because there was not sufficient space at Cleveland School. Cleveland School can now accommodate the students in the Cleveland School neighborhood. In both Roosevelt and Cleveland schools the majority of the students are minority students. Petitioner cited Madison School in her petition. The majority of the students at Madison School are also minority students. In the Rahway school district, the vast majority of the students are Black and Hispanic.

The Board began district wide program of sixth grade realignment. The reason for the realignment was to combat the decline in standardized test scores and the increase in disciplinary infractions when sixth grade students enter the middle school. The realignment meant that the sixth grade would remain in the elementary schools. The realignment was not arbitrary, capricious or unreasonable.

I **CONCLUDE** that petitioner has failed to shoulder its burden of proving that it has a likelihood of prevailing on the merits of his claims.

Based on the foregoing, I **CONCLUDE** that petitioner has failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting a stay or emergent relief. Accordingly, I **ORDER** that petitioner's application for such relief be and hereby is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

July 11, 2012

DATE
ljb



KIMBERLY A. MOSS, ALJ

OAL DKT. NO. EDU 8554-12
AGENCY DKT. NO. 169-6/12

V.L. and C.L., on behalf of minor children,
R.S. and R.L.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE
CITY OF RAHWAY, UNION COUNTY

RESPONDENT.

:

:

:

:

:

:

COMMISSIONER OF EDUCATION

DECISION ON

APPLICATION FOR EMERGENT RELIEF

The record of this emergent matter – which included a digital recording of the hearing conducted at the Office of Administrative Law (OAL) on July 11, 2012 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs with the ALJ that petitioners have failed to satisfy the requirements necessary for the granting of emergent relief as set forth in *Crowe v DeGioia*, 90 N.J. 126 (1982); most notably, petitioners have failed to demonstrate irreparable harm or the likelihood of prevailing on the merits of their claim.

Accordingly, the recommended order of the OAL denying petitioners' application is hereby adopted. This case shall proceed at the OAL for such further proceedings as may be required to bring it to conclusion.

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/31/12

Date of Mailing: 8/01/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A 18A:6-9.1*).

ANABEL GUTIERREZ,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
CITY OF ELIZABETH, UNION	:	
COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

In August 2010, petitioner – a tenured teacher in respondent’s school district – appealed the decision of the respondent Board to terminate her employment through a reduction in force (RIF) in June 2010. Petitioner asserted that the Board terminated her employment in contravention of her tenure and seniority rights under *N.J.S.A. 18A:28-5 et seq.*, and sought reinstatement and back pay retroactive to the date of her termination.

The ALJ found that: petitioner failed to appear for a hearing in this matter on July 30, 2012, despite having received appropriate notice; attorney for the petitioner appeared at the hearing and confirmed on record her ongoing inability to reach her client, but asked for additional time to contact her client. The ALJ extended the time for petitioner to respond until August 2012, but heard nothing further until a letter from counsel on September 13, 2012 advising that petitioner was still unresponsive to all attempts at communication. Accordingly, the ALJ concluded that petitioner had abandoned this matter and ordered the case returned to the Department for appropriate disposition.

Upon careful and independent review, the Commissioner concurred with the ALJ’s findings and conclusions and, accordingly, adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 26, 2012

OAL DKT. NO. EDU 10197-10
 AGENCY DKT. NO. 335-8/10

ANABEL GUTIERREZ,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE	:	
CITY OF ELIZABETH, UNION	:	
COUNTY,	:	
RESPONDENT.	:	

Petitioner was a tenured teacher in respondent's district and one of hundreds of employees terminated by respondent in June 2010. She was also one of approximately eighty employees who appealed respondent's action as violative of the tenure laws in place at the time.

As explained in the Initial Decision of the Office of Administrative Law (OAL), due to the commonality of the issues in most of the above-referenced eighty petitions, they were managed together. Ultimately, a hearing was set for July 30, 2012 and each petitioner was so advised by a notice from the OAL – which notice warned that the petitioner's "APPEARANCE [WAS] MANDATORY. FAILURE TO APPEAR [WOULD] RESULT IN DISMISSAL OF [HER] PETITION." A copy of the notice sent directly to the instant petitioner is in the file for this case.

Notwithstanding the notice, petitioner did not appear at the July 30 hearing. Her counsel, who did appear, represented that she had attempted to contact petitioner to discuss the need for petitioner's appearance, but was unable to reach her.

As no explanation for her non-appearance was received from petitioner subsequent to the hearing, the Administrative Law Judge concluded that petitioner had abandoned her appeal and directed that the file be returned to the Department of Education pursuant to *N.J.A.C.* 1:1-14.4(a). The Commissioner similarly concludes that the appeal has been abandoned, and dismisses the petition for petitioner's failure to prosecute.

IT IS SO ORDERED.¹


COMMISSIONER OF EDUCATION

Date of Decision: 10/26/12

Date of Mailing: 11/01/12

¹ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

FAILURE TO APPEAR

OAL DKT. NO. EDU 10197-10

AGENCY DKT. NO. 335-8/10

ANABEL GUTIERREZ,

Petitioner,

v.

BOARD OF EDUCATION OF THE

CITY OF ELIZABETH,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld Cohen, attorneys)

Marvin Lehman, Esq., for respondent

Record Closed: September 14, 2012

Decided: September 14, 2012

BEFORE **ELLEN S. BASS, ALJ:**

STATEMENT OF THE CASE

Petitioner, Anabel Gutierrez, a teacher formerly employed by the Board of Education of the City of Elizabeth (the Board), asserts that the Board terminated her employment in contravention of her tenure and seniority rights under N.J.S.A. 18A:28-5 et seq. She seeks reinstatement and back pay retroactive to the date of her termination.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Gutierrez filed her appeal with the Commissioner of Education (the Commissioner) on August 9, 2010. An answer was filed on behalf of the Board, and the contested case was transmitted to the Office of Administrative Law (OAL), on September 23, 2010.

In or about June 2010, the Board terminated several-hundred employees pursuant to a reduction in force (RIF); more than eighty of these employees have pending petitions challenging their terminations as violative of the tenure laws. Discovery and settlement discussions relative to these cases have been the subject of bi-monthly status conferences between counsel and me. In the aftermath of the RIF, many of the petitioners were reinstated by the Board, or secured alternative employment. Counsel and I agreed that many claims might be ripe for withdrawal or settlement, and that by disposing of these claims we would be better able to efficiently focus upon the claims that presented factual or legal complexities. Counsel were directed to communicate with their clients and share with the Board a settlement proposal that fully outlined the back and pay benefits sought by each petitioner, or in the alternative, to promptly withdraw any claim that was no longer viable.

At several case management conferences counsel advised me of ongoing difficulties in securing the cooperation of some of the petitioners and of counsel's inability to obtain the information needed to make a settlement proposal to the Board, or to counsel a client that it was appropriate to withdraw his or her claim. Accordingly, in my order dated May 15, 2012, I directed counsel to supply me with a list of petitioners with whom they have been unable to communicate regarding the nature and extent of their claims. Gutierrez was among these petitioners, per correspondence from her attorney.

A notice of hearing was issued on June 5, 2012, requiring Gutierrez's appearance on July 30, 2012. Gutierrez was notified by the Clerk of the Office of Administrative Law, that her appearance was mandatory, and that a failure to appear

would result in dismissal of her petition. The notice was sent both to her attorney and directly to Gutierrez at the address on record via regular mail. The OAL received no return of the notice as undeliverable. Gutierrez did not appear on July 30, 2012.

Gutierrez's attorney appeared at the hearing and confirmed on the record her ongoing inability to reach her client. But counsel asked that I afford her and her client a bit more time to connect, as despite the fact that a notice had been sent directly to Gutierrez, due to an oversight counsel had neglected herself to write to Gutierrez and stress the importance of her active participation in pursuing her claim. I afforded counsel until August 15, 2012, to update me further, but stated clearly, on the record, that if Gutierrez remained non-communicative I would dismiss her case.

Having heard nothing further I wrote to counsel on August 21, 2012, and September 11, 2012, seeking an update. Via letter dated September 13, 2012, counsel advised that "I have attempted on numerous occasions to contact Anabel Gutierrez, but I have received no response from her."

ANALYSIS AND CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Gutierrez has abandoned this matter and that it should be returned to the transmitting agency.

N.J.A.C. 1:1-14.4(a) provides that, if, after appropriate notice, a party does not appear in any proceeding scheduled by a judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge may direct the Clerk to return the matter to the transmitting agency for appropriate disposition. Gutierrez failed to appear at the scheduled proceeding, and she failed to provide an explanation one day following her nonappearance. Accordingly, the Clerk should return this matter to the Department of Education.

ORDER

It is **ORDERED** that the Clerk return this matter to the Department of Education for appropriate disposition.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 14, 2012

DATE

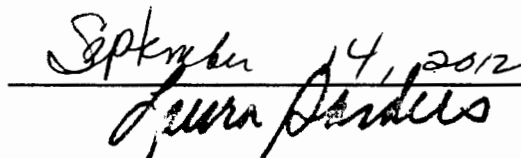
Date Received at Agency:

Date Mailed to Parties:

SEP 17 2012



ELLEN S. BASS, ALJ



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

IN THE MATTER OF THE TENURE :
 HEARING OF TAHGRYAH LOYAL, : COMMISSIONER OF EDUCATION
 SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
 OF IRVINGTON, ESSEX COUNTY. :
 _____ :

SYNOPSIS

Petitioning Board filed tenure charges of unbecoming conduct and other just cause against respondent, a tenured secretary, and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the allegations – which respondent has chosen not to deny – may be deemed admitted and are sufficient to warrant termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner and dismissed the respondent from her tenured secretarial position in petitioner's school district.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 26, 2012

AGENCY DKT NO. 289-9/12

IN THE MATTER OF THE TENURE	:	
HEARING OF TAHGRYAH LOYAL,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF IRVINGTON, ESSEX COUNTY.	:	
_____	:	

For the School District of Irvington, Ronald C. Hunt, Esq.

No appearance by or on behalf of Tahgryah Loyal

This matter was opened before the Commissioner of Education on September 25, 2012 through the certification of tenure charges of conduct unbecoming a public employee and other just cause by the School District of Irvington, Essex County, against Tahgryah Loyal – a tenured secretary. The District seeks Ms. Loyal’s dismissal from her position.

By notice dated September 25, 2012, the Commissioner directed respondent, via both certified and regular mail – the certified copy being returned to the Department as unclaimed but the regular mail copy being presumed delivered – to file an Answer to the tenure charges against her. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C. 6A:3-5.3 and 6A:3-5.4*, an individual against whom tenure charges are certified “*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*” and that failure to answer within the prescribed period would, absent granting of an extension for good cause shown, result in the charges being

deemed admitted by the charged employee. Because no reply has been received from respondent – or any attorney on her behalf – in response to the District’s charges, such charges against respondent are deemed to be admitted.

The Commissioner has reviewed the tenure charges certified against respondent by the District and the statement of evidence in support of those charges, which specify that:

1. On June 22, 2011, Respondent received a written reprimand due to her deletion of critical school records related to the payroll records of other employees, which Respondent was responsible for maintaining.
2. On May 18, 2012, a written reprimand was issued to Respondent[‘s] personnel file for her failure to adhere to Board policy/procedure with respect to her job duties.
3. Respondent was absent from May 2, 2012 through June 22, 2012.
4. During this period of time, Respondent claimed an illness as the basis for her absences, but respondent never provided medical documentation substantiating her illness.
5. Respondent utilized sick days; however, Respondent never provided medical documentation and the last thirteen (13) days of the school year, Respondent was AWOL and deemed to have abandoned her position.
6. During this period of time, Respondent advised her supervisor that she wanted to be terminated from her position with Petitioner.
7. On June 17, 2012, Respondent filed a claim for unemployment benefits with the NJ Department of Labor and Workforce Unemployment Insurance Office in Newark, NJ.
8. In her filing, Respondent stated the purported reason for filing for these benefits was that Petitioner had discharged her from employment.
9. Respondent’s conduct reflects her intent to abandon her position with Petitioner.

10. Petitioner never determined to discharge Respondent from her employment prior to Respondent requesting her termination and abandoning her position under the guise of an illness.

11. Due to Respondent's repeated instances of conduct unbecoming and her unequivocal abandonment of her position, Respondent's conduct represents just cause to terminate Respondent by way of tenure charges.

Noting that respondent has failed to respond to the allegations against her, the Commissioner finds that the District has demonstrated that respondent is guilty of conduct unbecoming and other just cause warranting the District's requested penalty of respondent's termination from her position.

Accordingly, summary decision is hereby granted to the District, and respondent Tahgryah Loyal is hereby terminated from her position with the School District of Irvington, Essex County effective with the filing date of this decision.¹

IT IS SO ORDERED.²



COMMISSIONER OF EDUCATION

Date of Decision: 10/26/12

Date of Mailing: 11/01/12

¹ Pursuant to *N.J.A.C.* 6A:3-1.14(c), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36. (*N.J.S.A.* 18A:6-9.1).

IN THE MATTER OF THE TENURE :
OF ADELE STAPLETON, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF :
JERSEY CITY, HUDSON COUNTY. :
_____ :

DECISION

SYNOPSIS

Petitioning Board filed tenure charges of excessive absenteeism and incapacity against respondent, a tenured teacher, and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the allegations – which respondent has chosen not to deny – may be deemed admitted and are sufficient to warrant termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured teaching position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for action against respondent's certificate as that body deems appropriate.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 26, 2012

AGENCY DKT. NO. 284-9/12

IN THE MATTER OF THE TENURE	:	
OF ADELE STAPLETON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	
JERSEY CITY, HUDSON COUNTY.	:	DECISION
_____	:	

For Petitioner, R. Scott Eveland, Esq.

No appearance by or on behalf of Respondent, Adele Stapleton.

This matter was opened before the Commissioner of Education on September 21, 2012 by way of certified tenure charges against respondent, a teacher in petitioner's district. Petitioner seeks respondent's removal for excessive absenteeism and incapacity.

By notice dated September 21, 2012, the Bureau of Controversies and Disputes (the Bureau) directed respondent to file an answer to the petition. The notice was sent to 31 Park Street, Jersey City, NJ – purportedly the last known address for respondent – via certified and regular mail. The certified mail receipt was signed and returned to the Bureau and the notice which was sent by regular mail was not. A copy of the notice was also sent to Philip Feintuch, Esq., who had represented respondent before the petitioning Board of Education.

The communication from the Bureau clearly provided respondent and her counsel with notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are filed shall have 15 days from receipt of the petition to file an answer. The Bureau has received neither an answer to the certified charges from the respondent nor from any attorney purporting to represent respondent.

The Commissioner concludes that the allegations – which respondent has chosen not to deny – may be deemed admitted, pursuant to *N.J.A.C. 6A:3-5.4(h)*, and are sufficient to warrant removal of respondent from her tenured position as a teacher.

IT IS THEREFORE ORDERED that summary decision shall be granted to the petitioner, and that respondent is dismissed from her tenured position in the district's employ as of the filing date of the within decision.¹ Further, this decision will be transmitted to the State Board of Examiners for its review and for any action that it may deem appropriate.


COMMISSIONER OF EDUCATION

Date of Decision: 10/26/12

Date of Mailing: 11/01/12

¹ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 3 (N.J.S.A. 18A:6-9.1)*.

OAL DKT. NO. EDU 13590-10
AGENCY DKT. NO. 612-10/10

CARIN HAABAK,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF WEST DEPTFORD,	:	
GLOUCESTER COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter, the parties' proposed Stipulation of Settlement and Order of Dismissal, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Commissioner approves the parties' settlement¹ and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

Date of Decision: 11/01/12

Date of Mailing: 11/01/12

¹ It is noted that the record of this matter contains a resolution of the West Deptford Board of Education approving petitioner's reinstatement in satisfaction of Term No. 1 of the parties' agreement.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13590-10

AGENCY DKT. NO. 612-10/10

CARIN HAABAK,

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF WEST DEPTFORD, GLOUCESTER COUNTY,**
Respondent.

James M. Carter, Esq., for petitioner

Alan R. Schmoll, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: September 13, 2012

Decided: September 13, 2012

BEFORE **LISA JAMES-BEAVERS, ALJ:**

STATEMENT OF THE CASE

Petitioner Carin Haabak alleged that the non-renewal of her employment was a violation of her tenure and seniority rights. The parties agreed to a settlement of all issues in dispute and prepared a Stipulation of Settlement and Order of Dismissal, which I have attached and fully incorporated herein.

PROCEDURAL HISTORY

On October 25, 2010, petitioner filed a verified petition against the respondent West Deptford Township Board of Education with the Department of Education Bureau of Controversies and Disputes alleging violation under the school laws. N.J.S.A. 18A:6-9. Respondent filed an answer on November 29, 2010 denying any violation of the school laws and requesting dismissal of the complaint. The Bureau transmitted the case to the Office of Administrative Law (OAL) where it was filed on December 7, 2010 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was scheduled for and held on July 8, 2011. On that date, the parties were able to come to an agreement, which they placed on the record. On July 16, 2012, I received a Stipulation of Settlement signed only by Alan Schmoll, Esq. Counsel was informed that both parties had to sign the Stipulation of Settlement. The record closed upon my receipt of a Stipulation of Settlement and Order of Dismissal signed by counsel to both parties on September 13, 2012.

FINDINGS OF FACT

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

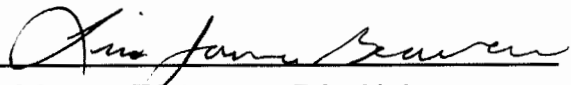
I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore

ORDER that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 13, 2012
DATE


LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

Date Mailed to Parties:

9/17/12

cmo

JAMES M. CARTER, ESQUIRE
HOFFMAN ♦ DIMUZIO
4270 Route 42
Turnersville, New Jersey 08012
Telephone: (856) 812-0714
Facsimile: (856) 262-3399
Attorneys for Petitioner

RECEIVED

2012 SEP 13 PM 11 59

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

CARIN HAABAK,

Petitioner,

vs.

WEST DEPTFORD TOWNSHIP
BOARD OF EDUCATION, KEVIN
KITCHENMAN, EDWARD J.
WASILEWSKI, JR., and
WILLIAM THOMPSON,

Respondents.

:
: OFFICE OF ADMINISTRATIVE LAW
: STATE OF NEW JERSEY
:
: AGENCY REF. NO. 612-10/10
: (FROM THE DEPARTMENT OF
: EDUCATION)
: Administrative Action
:
: STIPULATION OF SETTLEMENT
: AND ORDER OF DISMISSAL

THIS MATTER being brought before the Office of Administrative Law for a hearing on July 8, 2011, the Honorable Lisa H. James-Beavers, A.L.J., presiding; and the parties having amicably resolved all differences between them and having placed the terms of a settlement agreement on the record, the terms of which are set forth below; and for good cause shown;

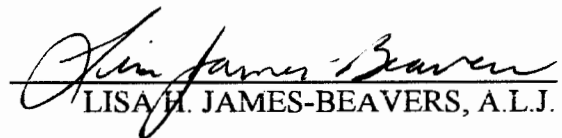
IT IS on this 13th September 2012, ~~March~~, 2012, ORDERED AND ADJUDGED, ~~nunc pro tunc~~, as follows:

1. Pending approval by the West Deptford Township Board of Education, Petitioner is reinstated as an employee of said Board, the effective date of which is anticipated to be July 18, 2012, or as soon thereafter as practicable.

2. Upon reinstatement, Petitioner shall be placed in the position of accounts payable clerk, with an approximate salary of \$45,000 per year. This is a non-bargaining unit, twelve-month position.
3. Petitioner shall retain her tenure as a clerk.
4. Petitioner shall receive longevity pay based upon her years of service with the Board.
5. Petitioner shall be entitled to vacation time based upon her years of service with the Board and shall be entitled to vacation time accrued for the 2011-2012 school year as if she were employed by the Board during the 2010-2011 school year.
6. Respondent shall pay Petitioner \$2000.
7. Upon reinstatement, Petitioner shall be entitled to the amount of sick time she had when she left the employ of the Board.

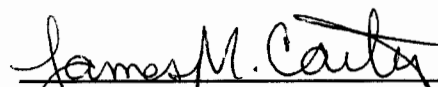
IT IS FURTHER ORDERED that a copy of this Stipulation shall be served upon counsel for the non-submitting party within seven days of its receipt by counsel for the submitting party.

IT IS FURTHER ORDERED that this matter be and hereby is DISMISSED.


LISA H. JAMES-BEAVERS, A.L.J.

I hereby consent to the entry
of the within order:


ALAN R. SCHMOLL, ESQUIRE
Attorney for Respondents


JAMES M. CARTER, ESQUIRE
Attorney for Petitioner

OAL DKT. NO. EDU 8623-11
AGENCY DKT. NO. 176-7/11

D.M., on behalf of minor child, D.M. :
PETITIONER, ;
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF MOORESTOWN,
BURLINGTON COUNTY, :
RESPONDENT. :

The record of this matter, the parties' proposed Settlement Agreement and Release, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 10/26/12

Date of Mailing: 11/01/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8623-11

AGENCY DKT. 176-7/11

D.M., O/B/O MINOR CHILD, D.M.,

Petitioner,

v.

TOWNSHIP OF MOORESTOWN

BOARD OF EDUCATION,

Respondent.

Peter M. Halden, Esq., for petitioner (Gerstein, Grayson & Cohen, attorneys)

Kathryn H. Acosta, Esq., for respondent (Comegno Law Group, attorneys)

Record Closed: August 30, 2012

Decided: September 14, 2012

BEFORE **JOHN R. FUTEY**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 25, 2011, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

Upon receipt of the certified copy of the Board of Education resolution on August 30, 2012, the hearing record closed.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 14, 2012
DATE

John R. Futey
JOHN R. FUTEY ALJ

Date Received at Agency:

Date Mailed to Parties:

/mamf/cb

9/17/12

EXHIBITS

Jointly submitted

- J-1 Settlement Agreement signed by Lynn E. Shugars, School Business Administration and D.M.
- J-2 Certified copy of the resolution of the Moorestown Township Board of Education received at the Office of Administrative Law on August 30, 2012.

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057
856.234.4114
856.234-4262 Fax
Attorneys for Respondent

8-1-11
for
5-18-11

BY: ARTHUR F. RISDEN, ESQUIRE
KIMBERLY A. SUKINIK, ESQUIRE

D.M. o/b/o D.M.

Petitioner,

v.

MOORESTOWN TOWNSHIP
BOARD OF EDUCATION,

Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

DOCKET NO: EDU-08623-2011
AGENCY REF: 176-7/11

**SETTLEMENT AGREEMENT AND
RELEASE**

This Settlement Agreement ("Agreement") is entered into by and between the Moorestown Township Board of Education ("Respondent" or "Board"), represented by the Comegno Law Group, P.C., Kimberly A. Sukinik, Esquire appearing, and DaWayne Montgomery, on behalf of his son, D.M., ("Petitioner"), represented by Gerstein, Grayson & Cohen, LLP, Peter M. Halden, Esquire appearing. Respondent and the Petitioner are collectively referred to as the "Parties."

WHEREAS, D.M. has been attending school in the Moorestown Township School District ("District") since September, 2010;

WHEREAS, in the Spring, 2011, a dispute arose as to D.M.'s eligibility to attend school in the District pursuant to *N.J.S.A. 18A:38-1 et seq.* and *N.J.A.C. 6A:22 et seq.*, which is the basis of the above-captioned matter;

WHEREAS, following good faith negotiations, the Parties wish to amicably resolve their dispute and to settle claims relating to or regarding D.M.'s eligibility to attend school in the District during the 2010-2011 school year;

WHEREAS, the Parties enter into this Settlement Agreement to outline the Parties' agreement and to release claims and counterclaims filed in the above-captioned matter regarding D.M.'s eligibility to attend school in the District during the 2010-2011 school year, without alleging or admitting deficiencies in their positions.

THE PARTIES HEREBY AGREE THAT:

1. Petitioner agrees, in resolution of the Board's Counterclaim, to pay to the Board the amount of \$6,000.00, which represents reimbursement for a portion of the tuition and fees for D.M.'s attendance and enrollment at Moorestown High School during the 2010-2011 school year. Petitioner shall make monthly payments of \$500, payable on the 1st of each month beginning ~~April~~ ^{July}, 2012. The total amount of such monthly payments shall be \$6,000.00. All equal monthly payments made under this Agreement to satisfy the agreed upon payment amount of \$6,000.00 shall be made by ~~March~~ ^{June} 1, 2013. *DM*

2. All payments pursuant to paragraph one (1) above shall be made payable to "Moorestown Township Board of Education" and sent to following address:

DM ^{ms.}
~~Mr.~~ Lynn Shugars, Business Administrator
803 N. Stanwick Avenue
Moorestown, New Jersey 08057

3. In the event Petitioner fails to make any one of the monthly payments within thirty (30) days of the first of the month such a payment is due, the Board may reduce \$ 10,449 (which represents the full tuition amount owed for the 2010-2011 school year from September to April 14, 2011) less any payments made by Petition at the time of default, to a judgment against Petitioner with a Court of appropriate jurisdiction. The Board shall be entitled to reasonable counsel fees in connection with a successful application to reduce this amount to a judgment following a failure to

make the monthly payment within thirty (30) days of the first of the month such a payment is due.

4. For the remainder of the 2011-2012 school year, D.M. shall continue to primarily reside at 475 North Church Street, Moorestown, New Jersey and shall continue attending Moorestown High School. The Board agrees that it will not seek to remove D.M. from the Board schools pursuant to N.J.S.A. 18A:38-1. et. seq. or otherwise declare D.M. a non-resident as long as he resides at 475 North Church Street, Moorestown, New Jersey.

5. Petitioner hereby dismisses, with prejudice, the claims in the above-captioned matter. The Board hereby dismisses its Counterclaim, with prejudice.

6. **Petitioner, upon the execution of this Agreement, fully and completely release the Board from any and all claims they have or may have, of any kind whether contractual, common law or statutory, including but not limited to all claims for injunctive relief, for alleged discrimination in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), §705(8), as well as recovery for damages, costs and attorneys fees under the Family Education Rights and Privacy Act, 20 U.S.C. §1232g, *et seq.*, 29 U.S.C. §794(a), 42 U.S.C. §1983, 42 U.S.C. §1988, 29 U.S.C. §705(20), the Individuals with Disabilities In Education Act ("IDEA"), 20 U.S.C. §1400, *et seq.*, the Americans with Disabilities Act, 42 U.S.C. §12132, *et seq.*, the Rehabilitation Act of 1973, 20 U.S.C. §7801, Title II of the Americans with Disabilities Act, 42 U.S.C. §12132, *et seq.*, N.J.A.C. 6A:14-1.1, *et seq.*, N.J.A.C. 6A:14-3.7, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000, *et seq.*, the Americans with Disabilities Act, 42 U.S.C. §621, *et seq.*, all as amended, any statutes of New Jersey including but not limited to the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.*, or any other claims which have been or could have been asserted by D.M., his Parents, or on the behalf of D.M. in any forum**

arising out of or connected with D.M.'s education by the Board, and from all liability whatsoever, whether known or unknown, or to the extent permitted by applicable law through the date this Agreement is executed. Nothing in this Agreement shall preclude Petitioner and D.M. from asserting any claims against the Board that may arise in the future, after the date of this Agreement.

7. This Agreement is dispositive of all issues in dispute between the Parties hereto, and is intended to constitute a final resolution of the dispute between the Parties. Each party shall be responsible for their own fees and costs, including physicians' and attorneys' fees and costs, incurred in connection with this dispute, to the extent applicable. Neither party shall be deemed a prevailing party in this matter.

8. This Agreement is not meant to be construed as an admission of liability as to any party. Respondent acknowledges and understands that Petitioner does not make any admission of liability by agreeing to withdraw his Petition of Appeal filed against the Board. Petitioner acknowledges and understands that Respondent does not make any admission of liability by agreeing to withdraw its Answer and Counterclaim.

9. In entering into this Agreement, Petitioner and Respondent represent that they each have relied upon the legal advice of their respective counsel, who is the attorney of their choice and that the terms of this Agreement and Release have been completely read and explained to each party. The Parties acknowledge that they are satisfied with the representation provided. The Parties fully understand and voluntarily accept the terms of this Agreement and Release. The Parties enter into this Agreement knowingly, without coercion or other improper influence, pressure, or duress.

10. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof, and supersedes all prior written or oral, as well as all contemporaneous oral agreements, understandings, and negotiations;

11. This Agreement shall be interpreted, enforced, and governed under the laws of the State of New Jersey. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the Parties.

12. This Agreement is subject to the approval of the Board.

13. This Agreement may only be amended by way of a writing signed by all Parties and counsel.

14. The Parties acknowledge that they have had the opportunity to review the terms of this Agreement with counsel and are satisfied with the representation provided. The Parties enter into this Agreement knowingly, without coercion or other improper influence.

15. The terms of this Agreement shall remain confidential and the terms of same shall not be disclosed to anyone other than Petitioner's attorney, or tax accountant, or by the Board unless disclosure is required or permitted by law.

MOORESTOWN TOWNSHIP BOARD OF
EDUCATION

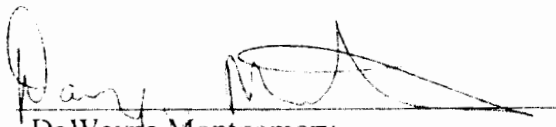
BY:

Lynn E. Shugars, School Business
Administrator

Dated:

PETITIONER DAWAYNE MONTGOMERY

BY:



DaWayne Montgomery

Dated: 5-18-17

MOORESTOWN TOWNSHIP PUBLIC SCHOOLS

Administration Building, 803 North Stanwick Road
Moorestown, New Jersey 08057
(856) 778-6600 Ext. 18150
Fax: (856) 235-0961
E-mail lsugars@mtps.com

Lynn E. Shugars
Business Administrator/Board Secretary

August 22, 2012

On August 21, 2012, the Moorestown Township Board of Education approved the following resolution:

B. Finance and Business

5. Student Settlement Agreement

MOTION:

I recommend the Board approve the following resolution:

Resolved by the Moorestown Township Board of Education to adopt and approve the Settlement Agreement between Student #7000597 and the Moorestown Township Board of Education attached as Exhibit #13-20. Approval of this resolution indicates that Mrs. Lynn E. Shugars, Business Administrator/Board Secretary for the Board, is authorized to execute the Settlement Agreement and Release on behalf of the Board, and by executing the Settlement Agreement and Release, the Board acknowledges that its Counterclaim will be dismissed.

Moved by: Mr. Simeone

Second: Mrs. Zajac

Vote: All Ayes

This is a certified copy of the minutes of the Moorestown Township Board of Education meeting held on August 21, 2012.


Lynn E. Shugars
Board Secretary

2012 AUG 30 A 10:51

#425-12

OAL DKT. NO. EDU 1190-12
AGENCY DKT. NO. 3-1/12

G.H., on behalf of minor children, A.H
and G.H.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE
TOWNSHIP OF MOORESTOWN,
BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the parties' proposed Settlement Agreement and Release, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

Date of Decision: 10/26/12

Date of Mailing: 11/02/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1190-12

AGENCY DKT. NO. 3-1/12

**G.H. ON BEHALF OF MINOR
CHILDREN, A.H. AND G.H.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF MOORESTOWN,
BURLINGTON COUNTY,**

Respondent.

John O. Poindexter, III, Esq., for petitioner

Kathryn H. Acosta, Esq. for respondent (Comegno Law Group, attorneys)

Record Closed: September 20, 2012

Decided: September 21, 2012

BEFORE **ROBERT BINGHAM II, ALJ:**

This matter was transmitted to the Office of Administrative Law on January 25, 2012, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement and Release indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the Settlement Agreement and Release (Exhibit J-1).
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 21, 2012
DATE



ROBERT BINGHAM II, ALJ

Date Received at Agency:

Date Mailed to Parties:

9/25/12

/bdt

APPENDIX

EXHIBITS

Joint:

J-1 Settlement Agreement and Release

For Petitioner:

None

For Respondent:

R-1 Moorestown Township Public Schools Board Minutes

Jun 21 2012 3:33PM HP LASERJET FAX

p.2

J-1
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2012 SEP 20 A 11: 04

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057
856.234.4114
856.234.4262 Fax
Attorneys for Respondent

BY: ARTHUR F. RISDEN, ESQUIRE
KATHRYN H. ACOSTA, ESQUIRE

G.H. o/b/o A.H. and G.H.

Petitioners,

v.

MOORESTOWN TOWNSHIP
BOARD OF EDUCATION,

Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

DOCKET NO: EDU-01190-2012-S
AGENCY REF: 3-1/12

SETTLEMENT AGREEMENT AND
RELEASE

This Settlement Agreement ("Agreement") is entered into by and between the Moorestown Township Board of Education ("Respondent" or "Board"), represented by the Comegno Law Group, P.C., Kathryn H. Acosta, Esquire appearing, and Gloria Hall, on behalf of her children, A.H. and G.H., ("Petitioner"), represented by John O. Poindexter, III. Respondent and the Petitioner are collectively referred to as the "Parties."

WHEREAS, A.H. and G.H. have been attending school in the Moorestown Township School District ("District") since September, 2011;

WHEREAS, in the Fall, 2011, a dispute arose as to A.H. and G.H.'s eligibility to attend school in the District pursuant to *N.J.S.A. 18A:38-1 et seq.* and *N.J.A.C. 6A:22 et seq.*, which is the basis of the above-captioned matter;

WHEREAS, following good faith negotiations, the Parties wish to amicably resolve their dispute and to settle all claims relating to or regarding A.H. and G.H.'s eligibility to attend school in the District during the 2011-2012 school year;

SA

Jun 21 2012 3:33PM HP LASERJET FAX

P. 3

WHEREAS, the Parties enter into this Agreement to set forth the Parties' agreement and to release claims and counterclaims filed in the above-captioned matter regarding A.H. and G.H.'s eligibility to attend school in the District during the 2011-2012 school year, without conceding or admitting deficiencies in their positions.

THE PARTIES HEREBY AGREE THAT:

1. For the remainder of the 2011-2012 school year, A.H. and G.H. shall continue to reside at 215 E. Camden Avenue, Apartment D-4, Moorestown, New Jersey, and A.H. shall continue attending William Allen Middle School, and G.H. shall continue attending Moorestown Township High School. The Board agrees that it will not seek to remove A.H. and G.H. from the Board's schools pursuant to *N.J.S.A. 18A:38-1, et. seq.* or otherwise declare A.H. and/or G.H. non-residents of the District and/or seek reimbursement of tuition so long as they reside at 215 E. Camden Avenue, Apartment D-4, Moorestown, New Jersey.

2. Simultaneous with the execution of this Agreement, Petitioner shall, on behalf of A.H. and G.H., complete the "State of New Jersey - Department of Education Student Transfer Card," and any other documentation or form which may be reasonably required by the Board, affirming that following the last school day of the 2011-2012 school year, neither A.H. nor G.H. will attend school in the District based upon Petitioner's representation that she, A.H., and G.H. are moving out of the District.

3. Petitioner hereby agrees to dismiss, with prejudice, any and all claims/defenses related to her Petition of Appeal in the above-captioned matter.

4. The Board hereby agrees to dismiss, with prejudice, its Answer and Counterclaim in the above-captioned matter.

Jun 21 2012 3:33PM HP LASERJET FAX

P. 4

5. Petitioner, upon the execution of this Agreement, fully and completely releases the Board from any and all claims they have or may have, of any kind whether contractual, common law or statutory, including, but not limited to, all claims for injunctive relief, for alleged discrimination in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), § 705(8), as well as recovery for damages, costs and attorney's fees under the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g, *et seq.*, 29 U.S.C. § 794(a), 42 U.S.C. § 1983, 42 U.S.C. § 1988, 29 U.S.C. § 705(20), the Individuals with Disabilities In Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*, the Americans with Disabilities Act, 42 U.S.C. § 12132, *et seq.*, the Rehabilitation Act of 1973, 20 U.S.C. § 7801, Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, *et seq.*, N.J.A.C. 6A:14-1.1, *et seq.*, N.J.A.C. 6A:14-3.7, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq.*, the Americans with Disabilities Act, 42 U.S.C. § 621, *et seq.*, all as amended, any statutes of New Jersey including, but not limited to, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.*, or any other claims which have been or could have been asserted by A.H. and/or G.H., their Parents, or on the behalf of A.H. and/or G.H., in any forum arising out of or connected with A.H. and/or G.H.'s education by the Board, and from all liability whatsoever, whether known or unknown, or to the extent permitted by applicable law through the date this Agreement is executed.

6. This Agreement is dispositive of all issues in dispute between the Parties hereto, and is intended to constitute a final resolution of the dispute between the Parties. Each party shall be responsible for their own fees and costs, including attorney's fees and costs, incurred in connection with this dispute, to the extent applicable. Neither party shall be deemed a prevailing party in this matter.

Jun 21 2012 3:33PM HP LASERJET FAX

P. 5

7. This Agreement is not meant to be construed as an admission of liability as to any party. Respondent acknowledges and understands that Petitioner does not make any admission of liability by agreeing to withdraw her Petition of Appeal filed against the Board. Petitioner acknowledges and understands that Respondent does not make any admission of liability by agreeing to withdraw its Answer and Counterclaim.

8. In entering into this Agreement, Petitioner and Respondent represent that they each have relied upon the legal advice of their respective counsel, who is the attorney of their choice and that the terms of this Agreement have been completely read and explained to each party. The Parties acknowledge that they are satisfied with the representation provided. The Parties fully understand and voluntarily accept the terms of this Agreement. The Parties enter into this Agreement knowingly, without coercion or other improper influence, pressure, or duress.

9. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof, and supersedes all prior written or oral, as well as all contemporaneous oral agreements, understandings, and negotiations;

10. This Agreement shall be interpreted, enforced, and governed under the laws of the State of New Jersey. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the Parties.

11. This Agreement is subject to the approval of the Court and the Board, to the extent such approval is required by law.

12. This Agreement may only be amended by way of a writing signed by all Parties and counsel.

Jun 21 2012 3:34PM HP LASERJET FAX

p.6

13. The terms of this Agreement shall remain confidential, and the terms of same shall not be disclosed to anyone other than as required or permitted by law.

RESPONDENT,
MOORESTOWN TOWNSHIP BOARD OF
EDUCATION

PETITIONER,
GLORIA HALL

BY: Lynn E. Shugars BY: Gloria Hall
Lynn E. Shugars, School Business
Administrator Gloria Hall

Dated: 6-25-12

Dated: 6-21-12

~~SH~~

R-1

MOORESTOWN TOWNSHIP PUBLIC SCHOOLS

*Administration Building, 803 North Stanwick Road
Moorestown, New Jersey 08057
(856) 778-6600 Ext. 18150
Fax: (856) 235-0961
E-mail lshugars@mtps.com*

RECEIVED

2012 SEP 20 A 11:04

**STATE OF NEW JERSEY
OFFICE OF ADMIN LAW**

Lynn E. Shugars
Business Administrator/Board Secretary

June 26, 2012

On June 25, 2012, the Moorestown Township Board of Education approved the following resolution:

1. Student Settlement Agreement

MOTION:

I recommend the Board approve the following resolution:

Resolved by the Moorestown Township Board of Education to adopt and approve the Settlement Agreement between Students #5000478 and #4000993 and the Moorestown Township Board of Education attached as Exhibit #12-321.

Moved by: Mrs. Alexandroff Second: Mr. Powell Vote: All Ayes

This is a certified copy of the minutes of the Moorestown Township Board of Education meeting held on June 25, 2012.



Lynn E. Shugars
Board Secretary

#426-12

OAL DKT. NOS. EDU 00186-12 & EDU 00211-12
 AGENCY DKT. NOS. 336-11/11 & 339-11/11
 (CONSOLIDATED)

BOARD OF EDUCATION OF THE :
 WEST ESSEX REGIONAL SCHOOL DISTRICT, :
 ESSEX COUNTY, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
 OF WEST ORANGE, ESSEX COUNTY AND :
 ESSEX COUNTY SUPERINTENDENT OF :
 SCHOOLS, :

RESPONDENTS. :

AND :

BOARD OF EDUCATION OF THE BOROUGH :
 OF ROSELAND, ESSEX COUNTY, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP :
 OF WEST ORANGE, ESSEX COUNTY AND :
 M.M. ON BEHALF OF MINOR CHILDREN :
 K.M., M.M. AND T.M., :

RESPONDENTS. :

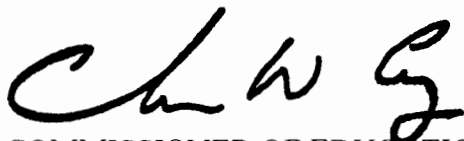
The record of this matter, the parties' proposed Settlement Agreement and Release, and the Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, it is noted that Term #10 of this agreement specifies: "This agreement is subject to ratification by the West Essex Board, the Roseland Board and the

West Orange Board....” The record of this matter, however, only contains a ratification resolution of the West Essex Board. Therefore, the Commissioner is compelled to reject the parties’ agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for supplementation of the record with the remaining two requisite Board resolutions.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

Date of Decision: 10/26/12

Date of Mailing: 11/02/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
CONSOLIDATED APPEALS

**BOARD OF EDUCATION OF THE
WEST ESSEX REGIONAL SCHOOL DISTRICT,
ESSEX COUNTY,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF WEST ORANGE, ESSEX COUNTY AND
ESSEX COUNTY SUPERINTENDENT OF
SCHOOLS,**

Respondents.

OAL DKT. NO. EDU 00186-12

AGENCY DKT. NO. 336-11/11

**BOARD OF EDUCATION OF THE BOROUGH
OF ROSELAND, ESSEX COUNTY,**

Petitioner,

v.

**BOARD OF THE EDUCATION OF THE TOWNSHIP
OF WEST ORANGE, ESSEX COUNTY AND M.M.
ON BEHALF OF MINOR CHILDREN K.M.,
M.M. AND T.M.,**

Respondents.

OAL DKT. NO. EDU 00211-12

AGENCY DKT. NO. 339-11/11

Stephen R. Fogarty, Esq., for West Essex Regional School District Board of
Education (Fogarty and Hara, attorneys)

Bruce W. Padula, Esq., for Boro of Roseland Board of Education (Cleary Giacobbe Alfieri Jacobs, attorneys)

Stephen J. Christiano, Esq., for Board of Education of West Orange (Stephen J. Christiano, Board Attorney, attorneys)

Geoffrey N. Stark, Deputy Attorney General, for the Essex County Superintendent of Schools (Jeffrey S. Chiesa, Attorney General of New Jersey, attorneys)

M.M., no appearance

Record Closed: September 17, 2012

Decided: September 18, 2012

BEFORE **GAIL M. COOKSON**, ALJ:

These matters arose as appeals by West Essex Regional School District Board of Education and the Boro of Roseland Board of Education from a determination of the Essex County Superintendent of Schools entered on or about October 18, 2011, that the M. family was homeless pursuant to N.J.A.C. 6A:17-2.3. As a result of that determination, the three minor children in the M. family, notwithstanding that they were then attending schools in West Orange, were the financial responsibility of West Essex and Roseland, the last districts in which they had established residency.

The matters were transmitted to the Office of Administrative Law (OAL) on or about January 5, 2012, for consolidation and hearing. I scheduled several telephonic conference calls with the parties in order to discuss and manage several complex discovery, witness and proof issues. On May 21, 2012, the consolidated matters proceeded with plenary hearings. At the conclusion of the hearing, counsel requested time to conduct some further settlement discussions. Accordingly, I agreed to adjourn temporarily any remaining hearing dates on my calendar.

On September 17, 2012, counsel for the West Essex Regional School District Board of Education forwarded a fully executed Settlement Agreement and Release between the parties and requested that if approved, I incorporate same into an order. The settlement represents the agreement of the three school districts as to the allocation of financial responsibility for the M. family for the one year of alleged homelessness, May 3, 2011, through May 3, 2012. No other interested party is impacted by the agreement and no child will be transferred from their present school as a result of this agreement.

I have reviewed the record and the terms of Settlement Agreement and Release and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 18, 2012

DATE

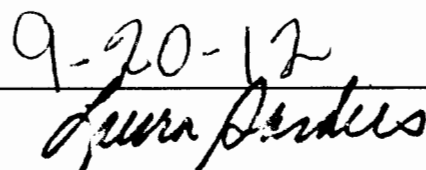
Date Received at Agency:

Date Mailed to Parties:

id

SEP 20 2012


GAIL M. COOKSON, ALJ


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
(201) 791-3432 Telecopier
Attorneys for Petitioner,
West Essex Regional School District
Board of Education

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OFFICE OF ADMIN LAW

WEST ESSEX REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION

Petitioner,

v.

TOWNSHIP OF WEST ORANGE BOARD
OF EDUCATION AND ESSEX COUNTY
SUPERINTENDENT OF SCHOOLS,

Respondents.

OFFICE OF ADMINISTRATIVE
LAW
(CONSOLIDATED)

DOCKET NO. EDU 00186-2012N

**SETTLEMENT AGREEMENT AND
RELEASE**

BOROUGH OF ROSELAND BOARD
OF EDUCATION, ESSEX COUNTY,

Petitioner,

v.

WEST ORANGE PUBLIC SCHOOLS,
AND M.M. ON BEHALF OF MINOR
CHILDREN, K.M., M.M., AND T.M.,

Respondents.

THIS SETTLEMENT AGREEMENT AND RELEASE (hereinafter referred
to as the "Agreement") is made between the West Essex Regional

High School District Board of Education (hereinafter referred to as the "West Essex Board"), with offices located at West Greenbrook Road, in the Borough of North Caldwell, State of New Jersey, the Roseland School District Board of Education (hereinafter referred to as the "Roseland Board"), with offices located at Passaic Avenue, in the Borough of Roseland, State of New Jersey, and the West Orange School District Board of Education (hereinafter referred to as the "West Orange Board"), with offices located at Eagle Rock Avenue, in the Township of West Orange, State of New Jersey (hereinafter collectively referred to as the "Parties").

WHEREAS, the M family moved from a residence located at 493 Eagle Rock Avenue, Roseland, New Jersey to a residence located at 23 McKinley Avenue, West Orange, New Jersey and registered their three (3) children, K.M., M.M. and T.M. (hereinafter collectively referred to as the "M children"), in the West Orange School District on or about May 3, 2011; and

WHEREAS, on October 24, 2011, the Executive County Superintendent, Essex County (hereinafter referred to as the "ECS"), issued a decision finding that the M family was homeless under N.J.A.C. 6A:17-2.3; and

WHEREAS, the ECS further concluded that, since Roseland was the last district in which the M children had permanent residence, the West Essex Board was responsible for the

educational costs for K.M., a seventh (7th) grader, and the Roseland Board was responsible for the educational costs for M.M. and T.M.; and

WHEREAS, the West Essex Board challenged the ECS's decision by filing a Verified Petition of Appeal with the Commissioner of Education of the State of New Jersey (hereinafter referred to as the "Commissioner") on or about November 14, 2011; and

WHEREAS, the Roseland Board challenged the ECS's decision by filing a Petition of Appeal with the Commissioner on or about November 17, 2011; and

WHEREAS, on May 21, 2012, a hearing was held before Administrative Law Judge Gail Cookson, who consolidated these matters at the outset of the hearing under West Essex Regional School District Board of Education v. Township of West Orange Board of Education and Essex County Superintendent of Schools, bearing Docket No. EDU 00186-2012N; and

WHEREAS, the Parties reached an agreement on the first day of hearing and are desirous of resolving this matter without resorting to further litigation and bearing additional costs associated therewith; and

WHEREAS, the M family has resided continuously at the McKinley Avenue address since on or about May 3, 2011, and has not resided at any other address during that time period.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the Parties agree as follows:

1. The West Orange Board agrees to be responsible for educational costs in the amount of Eighty-Nine Thousand Two Hundred Twenty-Four Dollars and Thirty Cents (\$89,224.30), which represents fifty-five percent (55%) of the annual tuition costs to educate the three (3) M children from May 3, 2011 through May 3, 2012. The West Essex Board agrees to reimburse the West Orange Board for payment of educational costs in the amount of Twenty-Four Thousand Three Hundred Thirty-Three Dollars and Ninety Cents (\$24,333.90), which represents forty-five percent (45%) of the annual tuition costs to educate K.M. from May 3, 2011 through May 3, 2012. The Roseland Board agrees to reimburse the West Orange Board for payment of educational costs in the amount of Forty-Eight Thousand Six Hundred Sixty-Seven Dollars and Eighty Cents (\$48,667.80), which represents forty-five percent (45%) of the annual tuition costs to educate M.M. and T.M. from May 3, 2011 through May 3, 2012.

2. For each of the M children, the annual tuition costs for the period from May 3, 2011 through May 3, 2012 outlined in Paragraph 1 of this Agreement include, and are limited to, the per pupil cost, the cost of a one-to-one instructional aide, related services and the cost of Camp Hope tuition for June and July of 2011. It is expressly agreed that

the payments by the West Essex Board and the Roseland Board as set forth in this Agreement represent their entire obligation, financial or otherwise, for the M children's educational program in the West Orange School District.

3. The West Essex Board and the Roseland Board shall forego application for any extraordinary aid so that the West Orange Board may file for any such aid to which it may be entitled.

4. Pursuant to N.J.S.A. 18A:38-1(d), the M family shall be deemed to be domiciled within the West Orange School District as of May 4, 2012, and the West Orange Board shall bear full responsibility for all educational costs for the M children from that date onward for as long as they continue to be domiciled within the West Orange School District.

5. The West Essex Board and the Roseland Board shall withdraw their respective petitions in this matter with prejudice.

6. Each of the Parties named herein hereby release each other, individually and collectively, the agents, servants and employees of each party, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought,

arising under or relating to the education of the M children through the date of this Agreement.

7. All Parties shall bear their own attorneys' fees and costs for the entirety of any matter or matters related to the subject matter of this Agreement.

8. The Parties recognize that they sign this Agreement as their own voluntary act and deed, and they fully understand the duties and obligations enumerated herein.

9. This Agreement may be signed in counterparts, which, taken together, shall constitute but a single document when executed by all parties. This Agreement shall not be effective until such time as it has been duly authorized and executed by all Parties.

10. This Agreement is subject to ratification by the West Essex Board, the Roseland Board and the West Orange Board and is without prejudice to any party if the terms are not agreed upon.

11. The Parties agree to submit this Agreement to an Administrative Law Judge for approval in full settlement of all issues pertaining to the educational costs for the M children. Nothing contained herein shall be interpreted as preventing the Parties from filing a lawsuit to enforce the terms of this Agreement. If approved, the Agreement shall be incorporated into a final Order by an Administrative Law Judge.

12. The terms of this Agreement represent the compromise of disputed claims between the Parties. This Agreement shall not constitute, be interpreted, construed, or used as evidence of any admission of fact, law, responsibility, or liability on the part of any party.

13. This Agreement shall be construed and enforced in accordance with the laws of the State of New Jersey.

14. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective party.

15. Should any part, term or provision of this Agreement be declared or determined by a Court of competent jurisdiction, applying New Jersey law, to be illegal, invalid or unenforceable, the legality, validity or enforceability of the remaining parts, terms or provisions shall not be affected thereby.

16. This Agreement constitutes the entire understanding of the Parties hereto and shall supersede any prior agreements between the Parties with respect to its subject matter. Further, there are no representations, warranties, covenants or undertakings other than those expressly set forth herein. The Parties acknowledge and agree that they are not relying upon any oral statements, representations, promises, or expectations which are not expressly and explicitly set forth in

this Agreement, which alone fully and completely expresses all agreements between the Parties.

17. A modification or waiver of any of the provisions of this Agreement shall be effective and enforceable, only if made in writing and executed by all Parties with the same formality as this Agreement.

18. The terms and conditions set forth herein shall be deemed severable. If any clause or provision contained herein shall be held unenforceable by a court of competent jurisdiction, it shall not affect the validity of any other clause or provision, all of which shall continue in full force and effect.

19. The Parties recognize that each has been represented by legal counsel and that they sign this within Agreement as their own voluntary act and deed, and that they understand the duties and obligations enumerated herein. The Parties further state that they are fully satisfied with the legal representation provided by their respective counsel.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the year and date set forth below.

WITNESS:

WEST ESSEX REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION

BY: 

MICHAEL FALKOWSKI
Business Administrator/
Board Secretary

BY: 

MARIE ROSENBERG
Board President

Dated: 9/11/12

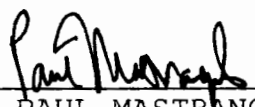
Dated: 9/11/12

WITNESS:

BOROUGH OF ROSELAND BOARD
OF EDUCATION

BY: 

JOSEPH BELLINO
Interim Business Administrator/
Board Secretary

BY: 

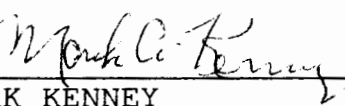
PAUL MASTRANGELO
Board President

Dated: 8-20-12

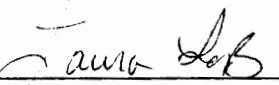
Dated: 7/16/12

WITNESS:

TOWNSHIP OF WEST ORANGE BOARD
OF EDUCATION

BY: 

MARK KENNEY
Board Secretary

BY: 

LAURA LAB
Board President

Dated: 6/20/12

Dated: 6/20/12

Board of Education
The West Essex Regional School District – September 10, 2012

West Essex Regional Board of Education

CURRICULUM/SPECIAL EDUCATION – September 10, 2012

The following curriculum/special education motions are made at the recommendation of the Superintendent of Schools:

CONSENT AGENDA

Anything placed on this agenda, Items 1-4, will be voted upon in one motion.

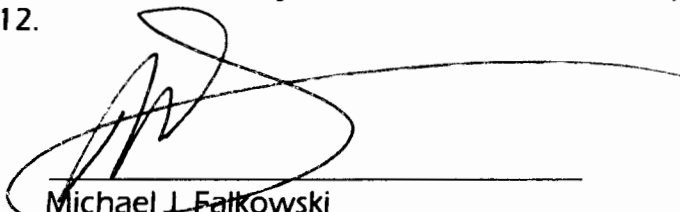
Motion by Mrs. Storey Seconded by Mrs. Candido to approve the following motions:

1. BE IT RESOLVED by the West Essex Regional High School District Board of Education (hereinafter referred to as the "Board") that the terms, stipulations and conditions as established in the Settlement Agreement and Release, Docket No. EDU 00186-2012N, which is annexed to this Resolution, are hereby adopted and approved by the Board. The Board President and Business Administrator/Board Secretary are hereby authorized and directed to execute the attached Settlement Agreement and Release and any other documents necessary to effectuate said Settlement Agreement and Release.

ROLL CALL: Yes: Mr. Antonucci, Ms. Bachmann, Mrs. Candido,
 Mrs. Gerken, Mr. Laible, Mr. Rubinich, Mrs. Storey
 and President Rosenberg
 No: None
 Abstain: None
 Absent: Mrs. Smith

I, Michael J. Falkowski, Business Administrator/Board Secretary of The Board of Education of the West Essex Regional School District in the County of Essex, State of New Jersey, HEREBY CERTIFY that the foregoing annexed extract from the minutes of a meeting of the Board duly called and held on September 10, 2012 has been compared by me with the original minutes as officially recorded in my office in the Minute Book of the Board and is a true, complete and correct copy thereof and of the whole of the original minutes so far as they relate to the subject matters referred to in the extract.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the Board this 11th day of September, 2012.



Michael J. Falkowski
Business Administrator/Board Secretary

(SEAL)

VIRGINIA WALLACE,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF MOUNT OLIVE,	:	
MORRIS COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

In 2005, the petitioner filed an appeal which asserted that the Board failed to pay full salary without loss of sick time for an injury sustained in the course of her employment. The matter was placed on the inactive list pending resolution of a related Worker's Compensation case. On August 27, 2012, the ALJ communicated with petitioner's counsel and requested a status update.

On September 20, 2012, the ALJ's assistant was informed by an assistant in counsel's office that there would be no response to the August 27, 2012 letter. Accordingly, the ALJ concluded that petitioner has abandoned this matter, and ordered that the matter be returned to the Department of Education.

The Commissioner concurred with the ALJ's finding, and determined that the case must be dismissed for failure to prosecute. Accordingly, the recommended decision of the OAL was adopted and the matter was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 12192-05
AGENCY DKT. NO. 213-8/05

VIRGINIA WALLACE,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF MOUNT OLIVE,	:	
MORRIS COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that – as a consequence of petitioner’s failure to respond to numerous requests of the ALJ for an update on the status of this matter – it is appropriately dismissed for failure to prosecute.

Accordingly, the recommended decision of the OAL is adopted and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 11/01/12

Date of Mailing: 11/02/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

FAILURE TO APPEAR

OAL DKT. NO. EDU 12192-05

Agency No. 213-8/05

VIRGINIA WALLACE,

Petitioner,

v.

**BOARD OF EDUCATION OF
THE TOWNSHIP OF MOUNT
OLIVE, MORRIS COUNTY,**

Respondent.

Nancy I. Oxfeld, Esq., for Petitioner (Oxfeld Cohen, attorneys)

Mark H. Zitomer, Esq., for Respondent (Schenck Price Smith & King, attorneys)

Record Closed: September 24, 2012

Decided: September 24, 2012

BEFORE **JESSE H. STRAUSS, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Virginia Wallace asserts that the Board of Education of the Township of Mount Olive (District) has failed to pay full salary without loss of sick time for an injury sustained in the course of her employment (SLI claim).

After petitioner filed a request for a hearing before the Office of Administrative Law (OAL), the Department of Education Bureau of Controversies and Disputes transmitted the matter to the OAL pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where, on November 7, 2005, it was filed for hearing and determination as a contested case. The matter was placed and remained on the Inactive List of the OAL for successive periods of time pending the resolution of a related Workers Compensation case. At the end of each period on the Inactive List, counsel for petitioner would respond to a request for an update on the status of the Workers Compensation matter advising that the Workers Compensation matter had not yet been resolved.

FINDINGS OF FACT

I **FIND** the following facts:

1. On August 27, 2012, I communicated with petitioner's counsel and reminded her that this petition related all the way back to August 23, 2005. I requested an update on the status of the matter. I further advised, that, "if I receive no communication within ten days, I will consider this matter withdrawn for a failure to proceed."
2. I received no response within the ten days.
3. In addition to the August 27, 2012, letter, my assistant telephoned counsel's office and left voice mail messages on four occasions in September 2012, asking for a status on this matter. None were answered.
4. On September 20, 2012, an assistant in counsel's office advised my assistant that counsel did not intend to respond to the August 27 letter.

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that petitioner has abandoned this matter and that it should be returned to the transmitting agency.

N.J.A.C. 1:1-14.4(a) provides that, if, after appropriate notice, a party does not appear in any proceeding scheduled by a judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge may direct the Clerk to return the matter to the transmitting agency for appropriate disposition. As Petitioner has taken no action to fulfill her obligations related to the completion of her appeal including an ordered response to my August 27, 2012, letter, I **CONCLUDE** that Petitioner has abandoned this matter. Accordingly, the Clerk should return this matter to the Department of Education.

ORDER

It is **ORDERED** that the Clerk return this matter to the Department of Education for appropriate disposition.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 27, 2012
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency:

9/24/12
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:

SEP 26 2012

id



State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JOHN CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHRISTOPHER D. CERF
Commissioner

November 2, 2012

Sheldon H. Pincus, Esq.
Bucceri & Pincus
300 Broadacres Drive
Suite 210
Bloomfield, N.J. 07003-3153

Adam S. Herman, Esq.
Adams Stern Gutierrez & Lattiboudere, LLC
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102

Re: *In the Matter of the Tenure Hearing of Jason Newby, School District of the Township of Hillside, Union County. Agency Dkt. No. 256-9/12.*

Dear Counsel,

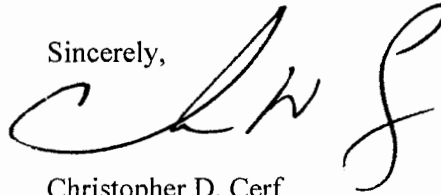
I have reviewed the materials filed in connection with respondent Jason Newby's Motion to Dismiss the tenure charges filed by the Board of Education. In his papers, the respondent argues that the Commissioner does not have jurisdiction over this matter because the respondent is a security guard and there are no educational statutes that provide tenure to security guards. On the other hand, the Board contends that the respondent acquired tenure with the Board contractually, and as such it must file tenure charges with the Commissioner before it can terminate the respondent.

Upon review and consideration of the submissions, I find that there is no statutory entitlement for security guards under the tenure laws, and as such, this dispute is not properly before the Commissioner of Education. It is well settled that the Commissioner's jurisdiction is limited to controversies and disputes that arise under the school laws. *N.J.S.A. 18A:6-9*. The dispute in this case involving the potential termination of the respondent's employment requires contract interpretation and an evaluation of the collective bargaining agreement, which does not fall under the Commissioner's jurisdiction. See, *South Orange-Maplewood Ed. Ass'n. v. Board of Ed. of the School Dist. of South Orange and Maplewood*, 146 N.J. Super 457 (App. Div. 1977); *Newark Teachers Union v. Board. of Ed. of the City of Newark, New Jersey*, 149 N.J. Super 367 (Ch. Div. 1977). Moreover, in the absence of a statute authorizing tenure for a group

of employees, jurisdiction cannot be conferred upon the Commissioner through a claim of contractual tenure.¹

Accordingly, the Motion to Dismiss is hereby GRANTED, and the tenure charges are dismissed for lack of jurisdiction.²

Sincerely,

A handwritten signature in black ink, appearing to read 'CD Cerf', written in a cursive style.

Christopher D. Cerf
Commissioner

c: County Superintendent
State Law Library

CDC/MKD/JKH

Via Regular Mail

¹ In order to evaluate the threshold question of subject matter jurisdiction, it is necessary to look at the claims made in the petition – not the defenses raised by a respondent. If the respondent believes that he has a claim against the Board for wrongful suspension that falls under *N.J.S.A. 18A:6-9*, he should file a petition of appeal pursuant to *N.J.A.C. 6A:3*.

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*).

#429-12LE



CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

CHRISTOPHER D. CERF
Commissioner

November 2, 2012

Matthew B. Wieliczko, Esq.
Zeller & Wieliczko, LLP
120 Haddontowne Court
Cherry Hill, New Jersey 08034

Paul H. Green, Esq.
Schenck, Price, Smith & King, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932

Re: Kelly Altenburg v. Board of Education of the Township of Cherry Hill, Camden County.
Agency Dkt. No. 316-10/12.

Dear Counsel:

I have reviewed the Petition of Appeal and Motion for Emergent Relief filed by petitioner, Kelly Altenburg. The petitioner is seeking an Order staying the tenure proceedings before the Board of Education (Board) pending a determination by the Commissioner of Education as to whether the Board is prohibited from considering a recording under the New Jersey Wiretapping and Electronic Surveillance Control Act, *N.J.S.A. 2A:156A-3* at the October 29, 2012 board meeting.

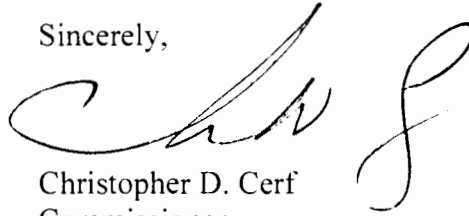
Upon review and consideration of the submission, I find that this dispute is not properly before the Commissioner of Education. It is well settled that the Commissioner's jurisdiction is limited to controversies and disputes that arise under the school laws. *N.J.S.A. 18A:6-9*. The claim in this petition is limited to the Board's ability to consider a recording in the course of the tenure proceedings at the local level, as formal tenure charges have not yet been filed with the Commissioner.¹ Moreover, the claims advanced by the petitioner

¹ It should be noted that if the tenure charges are ultimately filed with the Commissioner of Education and it is determined that the charges are sufficient to warrant dismissal or the reduction of salary, the matter will be assigned – pursuant to *N.J.S.A. 18A:6-16* – to an arbitrator who will evaluate the nature and extent of all of the evidence presented by the Board.

require an evaluation of the New Jersey Wiretapping and Electronic Surveillance Control Act, *N.J.S.A.* 2A:156A-3, which is beyond the scope of the Commissioner's jurisdiction and expertise. Jurisdiction cannot be conferred upon the Commissioner under these circumstances simply because the ultimate dispute between the parties involves a tenured teaching staff member.

Accordingly, this matter is dismissed for lack of jurisdiction.²

Sincerely,



Christopher D. Cerf
Commissioner

c: County Superintendent
State Law Library ✓

CDC/MKD/JKH

Via Facsimile

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36. (*N.J.S.A.* 18A:6-9.1).

STEPHANIE PLATIA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF HAMILTON, MERCER COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner appealed the respondent Board's failure to renew her teaching contract, alleging that she had acquired tenure as a special education teacher in respondent's school district. Petitioner was originally hired as a Teacher of Special Education by the Board in January 2008, and was rehired under the same title for the 2008-2009 and 2009-2010 school years; she was then re-employed under contract for the 2010-2011 school year as a long-term substitute teacher of special education, replacing an employee who was on a leave of absence. The Board contended that the petitioner's one-year service as a long-term substitute negated her ability to accrue tenure during the 2010-2011 school year. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there were no material facts in dispute, and the matter was ripe for summary decision; the question in this matter is whether, during the 2010-2011 school year, the petitioner filled a permanently vacant position or one that was temporarily vacated by a teacher who intended to return; it is well-settled in New Jersey that a clear legal distinction exists between an absence and a vacancy; the teacher that petitioner replaced during 2010-2011 was not fired, terminated, and did not resign, but filled a teaching position for a year in the district that was paid with a federal grant; petitioner was employed for that same year under a contract that advised that no tenure credit would accrue to her during the year; the facts in this case fit squarely within the principles of tenure law that create a distinction between a leave of absence and a vacancy; and petitioner failed to provide persuasive credible evidence to establish that a vacancy had occurred in the position she filled for the 2010-2011 school year. The ALJ concluded that petitioner was not entitled to tenure because she filled a leave of absence rather than a permanent vacancy; further, the respondent Board did not violate the petitioner's tenure rights when it failed to renew her teaching contract. Accordingly, the ALJ granted respondent's cross motion for summary decision, and dismissed the petition.

Upon a thorough and independent review of the record, the Commissioner concurred that summary decision is appropriately granted to the Board. Accordingly, the Initial Decision of the OAL was adopted as the final decision and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 9861-11
 AGENCY DKT. NO. 206-7/11

STEPHANIE PLATIA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF HAMILTON, MERCER COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Stephanie Platia and the Board of Education's (Board) reply thereto.

The petitioner's exceptions substantially reiterate the substance of her submissions at the OAL, recasting the arguments therein to support the contention that the Administrative Law Judge (ALJ) erroneously found that the petition should be dismissed. The petitioner maintains that the ALJ wrongfully determined that she did not acquire tenure despite the fact that she was continuously employed by the Board as a special education teacher from January 2008 until June 30, 2011.

In her exceptions, the petitioner contends that the ALJ improperly found that the petitioner was a substitute for Michele Snyder during the 2010-2011 school year, arguing that the factual finding is not supported by the record. Further, the petitioner asserts that she was not filling a position, as a long-term substitute, to which the absent teacher intended to return because there was no evidence to suggest that the Board contemplated Ms. Snyder's return as a special education teacher for the 2011-2012 school year. Finally, the petitioner stresses that the

language in her substitute contract for the 2010-2011 school year stating that “no tenure credit would issue to Platia during that year” is immaterial because tenure is statutory and not contractual.

In reply, the Board urges the adoption of the Initial Decision asserting that the ALJ properly determined that the petition should be dismissed. The Board maintains that the petitioner did not acquire tenure because during the 2010-2011 school year she was employed as a long-term substitute for Ms. Snyder who was on a leave of absence; and as a result the petitioner did not obtain tenure credit for the 2010-2011 school year. The Board stresses the fact that Ms. Snyder’s temporary assignment as an intervention teacher paid through federal grant sources resulted in a leave of absence, and she fully intended to return to her tenured position. Finally, the Board argues that the petitioner’s substitute contract is material because it clearly indicates that the petitioner was filling a position that was temporarily unfilled due to another staff member being on leave, and that she would not accrue tenure rights during the 2010-2011 school year.

Upon a comprehensive review of the record in this matter, the Commissioner is in accord with the ALJ’s determination – for the reasons stated in the Initial Decision – that the petitioner has not acquired tenure with the Board. The crux of the dispute in this matter is whether the petitioner was entitled to tenure credit during the 2010-2011 school year.¹ The Commissioner finds petitioner’s exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and clearly taken into account by her in concluding that the petitioner did not accrue tenure credit during the 2010-2011 school year because she filled a position resulting from a leave of absence, not a permanent vacancy. Moreover, under

¹ It is undisputed that without tenure credit for the 2010-2011 school year, the petitioner would not have completed the requisite years of service with the Board to obtain tenure under *N.J.S.A. 18A:28-5*.

N.J.S.A. 18A:16-1.1, a board of education is fully authorized to designate a person to act in the place of an employee during a leave of absence, but “no person so acting shall acquire tenure in the office or employment in which he acts ...”. Therefore, because the petitioner did not obtain tenure credit during the 2010-2011 school year, she did not complete the requisite years of credit to acquire tenure with the Board pursuant to *N.J.S.A.* 18A:28-5. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.²



COMMISSIONER OF EDUCATION

Date of Decision: 11/02/12

Date of Mailing: 11/02/12

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36. (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING

SUMMARY DECISION

OAL DKT. NO. EDU 9861-11

AGENCY DKT. NO. 206-7/11

STEPHANIE PLATIA,

Petitioner,

v.

**BOARD OF EDUCATION OF
THE CITY OF HAMILTON,**

Respondent.

Edward A. Cridge, Esq., for petitioner (Wills O'Neill and Mellk, attorneys)

William R. Burns, Esq., for respondent

Record Closed: April 27, 2012

Decided: September 17, 2012

BEFORE **TIFFANY M. WILLIAMS, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals the Hamilton Township Board of Education's failure to renew her teaching contract, which she alleges is a violation of her tenure. Respondent alleges that the petitioner's one-year service as a long-term substitute teacher negated her ability to accrue tenure, which required three years of tenure-eligible service.

The matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case on August 19, 2011. N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13. Petitioner filed a motion for summary decision on January 20, 2012, and a response was filed on February 10, 2012. Oral argument was conducted on March 7, 2012, and the record closed on April 27, 2012, after the submission of supplemental post-argument briefs.

FACTUAL DISCUSSION

The underlying relevant facts are undisputed and are **FOUND** as **FACT**:

1. Petitioner was hired by the Hamilton Township Board of Education (the Board) as a special education Teacher on January 28, 2008, for the school years 2008-2009 and 2009-2010.
2. Petitioner was employed by the Board through a contract as a long-term substitute teacher for special education for the 2010-2011 school year.
3. Petitioner's 2010-2011 contract stated, "You are replacing an employee who is on a leave of absence and who may be returning to his/her position at the expiration of this contract. This position is non-tenurial and carries no seniority eligibility. You will be assigned to the Substitute Teacher List if no position is available at the expiration of this contract."
4. During the 2010-2011, petitioner was a substitute for Michele Snyder, who was assigned to a Special Education Grant Funded position working out of the Kuser and Lalor Schools.
5. When the grant expired, Snyder claimed her tenure and seniority rights to her former position for the 2011-2012 school year, resulting in the termination of the petitioner's long-term substitute position.
6. On April 28, 2011, petitioner was notified by the Board that she would not be rehired for the following year.

LEGAL ANALYSIS AND CONCLUSIONS

The material facts involving this motion are not in dispute. Therefore, pursuant to N.J.A.C. 1:12.5(b) and Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995), I **FIND** that there are no genuine issues of material fact and that this matter is ripe for decision.

New Jersey's tenure laws establish a "competent and efficient school system by affording teaching staff members 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528-29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App.Div.1949)). Under N.J.S.A. 18A:28-5, a "teaching staff member" acquires tenure by completing:

- (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
- (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
- (c) The equivalent of more than three academic years within a period of any four consecutive academic years.

A "teaching staff member" is defined as:

professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse.

[Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63, 73-74 (1982) (quoting N.J.S.A. 18A:1-1).]

All teaching staff members with the requisite number of years, "are eligible for tenure unless they come within the explicit exceptions in N.J.S.A. 18A:28-5 or related statutes such as N.J.S.A. 18A:16-1.1." Spiewak, *supra*, 90 N.J. at 81. Pursuant to N.J.S.A. 18A:16-1.1, the District may designate persons to act in place of an employee during an absence, but "no person so acting shall acquire tenure in the office or employment in which he acts"

The resolution of this motion involves the determination as to whether, during the 2010-2011 school year, the petitioner filled a permanently vacant position or one that was temporarily vacated by a teacher who intended to return. The petitioner contends that tenure rights accrued during the 2010-2011 school year because she served as a long-term substitute for a teacher who was still employed by the district and therefore could not have been on a leave of absence. The respondent contends that while the absent teacher was still employed in a position within the District, she was temporarily filling a different position which was paid through federal grant sources and intended to return to her original position.

New Jersey authority is well-settled that a clear legal distinction exists between an absence and a vacancy. In Lammers v. Board of Education of the Borough of Point Pleasant, 134 N.J. 264 (1993), the New Jersey Supreme Court articulated that "an absence exists when a missing teacher is scheduled ultimately to return to the position," while a "vacancy exists when the teacher leaves the position permanently." *Id.* at 268. In Lammers, the Court specifically affirmed the Appellate Division's rationale articulated in the case of Sayreville Education Association v. Board of Education of the Borough of Sayreville, 193 N.J. Super. 424 (1984), where the Appellate Division drew a distinction between a vacancy and an absence, holding that the Borough's board of education could not use a long-term substitute to fill a vacancy. In interpreting N.J.S.A. 18A:16-1.1, the Appellate Division stated in relevant part:

We construe the authorization of this provision as applying when the services of a substitute teacher are required because of the temporary absence, even if protracted, of a regular teacher whose return to duty is contemplated. We

do not construe it as authorizing the use of a substitute to fill a vacant position on a long-term basis.

[Sayreville Educ. Assoc., supra, 193 N.J. Super. at 428.]

Further, the Appellate Division opined that “when a substitute appointment is made because of a temporary absence, a board of education would have to incur the expense of providing duplicate benefits.” Id. at 430.

Moreover, courts have not precluded teachers from serving in other roles within the District during a leave of absence and such service does not necessarily deem the teacher’s original position as vacated. See Dugan v. Stockton State College, 245 N.J. Super. 567, 573 (App. Div. 1991) (holding that a non-academic title during a portion of the petitioner’s teaching career did not preclude tenure during that same period of time); Giacomazzi v. Bd. of Educ. of the S. Orange-Maplewood Sch. Dist., EDU 9699-06, Final Decision (June 16, 2008) at *6, <http://lawlibrary.rutgers.edu/collections/oal/search.html> (holding that petitioner did not meet her burden to show a vacancy had occurred and that the teacher taught a different set of classes upon returning from a military leave was a red herring).

Based on the undisputed material facts, I **CONCLUDE** that petitioner was not entitled to tenure because she filled a leave of absence, not a permanent vacancy. The teacher that Platia replaced, Snyder, was not fired and did not resign. The fact that Snyder filled a teaching position for a year within the District that was paid with a federal grant is of no consequence other than to establish that she had not permanently vacated her teaching position with the District. It is undisputed that Snyder was given tenure credit for her teaching role during that year and that Platia’s contract advised that no tenure credit would issue to Platia during that year. The instant facts fit squarely within well-settled principles of tenure law that create a clear distinction between a leave of absence and a vacancy. Ms. Platia failed to provide persuasive credible evidence to establish that a vacancy had occurred in the position.

DECISION AND ORDER

Accordingly, I **CONCLUDE** that the petitioner did not accrue tenure during the year that she served as a long-term substitute because she filled a leave of absence. I further **CONCLUDE** that the respondent did not violate the petitioner's tenure rights in failing to renew her teaching contract upon Snyder's return.

The respondent's cross-motion for Summary Judgment is **GRANTED**. Therefore, I **ORDER** that the petitioner's appeal is **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 17, 2012
DATE

Tiffany M. Williams
TIFFANY M. WILLIAMS, ALJ

Date Received at Agency:

September 17, 2012
[Signature]

Date Mailed to Parties:

SEP 18 2012

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

LIST OF EXHIBITS

For Petitioner:

- P-1 Contract dated January 23, 2008
- P-2 Contract dated May 29, 2008
- P-3 Contract dated August 21, 2009
- P-4 Contract dated July 22, 2010
- P-5 Answers to Interrogatories
- P-6 April 28, 2011 letter to Stephanie Platia
- P-7 July 16, 2009 letter to Michele Myer

For Respondent:

- R-1 HR Form
- R-2 Contract dated January 23, 2008
- R-3 Contract dated May 29, 2008
- R-4 Contract dated July 15, 2009
- R-5 April 29, 2010 letter to Stephanie Platia
- R-6 Cooperative Grant Agreement description
- R-7 Contract dated July 22, 2010

GARDEN STATE SCHOOL BUS	:	
CONTRACTORS ASSOCIATION AND	:	
MARGARET PRIBYL,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	DECISION
OF MILLSTONE, MONMOUTH COUNTY,	:	
IC SCHOOL BUS INC. AND THE	:	
HANOVER INSURANCE COMPANY,	:	
	:	
RESPONDENTS.	:	
	:	

SYNOPSIS

Petitioners, Garden State School Bus Contractors Association and Margaret Pribyl, a resident and taxpayer of Millstone Township, sought to compel the respondent Board to immediately call for the forfeiture of a bid bond posted by respondent IC School Bus, Inc., in the course of submitting a bid to the Board for bus transportation services for the 2011-2012 school year. Additionally, petitioners sought to compel The Hanover Insurance Company (Hanover) to immediately pay over to the Board the bid bond posted by IC School Bus. Petitioners contended that the actions of respondents in connection with the award of a transportation services contract were violative of the bid specifications and applicable statutes and regulations. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; pursuant to *N.J.S.A. 18A:18A-22*, legally acceptable bids cannot materially deviate from the specifications set forth by the contracting agency; IC School Bus's bid was non-responsive to the bid specifications because it failed to provide evidence of its ability to obtain the required insurance, which was a material condition of the bid; IC School Bus failed to comply in that the insurance certificate referenced in its bid named another entity – IC Coachways, Inc. DBA Island Charter, and IC Bus, Inc., located at 380 Chelsea Road, Staten Island, NY – rather than IC School Bus of Tennent, NJ; testimony from the company's principal indicated that IC School Bus is a separate company from those identified on the insurance certificate submitted with the bid; a bidder with less or no insurance costs could afford to submit a lower bid than its competitors, giving it an unfair advantage; evidence of insurability was an essential element of the bid, unlike catch-all items included in the "Additional Requirements" section; pursuant to *N.J.S.A. 18A:39-4* and *N.J.A.C. 6A:27-9.4(e)(2)*, bid bonds such as the one submitted by IC School Bus through Hanover Insurance are subject to forfeiture upon refusal of the successful bidder to execute a contract; IC School Bus's bid was never accepted because it was materially deficient; IC School Bus was not the lowest responsible bidder, and the Board rejected the bid. Accordingly, the ALJ concluded that there was no basis to warrant the forfeiture of the bid bond, which was posted to guarantee that a contract would be executed if the bid was accepted, and granted respondent's cross motion for summary judgment as a matter of law.

Upon full review and consideration, the Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
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OAL DKT. NO. EDU 12431-11
AGENCY DKT. NO. 260-9/11

GARDEN STATE SCHOOL BUS	:	
CONTRACTORS ASSOCIATION AND	:	
MARGARET PRIBYL,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	DECISION
OF MILLSTONE, MONMOUTH COUNTY,	:	
IC SCHOOL BUS INC. AND THE	:	
HANOVER INSURANCE COMPANY,	:	
	:	
RESPONDENTS.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and replies thereto from the Board and the Hanover Insurance Company – submitted in accordance with the provisions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in making his determination herein.

Petitioners here – Garden State Bus Contractors Association and Margaret Pribyl, a resident and taxpayer of Millstone Township – seek to require the Board to compel forfeiture of the bid bond submitted on behalf of IC Bus by the Hanover Insurance Company in connection with IC Bus's bid for transportation services, claiming that the actions of the Board and IC Bus with respect to the awarding of the transportation services contract were violative of the bid specifications, statutes and regulations.

Petitioners' exceptions essentially replicate the arguments set forth in their Brief in Support of their Motion for Summary Decision advanced before the

Administrative Law Judge (ALJ) below. In that it is determined that the ALJ fully considered and addressed each of these proffered arguments in his Initial Decision, they will not be revisited here.

Upon an extensive review and due consideration, the Commissioner concurs with the ALJ – for the reasons comprehensively presented on pages 12-17 of his decision – that because the submitted bid of IC School Bus failed to comply with a material condition of the bid specifications by not providing evidence of its ability to obtain the required insurance coverage, it was rightly determined to be a non-responsive bid by the Board and, therefore, ineligible to be awarded any of the bus routes at issue therein. As such, there is no basis to warrant the forfeiture of the bid bond posted by the Hanover Insurance Company. Therefore, the Commissioner agrees with the ALJ that petitioners’ motion for summary decision must be denied and respondents’ cross-motions for summary decision are appropriately granted.

In so determining, the Commissioner initially notes that the Bid Specifications for Student Transportation Services – Combination Bid for Millstone Township and Upper Freehold Regional School District, Bid Number 12005, (Exhibit P-4) at P. 10 specifically state:

**THE FOLLOWING DOCUMENTS MUST [BE] SUBMITTED IN ORDER
FOR YOUR BID TO BE CONSIDERED:**

Bidder’s Guarantee

Business Registration Certificate

Evidence of the Bidder’s Ability to Obtain the Required Insurance Coverage

(emphasis supplied)

Omnibus Transportation Employee Testing Act Compliance Assurance

Prescribed Questionnaire

Consent of Surety

Stockholder’s Disclosure Statement

Affirmative Action Documentation or Questionnaire

Non-Collusion Affidavit

Bid Sheet

(Emphasis added)

As correctly found by the ALJ:

[t]here is no doubt that [evidence of a bidder's ability to obtain insurance coverage] was a material condition of the bid. *N.J.A.C. 6A:27-9.3(e)(8)* specifically provides that the Board shall direct "bidders to submit... proof of the ability to obtain automobile liability insurance coverage required by the specifications." The materiality of the insurance information is further evident by the inclusion of its details in a separate and distinct section of the Bid Specification. Additionally, the Bid Specification includes "Evidence of the Bidder's Ability to Obtain the Required Insurance Coverage" among a list of items under a separate heading that emphasized in bold and capital letters that such a document "must be submitted in order for your bid to be considered." This emphasis is contrasted by the catch-all "Additional Requirements" section, which has no such mandatory language and which included: "comprehensive safety plan; total accidents over \$1.00 for 2010; total employee injuries in 2010; any traffic violations received in 2010; and copies of inspection reports on all out of service vehicles from your last inspection with NJ Motor Vehicle Commission." The items on the catch-all list were non-material and would not cause a bidder to be disqualified for failure to submit them with the bid. (Initial Decision at 14)

The Commissioner similarly concurs with the ALJ that IC School Bus's bid failed to comply with this material bid condition "...in that the insurance certificate referenced in its bid named another entity, namely, IC Coachways, Inc. DBA Island Charter and IC Bus, Inc. located at 380 Chelsea Road, Staten Island, NY rather than IC School Bus[,] Inc. of Tennent[,] N.J. [The principal owner and CEO of IC School Bus, Fred] DiGiovanni testified that IC School Bus[,] Inc. is a separate company from those identified on the insurance certificate he submitted." (Initial Decision at 13-14) As IC Bus's bid in this regard was in direct contravention of a material requirement of the bid specifications, the Board was obligated to reject IC Bus's bid as non-responsive.

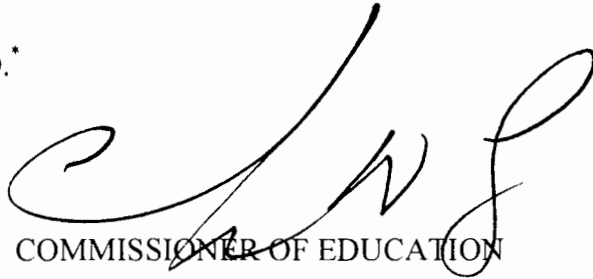
As to any responsibility of The Hanover Insurance Company with respect to its Bid Bond here, the Bid Specifications specifically provide that the Bid Bond would be forfeited upon refusal of a bidder to execute a contract. (See Bid Specifications at 6, "Bid Guarantee")¹ IC Bus did not refuse to execute a contract. As the Board properly rejected IC Bus' bid and,

¹ Also see *N.J.S.A. 18A:39-4* and *N.J.A.C. 6A:27-9.4(e)(2)* which specifies "[t]he bid bond...shall be forfeited upon the refusal of the successful bidder to execute a contract..."

therefore, could not have offered it a contract, the Hanover Insurance Company had no obligation whatsoever under its Bid Bond in this matter.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons clearly presented therein and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 11/02/12

Date of Mailing: 11/05/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 12431-11

AGENCY REF. NO. 260-9/11

**GARDEN STATE SCHOOL BUS CONTRACTORS
ASSOCIATION AND MARGARET PRIBYL,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF
MILLSTONE, MONMOUTH COUNTY, IC SCHOOL
BUS INC. AND THE HANOVER INSURANCE COMPANY,**

Respondents.

Charles M. Fisher, Esq., for petitioner (Windels, Marx, Lane & Mittendorf
attorneys)

Christopher J. Brennan, Esq., for respondent Millstone Township Board of
Education (Cleary, Giacobbe, Alfieri, Jacobs, attorneys)

Eric Nelson, Esq., for respondent IC School Bus Inc.

Paul H. Mandal, Esq., for respondent The Hanover Insurance Company
(Dreifuss, Bonacci & Parker, attorneys)

Record Closed: August 16, 2012

Decided: September 18, 2012

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE

Petitioners Garden State School Bus Contractors Association (Garden State) and Margaret Pribyl, a resident and taxpayer of Millstone Township (petitioners) seek to compel respondent Millstone Board of Education (Board) to immediately call for the forfeiture of a bid bond posted by respondent IC School Bus Inc. (IC School Bus) in the course of submitting a bid to the Board for bus transportation services for the 2011-2012 school year. They also seek to compel The Hanover Insurance Company (Hanover) to immediately pay over to the Board the bid bond posted by IC School Bus. Petitioners contend that the actions of respondents in connection with the award of a transportation services contract were violative of the bid specifications, statutes, and regulations.

PROCEDURAL HISTORY

On September 6, 2011, petitioners filed a verified petition. After respondents filed timely Answers, the Department of Education's Office of Controversies and Disputes transmitted the matter, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL), which filed it for hearing and determination as a contested case on October 18, 2011. The parties engaged in extensive discovery including the taking of certain depositions, a process which delayed moving this matter forward. At the conclusion of discovery, all parties requested the opportunity to file Motions and Cross-Motions for Summary Decision. I received Cross-Motions and Oppositions by August 16, 2012.

BACKGROUND

In June 2011, the Board issued a public bid for school bus transportation services for the 2011-2012 school year for forty-six separate school bus routes. Under the heading "Additional Requirements," the Bid Specification directed that a bidder must provide the District with the following: a comprehensive safety plan; total accidents over

\$1.00 for 2010; total employee injuries in 2010; any traffic violations received in 2010; and inspection reports on all out-of-service vehicles from the Motor Vehicle Commission.

Under a separate heading entitled "Insurance Coverage," the Bid Specification required the contractor to provide automotive liability insurance in the minimum amount required by Motor Vehicle Commission and Department of Education regulations. "Bidders will be required to provide with the bid, evidence of their ability to obtain the required insurance coverage. A certificate of insurance for the duration of the contract is to be presented by the successful bidder."

Under the "Bid Guarantee" heading, bidders were required to accompany each bid, " . . . by a bid bond, cashier's or certified check for twenty percent (20%) of the amount of the annual contract cost, but in no case may the certified check, cashier's check or bid bond exceed \$50,000." This section of the Bid Specification also provided as follows:

Such deposit shall be forfeited upon refusal of a bidder to execute a contract; otherwise, checks shall be returned when the contract is executed and a surety (performance) bond is filed with the Board of Education. The bid guarantee for all unsuccessful bidders, except for the three lowest bidders, will be returned within 10 days after the bid opening

. . . .

Additionally the Bid Specification stated in bold and capitalized letters, "**THE FOLLOWING DOCUMENTS MUST BE SUBMITTED IN ORDER FOR YOUR BID TO BE CONSIDERED.**" Included in the list of items that had to be submitted was "Evidence of the Bidder's Ability to Obtain the Required Insurance Coverage" and a "Bidder's Guarantee."

The "Payment Terms" section of the Bid Specification provided that, "the contractor shall execute the contract and submit it to the district board of education with all required related documents for the district board of education to comply with the timeline for submission of contracts to the county superintendent."

Finally, the Bid Form signed by all the bidders had the following provision:

FAMILIARITY WITH CONDITIONS OF CONTRACT

Have you read carefully the applicable New Jersey Statutes, regulations, procedures, the rules of the local board of education pertaining to student transportation, the specifications upon the basis of which the accompanying bid is submitted, and the contract which the successful bidder will be required to execute.

IC School Bus submitted bids on every one of the forty-six routes put out to bid by the Board. In connection with its bid, IC School Bus submitted a bid bond, Bond ICS-0607 (bid bond), which was issued by Hanover. The bid bond provided, in relevant part that Hanover is

held and firmly bound unto MILLSTONE TOWNSHIP SCHOOL DISTRICT as Obligee, in the penal sum of TWENTY PERCENT (20%) OF THE AMOUNT BID (\$1,670,256.00) DOLLARS for the payment of which, well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns.

The condition of the above obligation is such that whereas the Principal has submitted to the MILLSTONE TOWNSHIP SCHOOL DISTRICT a certain Bid, attached hereto and hereby made a part of hereof, to enter into a contract in writing to provide BID FOR STUDENT TRANSPORTATION SERVICES COMBINATION BID FOR MILLSTONE TOWNSHIP SCHOOL DISTRICT AND UPPER FREEHOLD REGIONAL SCHOOL DISTRICT BID #12005

NOW THEREFORE,

- (a) If said Bid shall be rejected, or in the alternate
- (b) If said Bid shall be accepted and the Principal shall execute and deliver a contract in the Form of Contract attached hereto (properly completed in accordance with said Bid) and shall furnish a bond for his faithful performance of said contract, and for the payment of all persons performing labor or furnishing materials in connection therewith, and shall in all other respects perform the agreement created by the acceptance of said Bid.

Then this obligation shall be void, otherwise the same shall remain in force and effect; it being expressly understood and agreed that the liability of the Surety for any and all claims hereunder shall, in no event, exceed the penal amount of this obligation as herein situated."

[(Emphasis added.)]

The School District opened the bids on June 7, 2011. IC School Bus was the lowest numerical bidder on forty of the forty-six bus routes. Fred DiGiovanni, the principal of IC School Bus, attended the bid opening. After the bid opening Bernard Biesiada, the business administrator for the Board, requested to meet DiGiovanni. Biesiada requested the meeting because he was concerned regarding aspects of IC School Bus's bid including the fact that "(t)he address listed was a PO box in Tennent, New Jersey and the telephone number was a 917 (or New York) number." The rationale for his concerns was that the "bus company that potentially could be awarded 46 runs and transporting potentially 4,000 children for both Millstone and Upper Freehold, that they would be operating out of a post office box and attempting to drive buses from New York to pick up our children." He could not recall if he had other concerns.

On or about, June 9, 2011, DiGiovanni met with Biesiada as well as Diana Schiraldi, the business administrator of Upper Freehold School District. In depositions DiGiovanni and Biesiada differed on what occurred at the meeting. According to Biesiada, he reviewed the bids after opening them to see if documents were in order and deem if they were responsible bidders. Although he had concerns, at that time he had no reason to believe that IC School Bus was an irresponsible bidder. Biesiada telephoned DiGiovanni and asked him to the June 9 meeting. Biesiada testified that he introduced himself to DiGiovanni, whereupon DiGiovanni said, "before you begin, I would like to request to withdraw my bids." He did not say why. Biesiada was shocked and told him he needed something in writing, and the meeting ended after five minutes. Di Giovanni submitted a letter the next day to Biesiada which stated, "with your permission, IC School Bus Inc. would like to with draw [sic] our bid for the school bus transportation bid # 12005, which was opened on June 6, 2011 @ 10. AM."

In his deposition DiGiovanni testified that when he left the bid opening on June 7, he believed that he would be presented contracts for the routes he had won. When Biesiada telephoned him for a meeting, he asked if DiGiovanni was even in the area and said he wanted him to explain IC School Bus as he had never heard of the Company. DiGiovanni was concerned because he wanted to establish himself in New Jersey. At the June 9 meeting, Biesiada expressed concern about DiGiovanni's affiliation with Peter George and Milu Bus Company, because they had heard negative things about the company. They did not think DiGiovanni would be able to handle the routes being a brand new company in New Jersey, but DiGiovanni disagreed.¹ Conformity to Bid Specifications was not discussed at the meeting. According to DiGiovanni, he remembered insurance being mentioned but did not remember anything about a certificate of insurance. Di Giovanni did not want to fight the Board on a claim that he was not a responsible bidder by not being already established in New Jersey, being the new company on the block. He asked what could be done and was instructed to write a letter, which he did. He left the meeting annoyed.

The Board prepared and published an Agenda for its June 27, 2011, meeting that included the following draft resolution:

WHEREAS, in response to its bid solicitation for student transportation services, specifically, combination bid for Millstone Township and Upper Freehold Regional School Districts, the Millstone Township Board of Education received bid responses on June 7, 2011; and

WHEREAS, IC School Bus, Inc., of Tennent, New Jersey responded to the Board of Education's bid solicitation; and

WHEREAS, IC School Bus, Inc. was the prospective low bidder for the contract; and

WHEREAS, by letter of June 10, 2011, the District received a certified writing from Fred A. DiGiovanni, President of IC School Bus, Inc., wherein relevant part Mr. DiGiovanni advised that they seek to withdraw their bid for school bus transportation services; and

¹ DiGiovanni testified that IC School Bus had an adequate number of used and new buses on order and had financing in order to purchase buses if it was required to fulfill the bid and would have been able to hire the requisite number of drivers.

WHEREAS, further investigation by the District administrative staff reveals that the basis for the request for withdrawal was that I.C. School Bus, Inc. did not have the necessary staff, equipment and facilities to fulfill the bid requirements; and

WHEREAS, the Board finds therefore, that the mistake made by the bidder in this instance relates to a material feature of the bid and occurred notwithstanding the bidder's exercise of reasonable care in the preparation of the bid; and

WHEREAS, the Board finds that the withdrawal of the bid is hereby without harm to the District to the extent that other responsive bidders made available to the Board of Education for selection and the notice of mistake by the prospective low bidder was timely in this instance;

NOW, THEREFORE BE IT RESOLVED that IC School Bus, Inc. be and is permitted to withdraw their bid without penalty and/or sanction[.]

This resolution was never presented to the Board or voted upon. It was drawn by the Board's counsel but then withdrawn on advice of counsel. Therefore, the Board never permitted IC School Bus to withdraw its bid.

On June 24, 2011, counsel for Garden State wrote to Biesiada indicating that it had learned that IC School Bus, although a lowest bidder, will not be performing on any of the routes. He reminded "the Board of its obligations under the law, including its obligation to call for the forfeiture of IC's bid bond in the event IC has refused to perform on any of the routes." This letter further stated:

IC was the lowest bidder on all 46 routes and the Board must, therefore, present contracts to IC for all 46 routes.[] If IC Bus refuses to perform, the Board must call for the forfeiture of IC's bid bond. Nothing else will preserve the sanctity of public bidding, and nothing else will save the taxpayers of Millstone from the losses they will suffer if the Board is forced to execute contracts with the second lowest bidders. See Hillside, supra, 25 N.J. at 322 (the public bidding statutes are for the benefit of the taxpayers and not the bidders; they should be construed with sole reference to the public good and they should be rigidly adhered to by the Courts).

[(Emphasis added.)]

Subsequently, the Board passed a resolution on July 11, 2011, substantially different from that proposed for the June 27, 2011, meeting, that disqualified IC School Bus. This resolution indicated in relevant part that:

WHEREAS, in response to its bid solicitation for student transportation services, specifically, combination bid for Millstone Township and Upper Freehold Regional School Districts, the Millstone Township Board of Education received bid responses on June 7, 2011; and

WHEREAS, IC School Bus, Inc., of Tennent, New Jersey responded to the Board of Education's bid solicitation; and

WHEREAS, IC School Bus, Inc. was the prospective low bidder for the contract; and

WHEREAS, the Board finds that the bid solicitation required responsive and responsible bidders to provide adequate evidence of the bidder's ability to obtain required insurance coverage; and

WHEREAS, a review of IC School Bus, Inc.'s bid reveals that the only documentation concerning adequate insurance was the submission of a Certificate of Liability Insurance dated May 25, 2011; and

WHEREAS, within the documentation submitted under the Section of the "insured," the corporate entity of IC School Bus, Inc. of Tennent, New Jersey, is not identified; and

WHEREAS, the Board finds that the failure to provide evidence of the Bidder's ability to obtain the required insurance coverage is a material feature of the bid; and

WHEREAS, within the Bid Specifications at Page 4, the Board Listed Additional Requirements, specifically:

Bidder must provide Millstone Township School District with the following information:

1. Comprehensive Safety Plan
2. Total Accidents over \$1.00 for 2010
3. Total Employee Injuries for 2010
4. Any traffic violations received in 2010

5. Copies of inspection reports on all out-of-service vehicles from the last inspection with the Motor Vehicle Commission; and

WHEREAS, IC School Bus, Inc. failed to provide any information responsive to the Additional Requirements;

NOW, THEREFORE BE IT RESOLVED that for the reasons set forth above, IC School Bus, Inc., be and hereby is found to be a non-responsive bidder;

BE IT FURTHER RESOLVED that the bid submitted by IC School Bus, Inc. is rejected by the Millstone Township Board of Education as being non-responsive[.]

DiGiovanni testified that IC School Bus Inc. is a separate company from those identified on the insurance certificate he submitted with his bid. The companies on the Certificate of Liability Insurance that accompanied the IC School Bus bid were IC Coachways, Inc. DBA Island Charter & IC Bus, Inc. at 380 Chelsea Road, Staten Island, NY 10314.

The Board subsequently awarded the bus routes to other higher bidders; some of whom also had missing from their Bid Specifications some of the information identified as "Additional Requirements" in the Bid Specification. None of those other bidders, however, suffered the deficiency of IC School Bus's Bid Specification with regard to a lack of evidence of the bidder's ability to obtain the required insurance coverage. IC School Bus did not identify its corporate entity of Tennent, NJ as being an insured. As a result of awarding the routes to bidders whose bids were higher than those of IC School Bus, the Board incurred greater costs for bus transportation had IC School Bus been awarded contracts for those routes and had performed.

ANALYSIS AND LEGAL CONCLUSIONS

Petitioners argue that respondents engaged in illegal conduct, backroom dealing, conspiracy, fraud, and a cover-up to permit a repudiating contractor to walk away without penalty from the forty routes it won but refused to perform. They contend that, once the Board opened the bids and determined the lowest bidders, those bidders were

legally obligated to execute contracts for those routes. Since IC School Bus was created in 2007, there was no business activity, and it did not own any buses or retain employees. With regard to the June 9 meeting, which petitioners characterize as illegal, petitioners acknowledge a factual dispute between Biesiada and DiGiovanni's testimony as to the nature of the discussion. Although contending that Biesiada's version is the more credible one, they suggest that, irrespective of which version was true, respondents violated the public bidding laws as a matter of law. Petitioners characterize the first proposed Board resolution that would have relieved IC School Bus of any obligations without penalty as false and fraudulent and part of a conspiracy and scheme between the Board and IC School Bus. They criticize as false claims in the proposed resolution that the Board engaged in a further investigation to determine that IC School Bus did not have the necessary staff, equipment and facilities to perform; that IC School Bus made a mistake notwithstanding its exercise of reasonable care; and that the withdrawal of the bid would not harm the District. Despite receiving the letter from Garden State counsel advising of the legal obligation of bond forfeiture before the June 27 Board meeting (where no action was taken on the proposed resolution), petitioners contend that the Board further entrenched itself in its unlawful scheme. It did so by publishing its second false and fraudulent resolution which abandoned the rationale of the June 27 resolution and created another fiction that IC School Bus was a non-responsive bidder because of its failure to provide adequate evidence of the bidder's ability to obtain required insurance coverage and failure to provide the information responsive to the "Additional Requirements." Petitioners argue that the July 27 resolution was a ruse because nearly every other bidder also failed to provide various information requested in the additional requirements section.

The arguments of the three respondents are essentially similar. They contend that the Board deemed IC School Bus's bid non-responsive—not because it failed to conform exactly with the Bid Specifications—but because it failed to comply with a material condition of the bid by not providing evidence of IC School Bus's ability to obtain the required insurance coverage.

N.J.S.A. 52:14B-9 provides a party in a contested administrative case the opportunity for a hearing at which it may present evidence and argument on all issues

involved. Such matters, however, may be subject to summary decision if the papers show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b).

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995). In Brill, the Court looked at the precedents established in Matsushita Electric Industrial Company v. Zenith Radio Corporation, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); and Celotex Corporation v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), wherein the Supreme Court adopted a standard that “requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict, *i.e.* ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” Brill, *supra*, 142 N.J. at 533 (quoting Liberty Lobby, *supra*, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214). The Court stated that under the new standard:

A determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The “judge’s function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”

[*Id.* at 540 (quoting Liberty Lobby, *supra*, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. “To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose.” *Id.* at 541.

In addressing whether the Brill standard has been met in this case, further guidance is found in R. 4:46-2:

An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issues to the trier of fact.

I **CONCLUDE** that this matter is ripe for summary decision under the applicable standard.

Under the public school contracts law, N.J.S.A. 18A:18A-1 to -59 (Act), contracts for the performance of work to be paid out of school funds generally are required to be made only after public advertisement for bids and after the bidding has taken place. N.J.S.A. 18A:18A-4. N.J.S.A. 18A:18A-22 requires that "No bid shall be accepted which does not conform to the specifications furnished therefor." The contract must be awarded to the lowest responsible bidder. N.J.S.A. 18A:18A-37. The "lowest responsible bidder" is the one whose response to a request for bids offers the lowest price, is responsive, and who is responsible. N.J.S.A. 18A:18A-2(t). "Responsible" means able to complete the contract in accordance with its requirements, including but not limited to requirements pertaining to experience, moral integrity, operating capacity, financial capacity, credit, and workforce, equipments, and facilities available. N.J.S.A. 18A:18A-2(x). "Responsive" means conforming in all material respects to the terms and conditions, specifications, legal requirements and other provisions of the request. N.J.S.A. 18A:18A-(y).

Legal principals established under other public bidding statutes are applicable to the public school contracts law because the purpose of all bidding statutes is "to secure competition and "guard against favoritism, improvidence, extravagance and corruption," in order to benefit the taxpayers and not the bidders." In re Honeywell Info. Sys., 145 N.J. Super. 187, 200-01 (App. Div. 1976), certif. denied, 73 N.J. 53 (1977) (quoting Twp. of Hillside v. Sternin, 25 N.J. 317, 322 (1957)). Therefore, public bidding statutes must be construed with sole reference to the public good and rigidly adhered to by the

courts. Statewide Hi-Way Safety v. New Jersey Dep't of Transp., 283 N.J. 223, 230 (App. Div. 1995).

Legally acceptable bids cannot materially deviate from the specifications set forth by the contracting agency. Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 314 (1994). While minor or inconsequential discrepancies and technical omissions can be waived, material conditions contained in bidding specifications cannot be waived. Terminal Const. Corp. v. Atl. County Sewerage Auth., 67 N.J. 403, 411 (1975). New Jersey Courts have developed a two-prong test for determining if a deviation is material: (1) does waiver of such defect deprive the purchaser of its assurance that the contract will be entered into, performed, and guaranteed according to the specified requirements, and (2) does it adversely affect the competitive bidding process by placing a bidder in a position of advantage over other bidders, or by otherwise undermining the necessary common standard of competition. Meadowbrook Carting, *supra*, 138 N.J. at 315. The Meadowbrook Court aptly cited from Terminal Const. Corp., *supra*, regarding the limitation on the doctrine of strict compliance for bids:

Essentially this distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications [that] by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding. In sharp contrast, advertised conditions whose waiver is capable of becoming a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance, or likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of affecting the ability of the contracting unit to make bid comparisons, are the kind of conditions [that] may not under any circumstances be waived.

[Terminal Const. Corp., *supra*, 67 N.J. at 412.]

I **CONCLUDE** that IC School Bus's bid was non-responsive, because it failed to provide evidence of its ability to obtain the required insurance, which was a material condition of the bid. IC School Bus failed to comply in that the insurance certificate referenced in its bid named another entity, namely, IC Coachways, Inc. DBA Island

Charter and IC Bus, Inc. located at 380 Chelsea Road, Staten Island, NY rather than IC School Bus Inc. of Tennent NJ. DiGiovanni testified that IC School Bus Inc. is a separate company from those identified on the insurance certificate he submitted.

There is no doubt that this item was a material condition of the bid. N.J.A.C. 6A:27-9.3(e)(8) specifically provides that the Board shall direct “bidders to submit . . . proof of the ability to obtain automobile liability insurance coverage required by the specifications.” The materiality of the insurance information is further evident by the inclusion of its details in a separate and distinct section of the Bid Specification. Additionally the Bid Specification includes “Evidence of the Bidder’s Ability to Obtain the Required Insurance Coverage” among a list of items under a separate heading that emphasized in bold and capital letters that such a document “must be submitted in order for your bid to be considered.” This emphasis is contrasted by the catch-all “Additional Requirements” section, which has no such mandatory language and which included: “comprehensive safety plan; total accidents over \$1.00 for 2010; total employee injuries in 2010; any traffic violations received in 2010; and copies of inspection reports on all out of service vehicles from your last inspection with NJ Motor Vehicle Commission.” The items on the catch-all list were non-material and would not cause a bidder to be disqualified for failure to submit them with the bid. Accordingly, it is a red herring for petitioners to argue that the absence of some of the catch-all items from the bids of other bidders who won routes subsequent to the rejection of the IC Bus bid makes them indistinguishable from the ultimate basis upon which the Board relied to reject the IC School Bus bids. None of the other winning bids lacked the insurance information. The other bidders submitted insurance information that reflected the names on the bid. IC School Bus did not. Accordingly, petitioners are incorrect to suggest that the basis for the July 11 rejection resolution was a ruse because every other bidder failed to provide the exact same information with their bids. Unlike the insurance information, the catch-all items do not lie at the heart of the transportation undertaking but are rather informational documents. See Terminal Const. Corp., supra, 67 N.J. at 411. A bidder with less or no insurance costs could afford to bid more cheaply than its competitors giving it an unfair advantage. Biesiada was clear in his testimony that evidence of insurability was an essential element of the bid, unlike the catch-all items.

N.J.A.C. 6A:27-9.4(e) provides that each bidder for a school transportation route shall submit a guarantee "to ensure that, if a contract, is awarded, the successful bidder shall enter into that contract" IC School Bus submitted a bid bond through Hanover as a guarantee that it would meet the requirements of its bid. The bid bond is subject to forfeiture upon refusal of the successful bidder to execute a contract. N.J.S.A. 18A:39-4; N.J.A.C. 6A:27-9.4(e)(2). "The purposes of a bid bond are to establish and measure the obligations of bidders; guarantee that a contract will be executed if the bid is accepted; aid the school board in reaching its decision; and reimburse the municipality for losses resulting from 'the wrongful act of a bidder in declining to enter into a contract for the performance of the work after the contract was lawfully awarded to him.'" Garden State School Bus Contractors Assoc. v. Passaic County Educ. Serv. Comm., A-1383-10T4 (App. Div. June 27, 2011) (slip op. at 10) (citing Fair Lawn Bd. of Educ. v. Fair Lawn Plaza Taxi, 55 N.J. Super. 357, 368 (App. Div. 1959), aff'd, 32 N.J. 129 (1960)).

Despite all of petitioners' hyperbole about alleged corruption and fraud between the Board and IC School Bus, the bottom line is that the Board did not and could not have tendered contracts to IC School Bus, because IC School Bus's bid was non-responsive due to its failure to comply with a material condition. The bid was never accepted. Since no contracts were presented in the absence of an accepted bid, IC School Bus was not in a position to execute such contracts. Hanover and IC School Bus would have had liability under the bid bond if IC School Bus had been the lowest responsible bidder. IC School Bus was not the lowest responsible bidder. The Hanover Insurance Company bond provided that, if a bid shall be rejected, the obligation on the bond shall be void. The bid was rejected. "A surety is chargeable only according to the strict terms of its undertaking and its obligations cannot and should not be extended either by implication or construction beyond the confines of its contract." Eagle Fire Protection Corp. v. First Indemnity of Am. Ins. Co., 145 N.J. 345, 356 (1996); Monmouth Lumber Co. v. Indemnity Ins. Co. of N. Am., 21 N.J. 439, 452 (1956). Under these circumstances, I **CONCLUDE** that there is no basis to warrant the forfeiture of the bid bond that was posted to guarantee that a contract will be executed if the bid is accepted.

The Passaic County case relied on by petitioners is very different from this matter. In that case, K & M Transportation, Inc. (K & M) submitted a bid for twenty-nine bus routes. The Passaic County Education Services Commission (PCESC) determined that K & M was the lowest bidder on eight of the twenty-nine routes. When PCESC notified K & M that it had been awarded eight routes, the company informed PCESC that it only had two buses, two drivers, and two aides available, and could therefore only service two of the eight routes. Although K & M did not have the ability to perform on all routes for which it submitted a bid, it was concerned about exclusion from being awarded any routes if it bid on just two. Upon learning that K & M only had two school buses available, PCESC chose not to tender a contract to K & M for all eight routes but rather for only two. The Passaic County facts are significantly different from those here in that there was no evidence that K & M's bid was not accepted because it was deficient in any manner, much less materially non-conforming as was in IC School Bus's bid. While K & M advised that it did not have the ability to perform on all routes on which it bid; in the instant matter, notwithstanding his request to withdraw his bid, DiGiovanni testified that he would have performed, that he had adequate buses on order, and that he would have been able to employ the necessary drivers. The Passaic County Court rejected a conclusion that, because PCESC never tendered a contract to K & M, the surety was not required to forfeit its bid bond. The difference in the instant matter is that the Board could not have tendered a contract because IC School Bus was only the lowest numerical bidder, not the lowest responsible, responsive, qualified, or successful bidder as in the case of K & M. The Passaic County Court held that K & M repudiated its contractual obligations when it informed PCESC that it would only be able to service two routes. IC School Bus never incurred a contractual obligation to repudiate.

Petitioners fail to make a case that IC School Bus and the Board engaged in fraud and corruption and a conspiracy. There is no showing that either side gained or stood to gain by what occurred. There is no explanation as to how IC School Bus would have profited by having submitted a fatally flawed bid in the first instance or by submitting a bid without a belief that it could procure the necessary equipment and personnel. There is no suggestion that the motive of IC School Bus was the same as

that of K & M, namely that it hoped, by bidding and winning on all the routes, it would be permitted to perform on but a few. It makes no sense that representatives of the Board would have conspired with IC School Bus to reject IC Bus's bid and award the contracts at a higher price to the second lowest bids. Although the June 27 proposed resolution and the July 11 passed resolution, indeed, differ in the basis for rejecting the IC School Bus bid and raise questions as to the level of analysis by the drafters, it is irrefutable that the basis for the rejection set forth in the July 11 resolution was a sound one, which existed, not as part of a post-bid conspiracy, but as part of a pre-bid-opening material and fatal flaw. Neither DiGiovanni's unsuccessful attempt to withdraw his bid nor the questionable foundation of the never-approved June 27 proposed Board resolution are dispositive in petitioners' favor to support a forfeiture of the bid bond. Those issues are moot in light of the bid rejection due to the insurance matter. It is of no moment that Biesiada had expressed concerns over IC School Bus's ability to service the routes without equipment and staff on hand and its failure to present a physical address as opposed to a post office box in New Jersey. Again, another uncontroverted reason existed for determining that IC School Bus was not the lowest responsible bidder.

I **CONCLUDE** that the Motion for Summary Decision by petitioners should be denied and that the Cross-Motions for Summary Decision by respondents should be granted as a matter of law.

ORDER

It is **ORDERED** that petitioners' Motion for Summary Decision be **DENIED**.

It is further **ORDERED** that the Cross-Motions for Summary Decision by respondents be **GRANTED** and that the petition be **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 18, 2012

DATE

Jesse H. Strauss

JESSE H. STRAUSS, ALJ

Date Received at Agency:

9/18/12

Date Mailed to Parties:

9/18/12

id

OAL DKT. NO. EDU 14722-11
AGENCY DKT NO. 337-11/11

IN THE MATTER OF THE TENURE :
HEARING OF MARK HENDERSON, : COMMISSIONER OF EDUCATION
NEW JERSEY JUVENILE JUSTICE : DECISION
COMMISSION. :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the Administrative Law Judge – for the reasons stated in the Initial Decision – that the Juvenile Justice Commission should be permitted to withdraw the tenure charges filed against the respondent, Mark Henderson. Accordingly, the Initial Decision of the OAL is adopted as to the final decision in this matter and the tenure charges are hereby withdrawn.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 11/08/12

Date of Mailing: 11/08/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 14722-11

AGENCY DKT. NO. 377-11/11

**IN THE MATTER OF THE TENURE
HEARING OF MARK HENDERSON,
NEW JERSEY JUVENILE JUSTICE COMMISSION.**

Susan Scott, Deputy Attorney General, for petitioner New Jersey Juvenile Justice Commission (Jeffrey S. Chiesa, Attorney General of New Jersey, attorney)

Rosemarie Cipparulo, Esq., for respondent Mark Henderson (Weissman & Mintz, attorneys)

Record closed: September 20, 2012

Decided: September 26, 2012

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

Petitioner, Office of Education of the Juvenile Justice Commission (JJC), charges respondent, Mark Henderson, a certificated and tenured employee holding the position of Teacher 2 with the JJC, with conduct unbecoming or other just cause. Petitioner alleges that respondent was indicted by a Monmouth County grand jury, and charged with endangering the welfare of a child under N.J.S.A. 2C:24-4(a), and sexual assault,

N.J.S.A. 2C:14-2(b), both crimes of the second degree, and seeks respondent's termination based upon that indictment. N.J.S.A. 18A:6-10.

PROCEDURAL HISTORY

On November 15, 2011, the petitioner filed a Certificate of Determination for Filing of Tenure Charges, Proofs of Service, the Commission's Sworn Statement of Tenure Charges, and a Sworn Statement of Evidence in support of tenure charges with the Department of Education (Department), in compliance with N.J.S.A. 18A:6-9, N.J.S.A. 18A:6-11, and N.J.A.C. 6A:3-5.4. The tenure charges were based solely on the pending Monmouth County indictment. On December 14, 2011, the respondent filed an answer with the Department.

The Department transmitted the matter to the Office of Administrative Law on December 14, 2011, for hearing as a contested case on an expedited basis. N.J.S.A. 18A:6-11; N.J.S.A. 52:14B-2(b). Respondent's request for a stay based on the pending indictment was granted on January 13, 2012.

The stay was vacated after counsel for the JJC advised that the indictment had been dismissed by the prosecutor, and by Order entered on June 29, 2012, the matter was returned to the active list. The hearing was scheduled for September 24, 2012.

On September 20, 2012, the JJC filed a Motion to Withdraw Tenure Charges. Respondent indicated that he had no objection to the motion and would not be opposing it.¹

FACTUAL DISCUSSION

The facts pertinent to the resolution of the motion and to this decision are as described in the procedural history set forth above.

¹ Respondent had been suspended without pay effective September 26, 2011, and was returned to pay status on August 28, 2012.

The petitioner indicates in its brief that it has reviewed the tenure charges filed against the respondent, as well as the evidence relied upon in support of those charges, and has concluded that, without more evidence, it is unable to proceed to hearing, and has requested that the tenure charges be withdrawn.

LEGAL ANALYSIS AND CONCLUSION

The issue in this matter is whether petitioner should be permitted to withdraw the tenure charges it filed pursuant to N.J.A.C. 6A:3-5.4 against respondent. N.J.A.C. 6A:3-5.6 provides that any proposed withdrawal shall: be accompanied by documentation as to the nature of the charges; include an explanation of the circumstances justifying withdrawal; be consented to by both parties; indicate that the charged party agrees to the withdrawal with a full understanding of his or her rights; include a showing that withdrawal is in the public interest; and, where the charged party is a teaching staff member, include a showing that the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate. See also In re Cardonick, 1990 S.L.D. 842, 846.

In this matter, the tenure charges were based upon the indictment returned against the respondent. Upon further investigation by the Monmouth County Prosecutor's Office, the Prosecutor's Office concluded that it could not prosecute the matter, and moved in Superior Court for the indictment to be dismissed. Once the indictment was dismissed in July 2012, the underlying basis for the tenure charges was no longer present. Furthermore, the petitioner had no other evidence available to sustain the charges against respondent. Without this evidence, the petitioner could not pursue the matter further.

The respondent has consented to the withdrawal of the charges with full understanding of his rights. He is aware that the Commissioner has a duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

The withdrawal of these charges is in the public interest because the criminal charges were dismissed and there is no other available evidence to sustain the tenure charges. Without this evidence, a trial in this matter would be an exercise in futility resulting in needless expense.

When all these circumstances are taken into consideration, I **CONCLUDE** that the petitioner should be permitted to withdraw the charges. The motion is granted, and the tenure charges will be withdrawn.

ORDER

I hereby **ORDER** that the motion to withdraw tenure charges filed against respondent Mark Henderson by the Juvenile Justice Commission is hereby **GRANTED**, and the tenure charges are hereby **WITHDRAWN**.

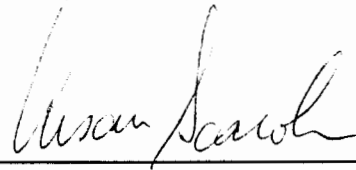
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 26, 2012

DATE



SUSAN M. SCAROLA, ALJ

Date Received at Agency:

9/26/12

Date Mailed to Parties:

9/26/12

LIST OF WITNESSES

For petitioner:

None

For respondent:

None

LIST OF EXHIBITS

For petitioner:

Petitioner's Brief of September 18, 2012

For respondent:

Respondent's Letter of September 21, 2012

OAL DKT. NO. EDU 12916-12
(EDU 5877-12 ON REMAND)
AGENCY DKT. NO. 102-4/12

M.V., on behalf of minor children, M.L and I.L., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF MOUNTAINSIDE, :
UNION COUNTY, :
RESPONDENT. :

The record of this matter, the parties' proposed Stipulation of Settlement, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

Date of Decision: 11/13/12

Date of Mailing: 11/13/12



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12916-12

AGENCY DKT. NO. 102-4/12

ON REMAND

OAL DKT. NO. EDU 05877-12

M.V. on behalf of minor children,

M.L. and I.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

BOROUGH OF MOUNTAINSIDE,

UNION COUNTY,

Respondent.

James N. Butler, Jr., Esq. for petitioner

Christine M. Martinez, Esq. for respondent, (Machado Law Group, LLC,
attorneys)

Record Closed: October 1, 2012

Decided: October 5, 2012

BEFORE IRENE JONES ALJ:

On September 21, 2012, the above referenced matter was remanded to the Office of Administrative Law (OAL) for "perfection of settlement or adjudication of merits". The

executed Stipulation of Settlement and Board Resolution were forwarded to the undersigned on October 3, 2012 and are attached hereto.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 5, 2012



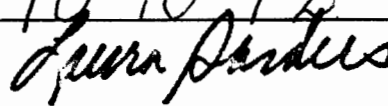
DATE

IRENE JONES ALJ

Date Received at Agency:

Date Mailed to Parties:

OCT 10 2012

10-10-12


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

Attachment

EDU 12916-12

AUGUST 1, 2012

M.V. o/b/o I.L. and M.L.

Petitioner

v.

Mountainside School District,

Respondent

OAL Docket No.

STIPULATION

OF

SETTLEMENT

1. The parties agree to settle the above matter as follows:

Petitioner agrees not to enroll

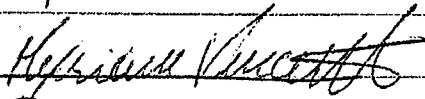
a) The minor children, I.L. and M.L., agree not to enroll in the Mountainside School District for the 2012-2013 school year.

b) M.V. o/b/o I.L. and M.L. ^{Petitioner,} will pay to the ^{Respondent,} Mountainside School District, \$2,500.00 in retroactive tuition for the 2011-2012 school year within 45 days of the Mountainside Board of Education meeting approving the settlement.

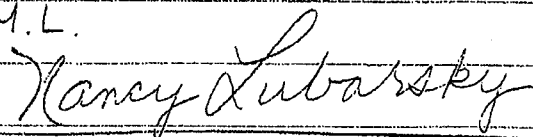
b1) The payment will be sent to Mountainside Board of Education, 1497 Woodcrest Dr., Mountainside, NJ 07092, attn: Dr. Lubarsky.

c) This settlement agreement resolves all disputes between the parties.

Myriam Vincent o/b/o I.L. and M.L.



Petitioner

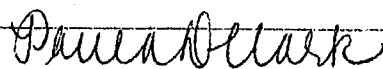


Aug. 1, 2012 Dr. Nancy Lubarsky

Chief School Adminis

trator

Mountainside School District



9/26/12

Attorney for the Mountainside Board of Education

Mountainside Board Of Education

Beechwood School, 1497 Woodacres Dr., Mountainside, NJ 07092

Certified Extract of Board Minutes

IV. Administration

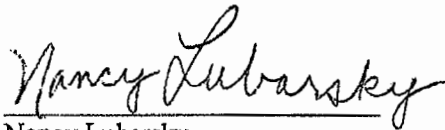
- I. Move to approve upon the recommendation of the Chief School Administrator the settlement agreement regarding a residency hearing (Attachment #1).

Moved: Mrs. Jakositz

Seconded: Mr. Venes

Ayes: 7 Nays: 0 Abstentions: 0

I hereby certify that the foregoing is an extract of formal Mountainside Board of Education Board minutes for the special meeting of August 7, 2012.



Nancy Lubarsky
Chief School Administrator

10-3-12

Date

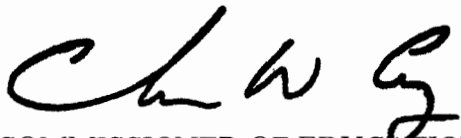
OAL DKT. NO. EDU 7050-12
AGENCY DKT. NO. 105-4/12

TANYA TENTURIER,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF ELIZABETH, UNION COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

Date of Decision: 11/13/12

Date of Mailing: 11/13/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 07050-12
AGENCY DKT. NO. 105-4/12

IN THE MATTER OF TANYA TENTURIER,

Petitioner,

v.

ELIZABETH BOARD OF EDUCATION,

Respondent

Timothy R. Smith, Esq., for Petitioner (Caruso Smith Edell Picini, attorneys)

Karen A. Murray, Esq., for Respondent (Elizabeth Board of Education)

Record Closed: September 27, 2012

Decided: September 27, 2012

BEFORE TAHESHA L. WAY, ALJ:

This matter was transmitted to the Office of Administrative Law on May 22, 2012, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached Board resolution dated September 13, 2012.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.
3. Both the claim and counterclaim have been resolved in accordance with the executed Settlement.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and N.J.A.C. 6A:3-5.6 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

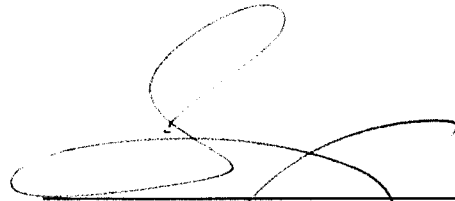
September 27, 2012

DATE

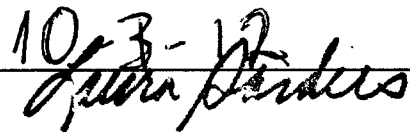
Date Received at Agency:

Date Mailed to Parties:

OCT - 1 2012



TAHESHA L. WAY, ALJ

10-3-12


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

CARUSO SMITH EDELL PICINI, P.C.
60 Route 46 East
Fairfield, NJ 07004
(973) 667-6000
Attorneys for: Petitioner, Tanya Tenturier

FILED

SEP 27 A 8:00

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Tanya Tenturier,

Petitioner,

v.

Elizabeth Board of Education,

Respondent

Before the Commissioner of Education
OAL Docket No.: EDU 07050-2012-N

**SETTLEMENT AGREEMENT AND
GENERAL RELEASE**

This Settlement Agreement and General Release is made by and between the Elizabeth Board of Education (the "Board") whose administrative offices are located at 500 North Broad Street, Elizabeth, New Jersey 07207 and Tanya Tenturier ("Tenturier"), whose address is 90 Tiffany Boulevard, 68A, Newark, New Jersey 07104. In consideration of mutual promises and undertakings contained in this Settlement Agreement and General Release and for good and valuable consideration the receipt of which is hereby acknowledge, the undersigned parties state:

WHEREAS, on October 3, 2011, Tenturierr was employed as a teacher by the Board; and

WHEREAS, on October 11, 2011, a criminal Complaint was issued against Tenturier for allegedly filing a fictitious report and harassing a student's parent during the course of Tenturier's employment by the Board; and

WHEREAS, on December 13, 2011, the Elizabeth Municipal Court dismissed the above-referenced criminal Complaint against Tenturier;

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Tenturier's defense counsel forwarded a demand letter to the Board, on or about January 26, 2012, seeking reimbursement from the Board for Tenturier's attorney's fees and costs associated with Tenturier's legal defense relative to Elizabeth Municipal Court Complaint, Summons No. G 2011-056423;

WHEREAS, Tenturier subsequently filed the Petition at issue demanding reimbursement from the Board in the amount of \$11,808.74;

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Settlement Agreement and General Release in order to avoid the need for further litigation; and

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Five Thousand Dollars **(\$5,000.00)** as full and complete indemnification of the attorney's fees and costs incurred by Tenturier in relation to the Elizabeth Municipal Court Complaint, Summons No. G 2011-056423. The Board shall make this payment payable to Caruso Smith Edell Picini P.C., and shall send it directly to Tenturier's legal counsel, Caruso Smith Edell Picini P.C. whose offices are located at 60 Route 46 East Fairfield, NJ 07004.
2. For and in consideration of the Indemnification set forth in Paragraph One (1) above, Tenturier and her heirs, executors, administrators, successors and assigns, hereby forever release and discharge the Elizabeth Board of Education, its members, successors and assigns and all of its or their past or future members, officers, agents, employees, administrators, attorneys, fiduciaries, successors and assigns (whether acting as agents for the Board, its affiliates or its related entities or in their individual capacities) from any and all claims, demands, causes of action, fees and liabilities of any kind whatsoever (upon any legal or equitable theory, whether contractual, common-law, statutory, federal, state, local, or otherwise), whether known or unknown, which Tenturier ever had, now has or hereafter may have against the Board by reason of any actual or alleged act, omission, transaction, practice,

conduct, occurrence or other matter relating to any and all allegations contained in the Petition entitled Tanya Tenturier v. Elizabeth Board of Education, and bearing OAL Docket No.: EDU 07050-2012-N.

3. The parties agree that if any of the provisions, terms, clauses, waivers and releases of claims and rights contained in this Settlement Agreement and General Release are declared illegal, unenforceable, or ineffective in a legal forum of competent jurisdiction, such provisions, terms, clauses, waivers and releases of claims or rights shall be modified, if possible, in order to achieve, to the extent possible, the intentions of the parties. If any such provisions, terms, clauses, waivers and releases of claims and rights contained in this Settlement Agreement and General Release cannot be modified, the remaining provisions, terms, clauses, waivers and releases of claims and rights contained in this Agreement shall remain in full force and effect.

4. This Settlement Agreement and General Release set forth the entire terms between the parties, and fully supersedes any and all prior Agreements or understanding between them pertaining to the subject matter thereof.

5. Nothing contained in this Settlement Agreement and General Release constitutes an admission of any wrongdoing by either party and neither party shall be considered to be a prevailing party in this matter.

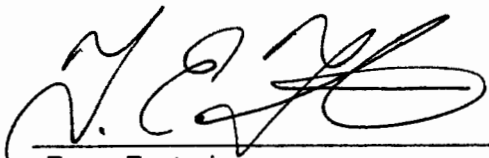
6. All terms of this Settlement Agreement and General Release are deemed material. The parties agree that this Settlement Agreement and General Release may not be altered, amended, modified, superseded, canceled or terminated except by an express written Agreement duly executed by all the parties or their attorneys on their behalf, which makes specific reference to this Settlement Agreement and General Release.

7. Tenturier agrees that she has been fully and fairly represented by legal counsel throughout this proceeding.

8. This Settlement Agreement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

9. This Settlement Agreement and General Release is an agreement that shall be construed in accordance with the laws of the State of New Jersey.

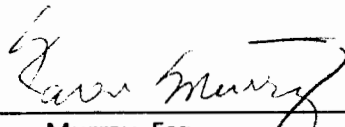
10. All parties hereby agree that the terms of this Settlement Agreement and General Release are binding upon all parties, their heirs and their assigns.



Tanya Tenturier

Dated: 9/1/12

Harold E. Kennedy, Jr.
Business Administrator/Board Secretary
ELIZABETH BOARD OF EDUCATION
Dated:



Karen Murray, Esq.
Board Counsel/Director for H.R.
ELIZABETH BOARD OF EDUCATION
Dated:

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BOARD OF EDUCATION

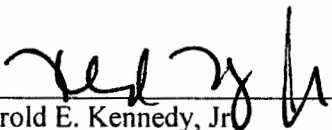
RESOLUTION

WHEREAS, the Elizabeth Board of Education and Tanya Tenturier have discussed a resolution of OAL Docket No. EDU 07050-2012 N; and

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case.

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts and approves the terms of the confidential settlement agreement on file in the Office of the School Business Administrator/Board Secretary.

TRUE COPY APPROVED AND ADOPTED AT
THE ELIZABETH BOARD OF EDUCATION MEETING
HELD ON **September 13, 2012**



Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

OAL DKT. NO. EDU 9630-12
 AGENCY DKT. NO. 188-7/12

A.R., on behalf of minor child, A.V.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODLAND PARK, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his full and independent review, the Commissioner finds that the attached letter dated August 29, 2012 from Board Attorney Jeffrey R. Merlino to the Administrative Law Judge, in which he reports: "Please be advised that following our August 23, 2012 conference, Petitioner provided the Board copies of a NJ driver's license/identification verifying her residence in Woodland Park. Accordingly, the Board withdraws its Answer and Counterclaim in the above matter and will enroll Petitioner's child(ren) in the Woodland Park Public Schools for the upcoming school year[.]" along with the parties' failure to appear at an in-person status conference at the OAL on October 10, 2012 and petitioner's lack of exceptions to the Initial Decision, compel a conclusion that this residency matter has been rendered moot.

Accordingly, the Initial Decision of the OAL is adopted and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*


 COMMISSIONER OF EDUCATION

Date of Decision: 11/13/12
 Date of Mailing: 11/13/12

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.*



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 09630-12N

AGENCY DKT NO. 188-7/12

A.R. ON BEHALF OF MINOR CHILD A.V.

Petitioner,

v.

**BOARD OF EDUCATION OF THE BOROUGH of
WOODLAND PARK, PASSAIC COUNTY,**

Respondent.

A.R. , petitioner pro se failed to appear

Jeffrey R. Merlino, Esq., for respondent (Lindabury, Estabrook & Cooper, P.C.)

Record Closed: October 10, 2012

Decided: October 10, 2012

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 10, 2012, petitioner, A.R., filed a residency appeal on behalf of her child, A.V. a student in Woodland Park. On July 16, 2012, the Borough of Woodland Park Board of Education (BOE or respondent) filed a response with the State Department of Education (DOE) seeking reimbursement from petitioner for the costs of tuition incurred by the attendance of her minor child in the BOE's school district. The BOE transmitted

this matter to the Office of Administrative Law (OAL) on July 18, 2012, for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. A pre-hearing conference was held on August 8, 2012. A status conference was held on August 23, 2012. I received a letter from respondent on September 4, 2012, stating that petitioner provided verification of her residence in Woodland Park. Accordingly, respondent withdrew its Answer and Counterclaim and agreed to enroll petitioner's child in the Woodland Park public schools for the upcoming school year. Said letter is attached hereto for reference. Petitioner stated that she would send a letter withdrawing her petition. To date, petitioner has not sent a withdrawal letter. I scheduled an in-person status conference for October 10, 2012. Both parties failed to appear. I closed the record at that time.

FACTUAL DISCUSSION AND FINDINGS

I **FIND** the following **FACTS**:

Petitioner provided respondent with proof of her residency in Woodland Park which respondent accepted. Once respondent accepted petitioner's residency verification it enrolled petitioner's child in Woodland Park public school system. Respondent also withdrew its Answer and Counterclaim.

LEGAL ANALYSIS AND CONCLUSIONS

Based on the facts adduced, I **CONCLUDE** that this matter is no longer a contested case before the OAL.

ORDER

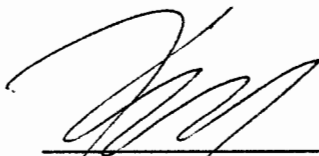
Based on the foregoing, it is hereby **ORDERED** that the petition is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10-10-12
DATE


KIMBERLY A. MOSS, ALJ

Date Received at Agency:

Date Mailed to Parties:
ljb

OCT 11 2012


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

— ∞ —
LINDABURY
McCORMICK, ESTABROOK & COOPER, P.C.
Attorneys at Law

4 P 2: 40
DIRECT FAX
August 29, 2012

Direct Fax: (908) 518-2967
jmerlino@lindabury.com

Via Fax (973) 648-6124

Hon. Kimberly Moss, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: A.R. o/b/o A.V. v. Woodland Park Board of Education ("Board")
OAL Docket No. EDU 09630-12N

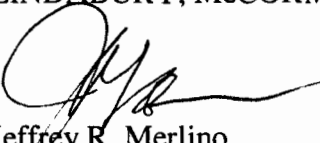
Dear Judge Moss:

We represent the Board in the above matter. Please be advised that following our August 23, 2012 conference, Petitioner provided the Board copies of a NJ driver's license/identification verifying her residence in Woodland Park. Accordingly, the Board withdraws its Answer and Counterclaim in the above matter and will enroll Petitioner's child(ren) in the Woodland Park Public Schools for the upcoming school year.

Thank you for Your Honor's courtesies in this matter.

Respectfully submitted,

LINDABURY, McCORMICK, ESTABROOK & COOPER, P.C.


Jeffrey R. Merlino
JRM/cam

cc: Elaine Baldwin, Interim Superintendent of Schools

Arlene Rodriguez, Petitioner (via regular mail)
40B Cedarhurst Avenue
Woodland Park, NJ 07424

2323637v1

CELINA CHENG, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

TOWNSHIP OF NORTH BERGEN, :

HUDSON COUNTY, :

RESPONDENT. :

SYNOPSIS

In June 2012, the petitioner – an adult student – filed a request for emergency relief to permit her to graduate from North Bergen High School and to attend commencement. The parties reached a tentative settlement of the issues, and petitioner confirmed on the record that she consented to the adjournment of the emergency hearing. On July 19, 2012, petitioner advised the ALJ that she would submit a letter withdrawing her emergent application. In October 2012, petitioner advised the ALJ's office that she had received her high school diploma, and again stated that she would send a letter withdrawing her original application for emergent relief. No letter was ever received.

The ALJ found that petitioner has knowingly and voluntarily withdrawn her emergent relief application, concluded that the matter is now moot, and ordered that the matter be dismissed with prejudice.

The Commissioner concurred with the ALJ's findings, and determined that the case is appropriately dismissed as moot.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 8023-12
AGENCY DKT. NO. 162-6/12

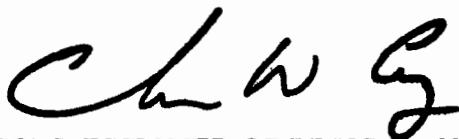
CELINA CHENG,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF NORTH BERGEN,	:	
HUDSON COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon full consideration, the Commissioner concurs with the ALJ – for the reasons comprehensively detailed in her Initial Decision – that this matter is appropriately dismissed as moot.

Accordingly, the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.¹


COMMISSIONER OF EDUCATION

Date of Decision: 11/13/12

Date of Mailing: 11/13/12

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c.36* (*N.J.S.A. 18A:6-9.1*)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSING
EMERGENT RELIEF PETITION

OAL DKT. NO. EDU 08023-12

AGENCY DKT.NO. 162-6/12

CELINA CHENG,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF NORTH BERGEN,
HUDSON COUNTY,**

Respondent.

Celina Cheng, petitioner pro se

Jack Gilman, Esq., for respondent Township of North Bergen Board of Education
(Law Offices of Joseph J. Ryglicki, attorney)

Record Closed: October 22, 2012

Decided: October 24, 2012

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 15, 2012, petitioner Celina Cheng, an adult student, filed a request for emergency relief requesting an order permitting her to graduate from North Bergen High

School on June 20, 2012, and accordingly, to attend the commencement. North Bergen High School and North Bergen Board of Education (jointly "Board") had advised petitioner that she did not have sufficient credits to graduate because of excessive absences in two of her classes, notwithstanding passing grades in those courses. Petitioner appealed to the Attendance Review Board which upheld the decision of the Board. Department of Education Bureau of Controversies and Disputes transmitted the application for emergency relief to the Office of Administrative Law (OAL) on June 15, 2012.

On June 19, 2010, the application for emergent relief was scheduled to be heard. On that date, the parties were able to reach a tentative settlement of the issues in controversy on the emergent application. Petitioner confirmed on the record that she consented to the adjournment of the emergency hearing on consideration of the Board's agreement that she could attend the graduation ceremony as a spectator and that she would be exploring whether she could use community college summer courses in satisfaction of her high school requirements. In lieu of those courses, other summer coursework options will be available to her at summer school and/or online. On consent of petitioner, thus, the emergency hearing was adjourned without a new date in order to allow them time to work out the details of registering for summer school credits that would allow her to graduate in August.

I convened status conferences with the parties telephonically on both June 25 and July 19, 2012, in order to remain abreast of the efforts to locate an alternative path to graduation for petitioner. On July 19, 2012, petitioner advised that she was registered for and taking one online and one in-person summer course and was fine with this alternative graduation track. Petitioner advised the undersigned that she would submit a letter withdrawing the OAL dispute. When a substantial amount of time passed without the written withdrawal request, I directed my secretary to contact the parties.

On October 5, 2012, my secretary spoke with petitioner who advised that she has now received her high school diploma and that she would send by facsimile a letter to that effect withdrawing her original application for emergent relief. No letter has ever been received. Therefore, I **FIND** that petitioner has withdrawn knowingly and voluntarily her

emergent application for relief in order to attend graduation with her class on June 20, 2012. I also **CONCLUDE** that the matter is now moot and **ORDER** that the matter be **DISMISSED** with prejudice.

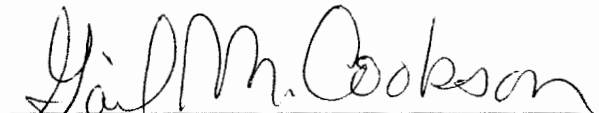
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 24, 2012

DATE



GAIL M. COOKSON, ALJ

Date Received at Agency:

10/24/12


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:

NOV 20 2012

id

OAL DKT. NO. EDU 1884-12
AGENCY DKT. NO. 22-1/12

C.T., on behalf of minor child, B.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ROSELLE PARK, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
_____	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Commissioner approves the parties' settlement¹ and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 11/14/12

Date of Mailing: 11/14/12

¹ It is noted that Term 5 of the parties' agreement deals with the awarding of counsel fees and costs under certain circumstances. It is well established, however, that the Commissioner of Education does not have plenary authority to award counsel fees in controversies and disputes presented under Education Law. (*Balsley v. North Hunterdon Bd. of Educ.*, 117 N.J. 434 (1990))



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01884-12N

AGENCY DOCKET NO. 22-1/12

C.T. ON BEHALF OF B.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF

ROSELLE PARK, UNION COUNTY,

Respondent.

Clara Smit, Esq. appearing on behalf of petitioner

Anthony P. Sciarrillo, Esq., for respondent (Lindabury, McCormick &
Estabrook)

Record Closed: October 19, 2012

Decided: October 19, 2012

BEFORE KIMBERLY A. MOSS, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on February 14, 2012, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted on March 2, 2012 during which time the parties scheduled the matter for hearing on June 7, 2012. Prior to the hearing date the petitioner's counsel requested an adjournment due to the

parties engaging in settlement discussions. A status conference scheduled for June 21, 2012. Follow up conference calls were requested the last one being August 24, 2012. On October 18, 2012 the undersigned received a copy of the fully executed Agreement and Certified Resolution Extract approving the settlement, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement and Board Resolution, I **FIND**:

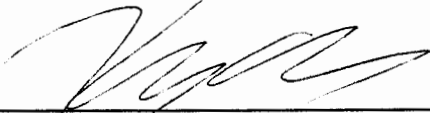
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement meets the requirements of N.J.A.C. 1:1-19.1 and that the stipulation should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

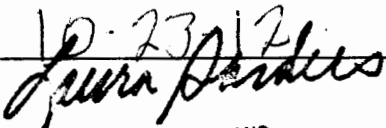
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

10-19-12
DATE


KIMBERLY A. MOSS, ALJ

Date Received at Agency:

10-23-12

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: **OCT 23 2012**
ljb

*Roselle Park Public Schools
510 Chestnut Street
Roselle Park, New Jersey 07204*

"Committed to Excellence"

Patrick M. Spagnoletti
Superintendent of Schools
(908) 245-1197
FAX (908) 245-1226

Susan M. Guercio
School Business Administrator/
Board Secretary
(908) 245-2103

Resolution: Business
Introduced By: Mr. Gerten
Seconded By: Mr. Balaban
Adopted: August 21, 2012
AYE: 5 NAY: 0

2012 OCT 19 P 3

38. Settlement Agreement

To approve the settlement agreement pertaining to OAL Agency Docket Number EDU 01884-2012 and Agency Reference Number 22-1/12, as recommended by the Superintendent.

I, Susan Guercio, Board Secretary of the Roselle Park School District, hereby certify that the extract from the minutes of a meeting of the Board of Education duly called and held on August 21, 2012 has been compared by me with the original minute book of said Board of Education, and is a true, complete and exact copy thereof, as far as the same relates to the subject matter referred to said contract.

IN WITNESS THEREOF, I have hereunto set my hand and seal of the Roselle Park Board of Education, this 11th day of September 2012.



Susan Guercio
School Business Administrator
Board Secretary.

laa

LINDABURY, McCORMICK, ESTABROOK & COOPER

A Professional Corporation

53 Cardinal Drive

P.O. Box 2369

Westfield, New Jersey 07091

(908) 233-6800

Attorneys for Respondent, Roselle Park Board of Education

C.T. o/b/o B.H.	:	STATE OF NEW JERSEY
	:	DEPARTMENT OF EDUCATION
Petitioners	:	DOCKET NO.: EDU 01884-2012 N
-vs-	:	AGENCY REF. NO.: 22-1/12
	:	
	:	
ROSELLE PARK BOARD OF	:	
EDUCATION	:	
	:	<u>SETTLEMENT AGREEMENT</u>
Respondent.	:	

WHEREAS, the Petitioner C.T. and Respondent Board of Education of the Borough of Roselle Park, Union County, desire to settle the above matters in an amicable way;

NOW THEREFORE, the parties hereby agree as follows:

1. Petitioner C.T. (hereinafter "Petitioner") agrees to pay to the Board of Education of the Borough of Roselle Park, Union County (hereinafter "Board") the total sum of \$17,000.00. The payment schedule is set forth in paragraph 2, *infra*, except that payments shall begin within thirty (30) days from the date of the Decision by the Commissioner of Education.

2. Petitioner shall make payments to the Board totaling \$17,000.00 by the conclusion of the 2013-2014 school year. The payments shall be made as follows:

- a. 2011-2012 school year: A total of \$3,000.00 prior to September 1, 2012;
- b. 2012-2013 school year: A total of \$7,000.00, to be paid in monthly installments as follows:
 - i. July 1, 2012 - \$580.00
 - ii. August 1, 2012 - \$580.00
 - iii. September 1, 2012 - \$580.00
 - iv. October 1, 2012 - \$580.00
 - v. November 1, 2012 - \$580.00
 - vi. December 1, 2012 - \$580.00
 - vii. January 1, 2013 - \$580.00
 - viii. February 1, 2013 - \$580.00
 - ix. March 1, 2013 - \$580.00
 - x. April 1, 2013 - \$580.00
 - xi. May 1, 2013 - \$580.00
 - xii. June 1, 2013 - \$620.00
- c. 2013-2014 school year: A total of \$7,000.00, to be paid in monthly installments as follows:
 - i. July 1, 2013 - \$580.00
 - ii. August 1, 2013 - \$580.00
 - iii. September 1, 2013 - \$580.00
 - iv. October 1, 2013 - \$580.00
 - v. November 1, 2013 - \$580.00

- vi. December 1, 2013 - \$580.00
- vii. January 1, 2014 - \$580.00
- viii. February 1, 2014 - \$580.00
- ix. March 1, 2014 - \$580.00
- x. April 1, 2014 - \$580.00
- xi. May 1, 2014 - \$580.00
- xii. June 1, 2014 - \$620.00

3. The aforementioned sums are being paid solely for the purpose of B.H.'s continued attendance in the Board's school system. B.H. shall be permitted to remain a Board student as long as the aforementioned payments are made, and in accordance with and subject to prevailing law.

4. In the event that the Petitioner fails to pay in strict accordance with the terms set forth in this Stipulation of Settlement ("Agreement"), then, and in that event, the Board shall be entitled to obtain entry of a judgment against Respondents in accordance with Paragraph 5 herein, for the following amounts:

- a. 2011-2012 school year - \$32,132.00
- b. 2012-2013 school year - \$35,500.00
- c. 2013-2014 school year - \$38,300.00
- d. TOTAL: \$105,932.00

The entry of judgment shall be minus any amounts paid up to the time of default, in addition to the sums set forth in Paragraph 5 herein.

5. In the event that the Petitioner fails to pay in strict accordance with the terms set forth in this Agreement, then, and in that event, the Board shall be entitled to an

award of counsel fees and costs incurred solely in connection with the enforcement of this Agreement on the submission by Board's counsel of an affidavit of services and costs to a court of law. Said counsel fees and costs will be in addition to any amounts the Board is entitled to under paragraph 4 of this Stipulation of Settlement. Counsel fees incurred in connection with the prosecution or defense of the above action shall not be part of any award of counsel fees or the Initial Decision contemplated in this Agreement.

6. In the event of default as aforesaid, the Board shall be entitled to obtain the entry of Judgment upon *ex parte* application, with supporting certification, with notice to Petitioner only in the form of a copy of the application addressed to the Petitioner by certified mail.

7. This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final Agreement on any and all issues.

8. This Agreement shall be governed by the laws of the State of New Jersey.

9. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

10. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. The parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they reviewed the Agreement in detail with their counsel or representative and fully understand its requirements and limitations.

11. No Admission of Liability/No Prevailing Party. This Settlement and Release Agreement does not constitute an admission by any party of liability or

responsibility to the other. It is acknowledged that each party's promises, covenants and releases set forth herein is in consideration of this agreement and is given for the purpose of avoiding the costs and expenses of legal proceedings.

12. The Board agrees not to seek any additional sums from Petitioner as it relates to this matter only, and in the case of Petitioner's default as provided for herein.

13. The parties shall hold in trust and confidence, and shall not disclose, discuss or divulge to others, in any way shape or form, any of the details of either this case, the settlement, or any of the financial information of this settlement agreement to the maximum extent permitted by law.

14. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.

15. Any and all paragraph titles are for illustrative purposes only and all meaning shall be borne from the language set forth in the paragraph itself.

16. C.T. ON BEHALF OF B.H. agrees to withdraw the pending petition in the matter of C.T. ON BEHALF OF B.H. vs. Board of Education of the Borough of Roselle Park, Union County, DOCKET NO: EDU 0188-2012 N and AGENCY REF NO.: 22-1/12, and the Board agrees to withdraw its Counterclaim to such petition.

17. Upon receipt and clearance of the full payment set forth in paragraph 1 herein, the Board agrees to provide to Petitioner a full release of any and all claims the Board has asserted against the Petitioner and as more specifically set forth in the Petition and Answer thereto. Similarly, Petitioner shall provide to the Board a full release of any and all claims the Petitioners may have against the Board.

18. This Agreement is subject to ratification by the Borough of Roselle Park Board of Education after receipt of a signed Agreement from Petitioner.

ON BEHALF OF C.T. and B.H.

Caterina Tenore, Parent

Date: _____

ON BEHALF OF THE ROSELLE PARK BOARD OF EDUCATION

Roseann Rinaldi
Roseann Rinaldi, Board President

Date: 9/11/12

WITNESSED BY:

Susan Guercio
Susan Guercio, SBA/BS

Date: 9/11/12

440-12LM



State of New Jersey

DEPARTMENT OF EDUCATION

PO BOX 500

TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHRISTOPHER D. CERF
Commissioner

November 14, 2012

Patricia Bombelyn, Esq.
Perez & Bombelyn
402 Livingston Avenue
New Brunswick, NJ 08901

Lester E. Taylor, Esq.
Florio, Perrucci, Steinhardt & Fader
1010 Kings Highway South, Building 2
Cherry Hill, NJ 08034

Dear Counsel:

I have reviewed the papers filed in connection with petitioners' motion seeking that – pursuant to *N.J.A.C. 6A:3-1.16* – I relax OAL Rule *N.J.A.C. 1:1-18.4* and permit the filing of exceptions to Administrative Law Judge (ALJ) Edward Delanoy's Order on Emergent Relief in the matter captioned *S.V., M.R. and G.R., on behalf of minor children, K.V., E.R. and F.H. v. Board of Education of the City of Camden, Camden County*, Agency Dkt. No. 307-10/12, OAL Dkt. No. 13908-12. Upon such review, I am compelled to deny petitioners' motion.

As petitioners were previously advised, *N.J.A.C. 1:1-18.4* makes no provision for the filing of exceptions to an Order of an Administrative Law Judge. Exceptions are only authorized for Initial Decisions. Although on rare occasion in the past the Commissioner has allowed the filing of exceptions to an Emergent Relief Order, this has only been permitted in the limited circumstance where the ALJ's Order effectively ended the contested case, which is unquestionably not the situation here.

Accordingly, petitioners' motion seeking relaxation of the prohibition to filing exceptions to the ALJ's Order on Emergent Relief is hereby denied.

Sincerely,

Christopher D. Cerf
Commissioner

CDC/MKD/MH
VIA FACSIMILE AND REGULAR MAIL

OAL DKT. NOS. EDU 10423-11 and EDU 4661-12 (CONSOLIDATED)
AGENCY DKT. NOS. 235-8/11 and 81-3/12

IN THE MATTER OF THE TENURE HEARING : COMMISSIONER OF EDUCATION
OF GREGORY CURRIE, SCHOOL DISTRICT :
OF THE TOWNSHIP OF JEFFERSON, : DECISION
MORRIS COUNTY. :
_____ :

Before the Commissioner is a proposed settlement of the two above-referenced consolidated tenure cases. The record, the proposed "Settlement, Resignation and Release," (Settlement), and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed and found in compliance with *N.J.A.C. 6A:3-5.6* – which reiterates the standards for settlement of tenure cases set forth in *In re Cardonick*, 1990 *S.L.D.* 842 (1990).

Accordingly, the Commissioner approves the Settlement terms and adopts the Initial Decision as the final decision in this case, with the proviso that the Commissioner has no jurisdiction over the parties' actions relative to the civil suit referenced in Paragraphs 3, 6 and 9E of the Settlement. The petition is hereby dismissed, subject to compliance with the terms of the Settlement.¹

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

Date of Decision: 11/20/12

Date of Mailing: 11/20/12

¹ A copy of this decision shall be forwarded to the New Jersey State Board of Examiners for action as that body deems appropriate.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10423-11N

AGENCY DOCKET NO. 235-8/11

**IN THE MATTER OF THE TENURE HEARING OF
GREGORY CURRIE, SCHOOL DISTRICT OF THE
TOWNSHIP OF JEFFERSON, MORRIS COUNTY,**

Nicholas Celso, III, Esq. on behalf of Jefferson Township Board of Education
(Schwartz, Simon, Edelstein & Celso, LLC)

Frederick E. Gerson, Esq., on behalf of Gregory Currie

Record Closed: September 27, 2012

Decided: October 2, 2012

BEFORE **JOANN LaSALA CANDIDO, ALJ:**

This matter was transmitted to the Office of Administrative Law (OAL) on September 1, 2011, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. Several hearings and conferences were scheduled. The last one being September 27, 2012, wherein the parties advised that the matter is settled. The Settlement and Resignation was put on the record. Gregory Currie (Currie) was voir dired as to his acceptance of the Settlement. Currie also agreed to the terms of this settlement upon advice of counsel.

The Settlement Agreement and Resignation was adopted by a majority of the full membership of the Jefferson Township Board of Education at a public meeting held on August 27, 2012. The fully executed Settlement, Resignation and Release are attached hereto for reference.

Based upon a review of the record as well as the proposed settlement agreement, and the representation of the parties on the record of this matter, I make the following **FINDINGS**:

1. Gregory Currie is employed as a teaching staff member in the School district of the Township of Jefferson in Morris County.
2. It is anticipated that the hearing in this matter would be protracted and costly.
3. If a hearing becomes necessary, the District has identified school personnel who are potential witnesses.
4. Litigation of the charges would lead to the disruption of the District's educational program due to the great amount of time lost by administrators and other personnel who would be required to testify to the incidence which led to the filing of the tenure charges against an employee who has signed the attached agreement, tenders his resignation from all employment with the Board.
5. Under the proposed settlement, Currie has submitted his resignation. However, beginning August 28, 2012 and continuing until the date of the Commissioner's approval of this Agreement, all monies paid shall count as an offset toward a total lump sum payment to be made by the Board under this Agreement in the amount of \$180,000.
6. If the tenure matter proceeds further, both parties would incur costs of paying their attorneys for a likely lengthy hearing.
7. The settlement fully disposes of all issues in controversy.

Based upon the foregoing, I **CONCLUDE** that the terms of settlement are in the public interest.

It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings are hereby concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 3, 2012
DATE

Joann Lasala Candido
JOANN LASALA CANDIDO, ALJ

Date Received at Agency:

Date Mailed to Parties:

OCT - 5 2012

10-5-12
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

SCHWARTZ SIMON
EDELSTEIN & CELSO LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
(973) 301-0001 F: (973) 993-3152
Attorneys for the Jefferson Township
Board of Education

IN THE MATTER OF THE TENURE
CHARGES AGAINST GREGORY
CURRIE,

BY THE BOARD OF EDUCATION OF
THE TOWNSHIP OF JEFFERSON,
MORRIS COUNTY.

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY

OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET NO.: EDU 10423-11
AGENCY REF. NO.: 235-8/11

-and-

OAL DOCKET NO.: EDU 04661-2012
AGENCY REF. NO.: 81-3/12

ADMINISTRATIVE ACTION

**SETTLEMENT, RESIGNATION AND
RELEASE**

WHEREAS, the Board of Education of the Township of Jefferson ("the Board") is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, which is entrusted with maintaining and conducting the public schools of the School District; and

WHEREAS, Gregory Currie ("Mr. Currie") is employed by the Board as a tenured high school vice principal; and

WHEREAS, on July 18, 2011, Dr. Kathaleen Fuchs, Superintendent of Schools, filed sworn tenure charges against Mr. Currie, together with a sworn statement of evidence in support thereof, and said charges were certified by the Board to the Commissioner of Education on August 15, 2011; and

WHEREAS, on January 20, 2012, Mr. Currie filed suit in Morris County Superior Court seeking damages for alleged spoliation of evidence in connection with the tenure charges, such suit having been assigned Docket Number MRS-L-136-12; and

WHEREAS, on February 9, 2012, Dr. Kathaleen Fuchs filed a second set of sworn tenure charges against Mr. Currie, together with a sworn statement of evidence in support thereof, and said charges were certified by the Board to the Commissioner of Education on March 26, 2012; and

WHEREAS, Mr. Currie filed an Answer denying all charges; and

WHEREAS, on April 17, 2012, the Honorable JoAnn LaSala Candido, ALJ ordered that the above referenced, separately filed tenure charges be consolidated; and

WHEREAS, hearings in the consolidated matters were held at the Office of Administrative Law on: April 26, 2012, May 3, 2012, June 19, 2012, June 21, 2012 and June 22, 2012; and

WHEREAS, the parties, now wishing to resolve the within matter amicably without the need for further litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein, and approval by the Court and the Commissioner;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. Tenure Charges to be Moot

The Board agrees that upon execution of the within Settlement, Resignation and Release ("the Agreement") by the parties and approval by the Court and the Commissioner, the subject tenure charges shall be moot and shall be deemed to be withdrawn and abandoned by the Board.

2. Resignation

Mr. Currie, by signing this Agreement, tenders his resignation from all employment with the Board, effective as of the date of the Commissioner's approval of this Agreement, subject to the Board's fulfillment of its obligations as set forth herein.

3. Dismissal with Prejudice of Civil Suit

Mr. Currie agrees to dismiss with prejudice, and without costs to either party, the civil suit captioned Gregory Currie v. Jefferson Township Public Schools, et als., Dkt. No. MRS-L-136-12, by the signing and filing of a Stipulation of Dismissal with prejudice.

4. No Admissions

The parties agree that neither the resignation of Mr. Currie nor the Board's approval of this Agreement, constitute an admission of liability or wrongdoing by either party.

5. Payment

A. Pending a final determination by the Commissioner, Mr. Currie shall continue to receive normal salary and benefits, subject to all normal deductions. However, beginning on August 28, 2012 and continuing until the date of the Commissioner's approval of this Agreement, all monies so paid shall count as an offset toward a total lump sum payment to be made by the Board under this Agreement in the amount of \$180,000 (One Hundred Eighty Thousand Dollars). Mr. Currie shall receive a hard copy record itemizing all salary payments and deduction until effective date of separation from employment.

B. In consideration of Mr. Currie's satisfaction of the terms and conditions of this Settlement Agreement, the Board will pay to Mr. Currie a total amount of \$180,000 calculated as follows: A lump sum payment of the \$180,000, less the cost of all compensation paid to Mr. Currie, inclusive of all normal salary and fringe benefits, from August 28, 2012 through the date of the Commissioner's approval of this Agreement, which shall be the effective date of termination of all employment.

C. The balance of monies due upon the date of the Commissioner's approval shall be paid as a lump sum, without payroll deductions, for which the Board shall issue an IRS Form 1099. Mr. Currie shall be solely responsible for all taxes due on the lump sum payment and hereby indemnifies and agrees to hold harmless the Board against any and all claims emanating from his failure to fulfill his tax obligations.

D. Mr. Currie waives any and all rights he may have to all other compensation from the Board of any kind, including but not necessarily limited to payment for unused sick, vacation and personal days under any collective bargaining agreement, individual contract, Board Policy or otherwise, except that he shall receive the appropriate COBRA notice upon termination from employment.

6. Release

In exchange for the above consideration, Gregory Currie, his heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any and all claims or rights, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, all officers, agents, attorneys,

administrators, and employees, personally and officially, as well as their successors and assigns, including, but not limited to any and all claims for attorneys fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this settlement; any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act (including, but not limited to, all claims which have been asserted or could have been asserted in the civil suit captioned Gregory Currie v. Jefferson Township Public Schools, et als., Dkt. No. MRS-L-136-12), the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retaining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Law, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any and all other claims for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Additionally, and without limitation, specifically included in this Release is the Superior Court Action: Gregory Currie v. Jefferson Township Public Schools, et als., currently pending in Morris County Superior Court, Law Division, Dkt. No. MRS-L-136-12, which Mr. Currie agrees to withdraw with prejudice upon final approval of this Agreement. Specifically exempted from this release are any claims for health insurance continuation coverage pursuant to Consolidated Omnibus Budget Reconciliation Act (referred to hereinabove as "COBRA").

7. Post-Employment Inquiries

The Board agrees, through its Administration, to respond to post-employment inquiries regarding Mr. Currie by providing basic work history type information, such as length of employment, date of resignation, and assignments. However, the Board shall also provide fully and truthfully all such information as it may be legally required to provide to various governmental agencies or otherwise.

8. Non-disparagement

Mr. Currie and his agents and the Board and its agents shall be precluded from any and all public and private negative comment regarding each other, and each others employees and agents.

9. Requirements Pursuant to N.J.A.C. 6A:3-5.6

A. True copies of the Tenure Charges are annexed hereto.

B. Under the circumstances that gave rise to the specific incidents underlying the tenure charges, some or all of which may have been due to a disability from which Mr. Currie suffers, the proposed settlement is justified and in the best interest of both parties. Mr. Currie recognizes the Board of Education's position with respect to re-employment and states that he shall never seek re-employment with the Jefferson Township Board of Education. This Agreement assures that Mr. Currie will never again be employed by the Jefferson Township Board of Education. On the other hand, Mr. Currie's separation from all employment with the Board, may afford him the opportunity to seek employment elsewhere.

C. Both parties have freely consented to the within Agreement, as evidenced by their respective signatures below

D. Both parties have had the benefit of independent legal counsel and have been fully apprised of their rights and obligations, and have indicated their full understanding and acceptance of same, by their respective signatures below.

E. The proposed settlement will serve the public interest. As a result of Mr. Currie's letter of resignation from employment with the Board, the Board will not have to incur further litigation currently pending in the Superior Court (Gregory Currie v. Jefferson Township Public Schools, et als., Dkt. No. MRS-L-136-12) which also names the Board's administrators as co-defendants. This Settlement also resolves the threat of further litigation threatened by a Notice of Claim, filed with the Board on behalf of Mr. Currie on or about June 18, 2012. As the proposed Settlement is global in nature, it is cost effective and will avoid the expenditure of substantial future administrative time and effort, as well.

F. Mr. Currie has been advised by his attorney that the Commissioner of Education may refer the within matter to the State Board of Examiners for possible suspension or revocation of his certification.

G. The parties agree that nothing in the proposed Settlement shall restrict access to information or records deemed public by law or result in misrepresentation of the reason for Mr. Currie's separation from service. However, to extent consistent with law, Mr. Currie shall refrain from public comment on the terms and conditions of this Settlement and shall discuss same only with his attorney, accountant, members of his immediate family and , in confidence, with any potential employer who seeks this information. The Board agrees, to the extent consistent with law, that it and its agents shall refrain from public comment on the terms and conditions of the settlement agreement and shall disclose same only pursuant to a valid OPRA request and to the extent that it is legally required by law, or as directed by an agency or court of competent jurisdiction.

H. The Board has formally approved this Settlement Agreement, subject only to approval by the Court and the Commissioner. A certified resolution is annexed hereto as "Attachment A."

10. Surrender of Board Property

A. Mr. Currie shall forthwith surrender all school keys and property in his possession to the Superintendent of Schools.

B. The Superintendent of Schools shall forthwith arrange an appointment for Mr. Currie to retrieve his personal property.

11. Assent to Terms

The parties hereby acknowledges that they have entered into this Agreement with a full understanding of their rights and obligations and that they were fully informed of the implications of this Agreement by their respective attorneys, and he do so without duress, of their own free will and volition.

Mr. Currie further acknowledges that he was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and was given seven (7) days from the execution of this document to revoke this Agreement, by delivering written notification to the Hon. JoAnn LaSala Candido, ALJ, Office of Administrative Law, 33 Washington Street, Newark, New Jersey 07102 and Nicholas Celso, III, Esq., 100 South Jefferson Rd., Suite 200, Whippany, New Jersey 07981. In the event of such revocation, this Agreement shall be null and void and the subject tenure proceedings shall be reinstated.

12. Entire Agreement

This Agreement represents the entire understanding of the parties.

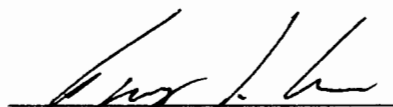
13. Severability

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of the Agreement shall remain in full force and effect to the extent that they do not materially impair the consideration upon which the parties have mutually relied.

14. Governing Law

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:



GREGORY CURRIE

Date: 8-24-12

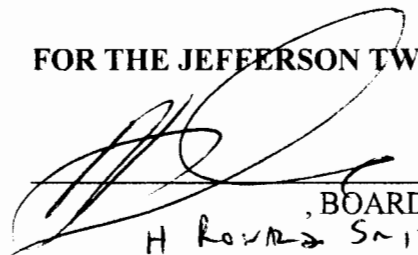
WITNESS:



Frederick E. Gerson, Esq.

Date: 8/24/12

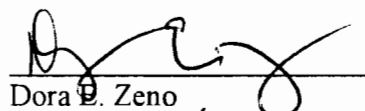
FOR THE JEFFERSON TWP. BOARD OF EDUCATION:



BOARD PRESIDENT
H Roman Smith

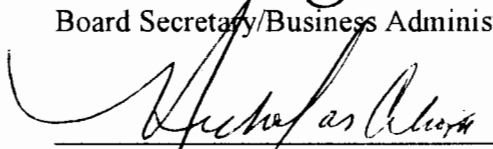
Date: 8/27/12

ATTEST:



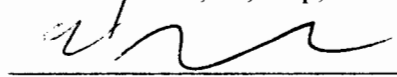
Dora E. Zeno
Board Secretary/Business Administrator

Date: 8-27-2012



Nicholas Celso, III, Esq., Board Attorney

Date: 9-5-12



Eric Harrison, Esq., Board Attorney

Date: 9/4/12

ATTACHMENT - A

CERTIFIED BOARD RESOLUTION APPROVING SETTLEMENT

WHEREAS, on August 15, 2011 and March 26, 2012, the Jefferson Township Board of Education ("Board") certified tenure charges against Gregory Currie pursuant to N.J.S.A. 18A:6-11; and

WHEREAS, Mr. Currie has defended against those charges, as well as filed a Civil Complaint against the Board, amongst others, in the matter entitled Gregory Currie v. Jefferson Township Public Schools, et als., currently pending in Morris County Superior Court, Law Division, Dkt. No. MRS-L-136-12, and filed a Notice of Claim against the Board; and

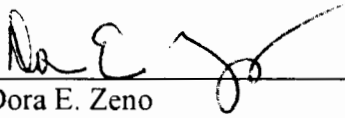
WHEREAS, the Board has made a determination that settlement is in the best interest of both the school district and the public, as the proposed Settlement, Resignation and Release is global in nature, it is cost effective and will avoid the expenditure of substantial future administrative time and effort, saving the Board from incurring further litigation currently pending in the Superior Court (Gregory Currie v. Jefferson Township Public Schools, et als., Dkt. No. MRS-L-136-12) which also names the Board's administrators as co-defendants and resolving the threat of further litigation threatened by a Notice of Claim, filed with the Board on behalf of Mr. Currie on or about June 18, 2012; and

WHEREAS, the Board acknowledges that the settlement of the tenure charges against Mr. Currie is contingent upon the approval of the Commissioner of Education; and

NOW, THEREFORE, BE IT RESOLVED that the Jefferson Township Board of Education approves the Settlement, Resignation and Release agreement between itself and Mr. Currie, in the matter of the tenure charges against Mr. Currie, OAL Docket No. EDU 10423-11, Agency Reference Number 235-8/11 and OAL Docket Number EDU 04661-12, Agency Reference Number 81-3/12, subject to the terms and conditions set forth therein and approval by the Commissioner of Education, and accepts Mr. Currie's resignation from employment with the Board effective as of the date of the Commissioner of Education's approval; and

BE IT FURTHER RESOLVED that the Jefferson Township Board of Education authorizes and directs its President and Secretary to execute same on behalf of the Board and to submit the Settlement, Resignation and Release agreement to the Commissioner of Education for approval.

The undersigned certifies that the foregoing is a true copy of a resolution duly adopted by a majority of the full membership of the Jefferson Township Board of Education at a public meeting held on August 27, 2012.



Dora E. Zeno
Board Secretary/Business Administrator

443-12



State of New Jersey

DEPARTMENT OF EDUCATION

PO BOX 500

TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHRISTOPHER D. CERF
Commissioner

November 21, 2012

Jennifer M. Perez, Clerk
Superior Court of New Jersey
Hughes Justice Complex
25 W. Market Street
P.O. Box 971
Trenton, NJ 08625

Re: *Request for Docketing of Judgment*

Dear Ms. Perez:

In accordance with N.J.S.A. 2A:58-10, I am enclosing the November 21, 2012 Order of the Commissioner of Education finding that Lovena Batts is subject to entry of a judgment on the docket of the court due to her failure to pay the tuition assessment ordered in the matter of *L.B., on behalf of minor children, J.K.B., L.B. and J.B. v. Board of Education of the City of Linden, Union County*. By copy of this letter, I am advising Lovena Batts, as well as counsel for the City of Linden Board of Education, of the Commissioner's issuance of the enclosed order.

If you require anything more, please contact this office at (609) 292-5706.

Very truly yours,

A handwritten signature in cursive script, reading "M. Kathleen Duncan".

M. Kathleen Duncan, Director
Bureau of Controversies and Disputed
MKD/MH
Enclosure

c: L. [REDACTED] B. [REDACTED], *Pro Se* (with copy of Order)

[REDACTED]
Roselle, New Jersey 07203

Sarah A. Gober, Esq. (with copy of Order)

Jones Addo (with copy of Order)

OAL DKT. NO. EDU 1271-12
 AGENCY DKT. NO. 16-1/12

L.B., on behalf of minor children, J.K.B., L.B.,
 and J.B.

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY
 OF LINDEN, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

ORDER

On July 16, 2012, a final agency decision was rendered in this matter, wherein the Acting Commissioner found that petitioner had failed to sustain her burden of establishing that her children were eligible for a free public education in Linden schools. As such, the Acting Commissioner ordered the petitioner to reimburse the Board tuition in the amount of \$76,223.40 for her children's ineligible attendance in the district's public schools during the 2010-11 and 2011-12 school, pursuant to *N.J.S.A.* 18A:38-1. The Board subsequently notified the Commissioner that the petitioner had failed to comply with that decision and it requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Petitioner offered no reason why the judgment against her should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, L. B. is now subject to entry of a judgment by the court in the amount of \$76,223.40, which represents the payment ordered at the conclusion of the contested case before the Acting Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

Date of Decision: 11/21/12

Date of Mailing: 11/21/12

100

100

100

100

100

BRIDGEWATER-RARITAN EDUCATION :
 ASSOCIATION, ON BEHALF OF :
 TAMARA MANZUR, CAROL O'NEIL AND :
 MAGGIE CASSIDY, :
 PETITIONER, : COMMISSIONER OF EDUCATION
 V. : DECISION
 BOARD OF EDUCATION OF THE :
 BRIDGEWATER-RARITAN SCHOOL :
 DISTRICT, SOMERSET COUNTY, :
 RESPONDENT. :

SYNOPSIS

Petitioning teachers, through the Bridgewater-Raritan Education Association, asserted that the Board's failure to renew their employment was a violation of their tenure and seniority rights. The three petitioning teachers each worked as replacement teachers during some portion of their service in the school district, and contended that a District policy required that time served as a replacement teacher be counted towards the acquisition of tenure. The respondent Board maintained that no such policy was ever formally adopted by the District; accordingly – under applicable New Jersey statutes – the teachers did not attain tenure because time served as a replacement teacher cannot legally be counted towards tenure accrual. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no issues of material fact in this case, and the matter is ripe for summary decision; the Commissioner of Education has previously held that, absent the formal adoption of a policy, a school board cannot be bound by oral promises; the issue of whether there was an implied contract is therefore irrelevant; all three petitioning teachers served as replacements for specific teachers who were on maternity leave, and ultimately returned to work; they therefore did not fill vacant positions; under *N.J.S.A.* 18A:28-5, the time the three teachers spent as substitutes for non-vacant positions cannot count towards acquiring tenure; accordingly, none of petitioners served as regular employees for a sufficient period of time to accrue tenure in the District; and the petitioners' argument for equitable estoppel fails because there is no evidence that the Board ever made a material representation to the teachers that their replacement time would count towards the attainment of tenure. Accordingly, the ALJ granted the Board's motion to dismiss the petition.

Upon full consideration, the Commissioner concurred with the ALJ for the reasons comprehensively presented in his recommended decision, and adopted the Initial Decision of the OAL as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

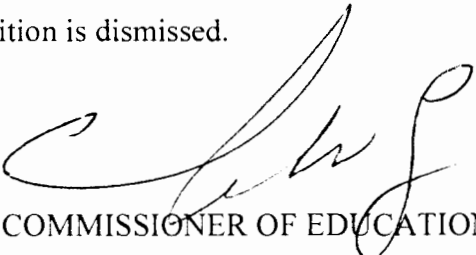
OAL DKT. NO. EDU 6095-11
AGENCY DKT. NO. 125-5/11

BRIDGEWATER-RARITAN EDUCATION	:	
ASSOCIATION, ON BEHALF OF	:	
TAMARA MANZUR, CAROL O'NEIL AND	:	
MAGGIE CASSIDY,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	
	:	DECISION
V.	:	
	:	
BOARD OF EDUCATION OF THE	:	
BRIDGEWATER-RARITAN SCHOOL	:	
DISTRICT, SOMERSET COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this tenure dispute, the Initial Decision of the Office of Administrative Law, the petitioner's exceptions on behalf of its members, and the respondent's reply to those exceptions. Upon consideration of the foregoing, the Commissioner completely concurs with the Administrative Law Judge's determination that petitioner's members did not earn tenure in respondent's district.

Accordingly, respondent's motion for summary disposition is granted – for the reasons set forth in the Initial Decision – and the petition is dismissed.

IT IS SO ORDERED. ¹


COMMISSIONER OF EDUCATION

Date of Decision: 11/21/12
Date of Mailing: 11/21/12

¹ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 3* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 6095-11

AGENCY DKT. NO. 125-5/11

**BRIDGEWATER-RARITAN
EDUCATION ASSOCIATION,
ON BEHALF OF TAMARA
MANZUR, CAROL O'NEIL AND
MAGGIE CASSIDY,**

Petitioner,

v.

**BOARD OF EDUCATION OF
THE BRIDGEWATER-RARITAN
SCHOOL DISTRICT, SOMERSET
COUNTY,**

Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, P.C., attorneys)

Nicholas Celso, III, Esq., for respondent (Schwartz, Simon, Edelstein & Celso,
LLC, attorneys)

Record Closed: October 5, 2012

Decided: October 5, 2012

BEFORE **JOHN R. FUTEY, ALJ:**

This is an initial decision issued relative to a summary decision motion filed by respondent, the Board of Education of the Bridgewater-Raritan School District, Somerset County (hereinafter the District or the Board) seeking a dismissal of the challenges by all three petitioning teachers. A response was submitted by petitioner, the Bridgewater-Raritan Education Association (hereinafter the Petitioner or the Association), on behalf of Tamara Manzur, Carol O'Neil, and Maggie Cassidy, the named petitioner herein. A reply to that response was made by the District, as a result of which the parties requested oral argument which was heard at the Office of Administrative Law. At that time, certain concerns were further identified and argued by the parties. After considering all of the arguments advanced, both in writing and orally, the hearing record has now closed for purposes of the instant motion for summary decision.

FACTUAL BACKGROUND

In the underlying matter, the petitioning teachers, through the Association, allege that the non-renewal of their respective employments was a violation of their tenure and seniority rights. The issue involves whether or not an implied contract exists relative to the petitioner's service in temporary or substitute teaching positions that would qualify when determining tenure and, subsequently, seniority rights. As a result, should summary decision be granted for respondent, as to each or as to any of them?

DISCUSSION

Petitioner, the Bridgewater-Raritan Education Association brings this matter on behalf of three teaching staff members who worked as replacement teachers during at least some portion of their employment for the respondent District, the Board of Education of Bridgewater-Raritan, Somerset County. The teachers include Tamara Manzur, who began in September 2006, Carol O'Neil, who began in March 2007, and Maggie Cassidy who began in September 2007. The teachers were notified by

respondent that they were not being renewed for the 2011-2012 school year. Petitioner appeals the non-renewals on the basis that the three teachers acquired tenure under a District policy that required time served as a replacement teacher to be counted towards the acquisition of tenure. In reply, respondent contends that since no such policy was ever formally adopted by the District, under applicable New Jersey statutes, the teachers do not have tenure because time served as a replacement teacher cannot legally be counted towards tenure accrual.

Because this appeal and the instant motion involves three separate teachers with their own individual circumstances, the facts will be discussed and analyzed relative to each teacher individually.

Tamara Manzur (herein after Manzur) was hired in September 2006 to serve as a replacement for another teacher, Concetta Fischer, who was on maternity leave. (Pet. Appeal ¶ 4; Resp. Ans. ¶ 4; Manzur Aff. Ex-E.) Ms. Manzur worked as a sixth grade teacher and continued in this capacity through the following 2007-2008 school year. (Manzur Aff. ¶ 7.) Manzur states that she was not informed that she was considered a replacement teacher for the 2007-2008 school year. (*Ibid.*) Beginning with the 2008-2009 school year, it is undisputed that Manzur became a regular teacher of the fifth grade. (*Id.* at ¶¶ 8,9,14.) Petitioner alleges that the District had a policy to consider time served as a replacement teacher to be counted towards the acquisition of tenure. (Pet. Appeal ¶ 6.) This policy was communicated to Manzur by her Building Principal and the Superintendent of Schools. (Manzur Aff. ¶¶ 4-5.) In reliance upon this promise that her time served as a replacement would count towards acquiring tenure, Manzur did not seek a regular position in another district while serving as a replacement teacher for respondent. (*Id.* at ¶ 11.)

The second teacher, Carol O'Neil (hereinafter O'Neil), was hired in March 2007 to serve as a replacement fourth grade teacher for Karen Bauer who was on maternity leave. (Pet. Appeal ¶ 9; O'Neil Aff. ¶ 3.) Ms. O'Neil continued working as a replacement fourth grade teacher for Ms. Bauer during the 2007-2008 and 2008-2009 school years. (O'Neil Aff. Ex-B at 2 and Ex-C at 2.) Beginning with the 2009-2010

school year, it is undisputed that O'Neil became a regular teacher of the fourth grade. (O'Neil Aff. Ex-D at 1.) O'Neil alleges that she was told by her Building Principal that her time toward acquiring tenure began in September 2007. (O'Neil Aff. ¶ 4.) In reliance upon this promise, O'Neil did not seek a regular position in another district between September 2007 and June 2009. (Id. at ¶ 7.)

The third teacher, Maggie Cassidy (hereinafter Cassidy), was hired in September 2007 to serve as a replacement teacher for Meghan Friedman who was on maternity leave. (Pet. Appeal ¶ 13; Cassidy Aff. ¶ 3.) Ms. Cassidy states that she was induced to leave the Clinton School District and begin employment for respondent because her time working as a replacement teacher would count towards acquisition of tenure. (Pet. Appeal ¶ 13.) The teacher for whom Cassidy was replacing returned to work on September 1, 2008, and was transferred to another position. (Resp. Ans. ¶ 15.) Beginning with the 2008-2009 school year, it is undisputed that Cassidy became a regular teacher of pre-school. (Resp. Ans. ¶¶ 14-15.) Cassidy alleges that the District had a policy to consider time served as a replacement teacher to be counted towards the acquisition of tenure. (Cassidy Aff. ¶ 4.) This policy was communicated to Cassidy by her supervisor and the Superintendent of Schools. (Ibid.) In reliance upon this promise that her time served as a replacement would count towards acquiring tenure, Cassidy resigned her previous employment and accepted the position as a replacement teacher for respondent. (Ibid.)

The employment history of the three teachers is graphically summarized by the following table:

Teacher	School Year(s)	Status	Incumbent Teacher	Grade	Years Toward Tenure
Tamara Manzur	2006 – 2007	Replacement Teacher	Ms. Fischer	6 th	N/A
	2007 – 2008	Replacement Teacher	Ms. Fischer	6 th	N/A
	2008 – 2009	Regular Teacher	N/A	5 th	1
	2009 – 2010	Regular Teacher	N/A	5 th	2
	2010 – 2011	Regular Teacher	N/A	5 th	3
Carol O'Neil	March 2007 – June 2007	Replacement Teacher	Ms. Bauer	4 th	N/A
	2007 – 2008	Replacement Teacher	Ms. Bauer	4 th	N/A
	2008 – 2009	Replacement Teacher	Ms. Bauer	4 th	N/A
	2009 – 2010	Regular Teacher	N/A	4 th	1
	2010 – 2011	Regular Teacher	N/A	4 th	2
Maggie Cassidy	2007 – 2008	Replacement Teacher	Ms. Friedman	Pre-school	N/A
	2008 – 2009	Regular Teacher	N/A	Pre-school	1
	2009 – 2010	Regular Teacher	N/A	Kindergarten	2
	2010 – 2011	Regular Teacher	N/A	Kindergarten	3

Legal Analysis

N.J.A.C. 1:12-5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided “that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:12-5(b). The provisions of N.J.A.C. 1:12-5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. To survive summary decision, the opposing party must show that “there is a genuine issue which can only be determined in an evidentiary proceeding.” Ibid. Failure to do so entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

Moreover, even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is “so one-sided that [the moving party] must prevail as a matter of law.” Id. at 536. This tribunal is required to do “the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial.” Id. at 539-540. Like the New Jersey Supreme Court’s standard for summary judgment, summary decision is designed to “liberalize the standards so as to permit summary [decision] in a larger number of cases” due to the perception that we live in “a time of great increase in litigation and one in which many meritless cases are filed.” Id. at 539 (citation omitted).

In this case, the Commissioner of Education has previously held that, absent formal adoption of a policy, a school board cannot be bound by oral promises of administrators. Therefore, as set forth more fully below, the issue of whether an implied contract exists is irrelevant because there is no allegation that the respondent school board, or an authorized agent, ever entered into an express or implied contract. Even if an implied contract exists in this case, it would be between the teachers and administrators who lack the authority to enter into such contracts. In summary, the petitioner has not identified any formal policy adopted by the respondent that modified

the statutorily defined requirements to acquire tenure. Based upon the foregoing, I **FIND** that summary decision is thus appropriate regarding all three teachers because there is no material issue warranting a plenary hearing and, as a matter of law, the three teachers have not satisfied the requirements of the tenure statute, N.J.S.A. 18A:28-5, despite incorrect statements by supervisors, school principals and the district superintendent to the contrary.

The requirements and exceptions for tenure in New Jersey are statutorily defined. Acquisition and effect of tenure are statutorily defined by N.J.S.A. 18A:28-5, which states that “teaching staff members”ⁱ acquire tenure by completing:

- (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
- (b) Three consecutive academic yearsⁱⁱ, together with employment at the beginning of the next succeeding academic year; or
- (c) The equivalent of more than three academic years within a period of any four consecutive academic years.

For further explanation and clarification, the New Jersey Supreme Court held that “all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, are eligible for tenure **unless they come within the explicit exceptions in N.J.S.A.**”

ⁱ “‘Teaching staff member’ means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse.” Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63, 73-74 (1982) (quoting N.J.S.A. 18A:1-1).

ⁱⁱ “Academic year” is defined as “the period between the time school opens in any school district or under any board of education after the general summer vacation until the next summer vacation.” N.J.S.A. 18A:1-1.

18A:28-5 or related statutes such as N.J.S.A. 18A:16-1.1. Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63, 81 (1982) (emphasis added).

In the present matter, the parties are not contesting that the three teachers at issue worked in positions requiring a certificate, or that they possessed the necessary certificates while holding the positions. Additionally, it is not contested that the three teachers were employed for the requisite number of academic years. The dispute arises because the respondent contends that a portion of each teachers' employment falls within one of the explicit statutory exceptions for teachers serving in a replacement capacity, but the petitioner contends that a policy existed that waived this applicable statutory exception.

N.J.S.A. 18A:16-1.1, provides the following exception to the tenure statute:

In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of section 18A:17-13.

The act of any person so designated shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting **but no person acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.**

[(emphasis added).]

This exception applies "when the services of a substitute teacher are required because of the temporary absence, **even if protracted, of a regular teacher whose return to duty is contemplated.**" Sayreville Educ. Ass'n. v. Bd. of Educ. of the Borough of Sayreville, 193 N.J. Super. 424, 428 (App. Div. 1984) (emphasis added). This exception exists because of "the fact that when a substitute appointment is made because of a temporary absence, a board of education would have to incur the expense of providing duplicative benefits if both the substitute and the absent teacher were to be regarded as simultaneously entitled to all of the statutory and contractually mandated benefits of regular staff membership." Id. at 430. The court noted that

where the absentee teacher's employment has been terminated, no concern for duplicated benefits exists. Ibid. The court concluded, "[t]hus in terms of a board's legitimate economic concerns, the withholding of regular staff membership from a substitute teacher who fills a position whose incumbent is only temporarily absent is a sensible approach and perhaps even a financial necessity." Ibid.

This holding applies only where the position to be filled is not a vacant one. "The word 'vacancy' is commonly understood to mean an unoccupied position for which an incumbent does not intend to return, as contrasted with a leave of absence that 'connotes continuity of the employment status.'" Lammers v. Bd. of Educ., 134 N.J. 264, 272 (1993) (citations omitted). If the position is vacant, then a long-term substitute teacher filling the vacant position is entitled to have this period credited toward tenure. Sayreville Educ. Ass'n., supra, at 193 N.J. Super. at 428-9. In the present matter, petitioner raises hypothetical difficulties with determining who a replacement teacher is actually replacing, but acknowledges such challenges are not present in this case. (Pet. Brief in Opp. at 22.)

More importantly and most significantly, the petitioner has not alleged that the three teachers were filling vacant positions. In fact, it is now undisputed that the three teachers were filling in for specific, known teachers on maternity leave who ultimately returned to work. For example, Manzur served as replacement teacher for Ms. Fischer for the school years 2006-2008. She admits that she was informed that she would be a replacement teacher for the 2006-2007 school year. (Manzur Aff. ¶ 3.) While she may not have been informed of her replacement status for the 2007-2008 school year, such notice is not required under New Jersey school laws. The fact remains that she stayed in the same assignment from the previous school year and the position was not vacant because Ms. Fischer returned to teaching. The second teacher, O'Neil, also served as a replacement teacher during the 2007-2009 school years for Ms. Bauer. This fact is clearly evidenced by the evaluations provided to O'Neil where they began by stating her replacement status. (O'Neil Aff. Ex-B at 2 and Ex-C at 2.) It is also undisputed that the position was not vacant because Ms. Bauer returned to teaching. The third teacher, Cassidy, admits to serving as a replacement teacher for Ms. Friedman during the 2007-

2008 school year. (Cassidy Aff. ¶ 3.) It is also undisputed that the position was not vacant because Ms. Friedman returned to teaching.

Instead, the petitioner argues that the teachers were told that the District would consider their long-term substitute time when determining tenure, despite the applicable statutory exception to the contrary. This argument is moot, as discussed further below, under binding precedent from the Commissioner that oral representations from administrators cannot bind a school board. Thus under N.J.S.A. 18A:16-1.1, the time the three teachers spent as substitutes for non-vacant positions cannot count towards acquiring tenure. And I so **FIND**.

The controlling determination is that oral representations from administrators cannot bind a school board. The governing statute, N.J.S.A. 18A:28-5, provides boards of education with the authority to shorten the time period for the acquisition of tenure if it applies to an entire category of its employees, regardless of the number of employees in that category, and permits boards to subsequently act to fix a different tenure qualifying period or restore the statutory qualification period. Rall v. Board of Ed. of the City of Bayonne, 54 N.J. 373, 377 (1969). Additionally, the law is clear that a school board may enter into contractual agreements to enact a policy modifying the terms of tenure acquisition. See, eg., Remedial Educ. & Diag. Serv. v. Essex County Educ. Serv., 191 N.J. Super. 524, 527 (App. Div. 1983) (public body may enter into contracts within its express or implied authority). However, such contract must be formally adopted (emphasis added) and absent approval of the Board or an individual designated by the Board for such purpose, any promise made to the teachers in this case cannot bind respondent. Gross v. Bd. of Ed. of the Twp. of Mt. Holly, EDU 8567-04, Initial Decision (July 26, 2006), adopted, Comm'r. (Sept. 1, 2006), <<http://njlaw.rutgers.edu/collections/oal/>> ("It is long-settled in education law that the representations of individual board members or administrators are insufficient to bind a board to a particular course of action." (citations omitted)). See also, Swaim and Middletown Twp. Ed. Assoc. v. Bd. of Ed. of the Twp. of Middletown, Monmouth County, EDU 6705-98, Initial Decision (Oct. 27, 2000), aff'd., Comm'r. (Jan. 26, 2001) (District's policy to establish a two-year period for the grant of tenure for its principals

was proven by a resolution adopted by the Board, and its subsequent action a month later to change the tenure qualifying period back to the three-year statutory period was also proven by a resolution of the Board.).

In Gross, the Commissioner held that Mt. Holly School Board was not bound by promises made by Board employees regarding the terms and availability of future long term substitute positions that enticed the petitioner to take early retirement. Gross, supra. Therefore, in the present case, the petitioner's argument that the teachers were told by their supervisors, principals, and the superintendent that the District followed a policy to count time served as a replacement teacher towards tenure is irrelevant absent a showing that the school board formally adopted such a policy. Further, the petitioner has not alleged nor identified any evidence that such a policy was expressly or implicitly adopted by the Board. As in Gross, the promise by administrators that replacement time would count towards earning tenure does not suffice to prove the respondent actually adopted such a policy. As evidence, respondent's superintendent affirmed that the Board never adopted any such resolution or formal policy modification to credit time served as a replacement teacher towards accruing tenure. (Schilder Aff. ¶¶ 4-5.)

Lastly, petitioner has not established any intentional misrepresentation by respondent nor presented compelling circumstances necessary to invoke equitable estoppel against a government entity. Petitioner argues that the doctrine of equitable estoppel should apply to require the respondent to grant the three teachers early tenure because they relied upon the administrators' representations by not seeking regular teacher positions in other school districts during their time working as substitutes. The essential elements of equitable estoppel are "a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance, and reliance by the party seeking estoppel to his or her detriment." O'Malley v. Dep't of Energy, 109 N.J. 309, 317 (1987). It is a general principle that it should only be utilized in "compelling circumstances" and "is rarely invoked against a government entity...." State v. King, 340 N.J. Super. 390, 399 (App. Div. 2001). To prevail on a claim of equitable estoppel,

a party must demonstrate that the representation was intentionally made or that it was clear it would induce reliance. Miller v. Miller, 97 N.J. 154, 163 (1984).

In the present matter, petitioner has not proven knowing and intentional misrepresentation to any of the petitioning teachers by the respondent. The only misrepresentations alleged were made by administrators, not the respondent. Also, petitioner has not cited to any action by the District whatsoever supporting the claim that the District had a policy to count time served as a long-term substitute towards acquiring tenure. As discussed in Gross and Swaim, even assuming that the administrators made the promises to any of the three teachers, the actions of the administrators does not constitute knowing and intentional misrepresentation by the respondent. Since the three teachers did not rely on any misrepresentation from the Board, there is nothing in the record to indicate that the District engaged in any conduct which was calculated to mislead the teachers. See, Maraviglia v. State Operated School District Of The City of Newark, EDU 1594-02, Initial Decision, (Aug. 15, 2006), adopted, Comm'r. (Sept. 28, 2006) <<http://njlaw.rutgers.edu/collections/oal/>> (no equitable estoppel where petitioner was demoted from position where supervisor informed him that he was the holder, but where the record showed no evidence that he was ever appointed to this position by official action of the Board); Alt v. Bd. of Educ. of the Borough of Bergenfield, EDU 9624-02, Initial Decision, (Aug. 15, 2003), adopted, Comm'r. (Sept. 29, 2003) <<http://njlaw.rutgers.edu/collections/oal/>> (no equitable estoppel where petitioner was terminated in a RIF but alleged that he held tenure after the district assistant superintendent lured him away from his former teaching position with promises that he would be given tenure status and seniority. The ALJ found that absent formal action or ratification by the Board, petitioner could not reasonably rely upon representations by Board employees. (citing Busler v. East Orange BOE, EDU 3916-00, Initial Decision, (July 11, 2001), aff'd., Comm'r, (Aug. 30, 2001)).

Also, case precedent only provides that equitable estoppel may be applied to disputes where a teacher would obtain tenure but through no fault of his/her own he/she did not possess appropriate certification for the instruction provided yet was eligible for such certification. Ramaswami v. Bd. of Ed. of the City of Plainfield, Union

County, EDU 11776-07, Initial Decision, (Feb. 11, 2009), adopted, Comm'r. (May 1, 2009) ("doctrine of equitable estoppel may be applied [where tenure denied for lack of certification but teacher was eligible for such certification]" (citing McAneny v. Bd. of Ed. of School District of the Chathams, 92 N.J.A.R.2d (EDU) 208, 213)). In Ramaswami, a teacher was denied tenure and terminated after being hired into a position that required a certification for which she did not possess. Ibid. The ALJ and Commissioner considered the teacher's claim of equitable estoppel because she was not told that she needed a certificate and that she was hired despite disclosing that she did not have a teaching certificate. Ibid. In the present matter, petitioner's reliance on Ramaswami to illustrate that equitable estoppel can generally be invoked against a school board is misplaced. The facts of the case and precedent referenced demonstrate that the doctrine can only be invoked in the specific type of dispute where a teacher is denied tenure for lack of certification. This scenario is not present in the instant case, thus the circumstances are not met to invoke the doctrine of equitable estoppel.

CONCLUSION AND ORDER

As the moving party, respondent carries the burden of proof that the three teachers were actually substituting for the absences of other teachers and were not filling vacant positions. After considering all of the proofs and arguments relative to the motion, I **CONCLUDE** that respondent has met that burden by identifying the teachers who were on maternity leave and then returned to work, which demonstrated that the positions were never vacant. Despite evidence that school administrators had apparently made incorrect statements that time spent in replacement capacity would count toward tenure, there is no evidence that the Board ever adopted such a policy and that Board cannot be bound by the administrator's misrepresentations. Thus, in calculating the time the teachers served as regular employees, none have satisfied the requirements of the tenure statute and the Board's decision not to renew them for the 2011-2012 school year was permissible. Lastly, the argument for equitable estoppel must fail because there is no evidence the Board ever made a material misrepresentation to the teachers.

Based on all of the foregoing and after having given deference to the arguments advanced by both sides, I **CONCLUDE** that the respondent's motion for Summary Decision as to all three petitioning teachers is appropriate and the motion should be **GRANTED**.

It is therefore, **ORDERED** that the motion for summary decision by the Board is **GRANTED** for all the reasons stated hereinabove.

It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 5, 2012
DATE



JOHN R. FUTEY, ALJ

Date Received at Agency:

10/9/12

Date Mailed to Parties:

10/9/12

/cb

OAL DKT. NO. EDU 4718-06
 AGENCY DKT. NO. 206-6/06

PAULA LICHT,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF ASBURY PARK,	:	
MONMOUTH COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter, the parties' proposed Settlement Agreement and Release, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Commissioner approves the parties' settlement¹ and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 11/21/12
 Date of Mailing: 11/21/12

¹ It is noted, however, that Term 5 of the parties' agreement, Effective Date, specifies "This Settlement Agreement shall be effective when the last Party shall have executed the same and provided a copy to all other Parties." The Commissioner cautions the parties that – as this agreement is subject to approval by the Commissioner – the "effective date" should, most prudently, be subsequent to such approval.

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4718-06

AGENCY DKT. NO. 206-6/06

PAULA LICHT,
Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY OF
ASBURY PARK, MONMOUTH COUNTY,**
Respondent.

Jason E. Sokolowski, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum
and Friedman, attorneys)

Michael J. Gross, Esq., for respondent (Kenny, Gross, Kovats and Parton,
attorneys)

Record Closed: October 19, 2012

Decided: October 25, 2012

BEFORE **JEFF S. MASIN, ALJ:**

Petitioner, Paula Licht, asserts that the Asbury Park Board of Education failed to pay her full salary without loss of sick time for an injury sustained in the course of employment, pursuant to N.J.S.A. 18A:30-2.1.

Due to a pending workers' compensation matter and the parties' efforts to settle the matter, this case was held inactive. On October 19, 2012, a fully executed Settlement Agreement and Board Resolution adopting the settlement was received, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

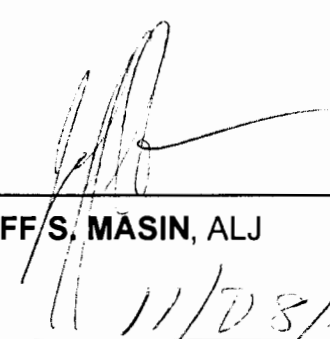
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 25, 2012

DATE

Date Received at Agency:

Date Mailed to Parties:



JEFF S. MASIN, ALJ

11/28/12

10/26/12

mph

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT and Mutual Release ("Settlement Agreement" or "Agreement") is made on this _____ day of June, 2012, by and between Paula Licht ("Petitioner"), 9 Tennet Avenue, Englishtown, New Jersey 07726, and the Asbury Park Board of Education, ("Respondent" or "the District") 603 Mattison Ave., 3rd Floor Asbury Park, NJ 07712, in effort to resolve OAL Docket Number EDU 04718-2006S in an amicable and mutually satisfactory manner. The Parties hereby set forth their full and complete agreement as follows;

WHEREAS, the Asbury Park Board of Education is charged with the operations of the public schools of the Asbury Park School District, County of Monmouth, a K-12 school system, pursuant to Title 18A of the New Jersey Statutes; and

WHEREAS, Paula Licht has been employed by the District as an accountant by the District; and

WHEREAS, on or about March 20, 2006, Petitioner is alleged to have suffered a work-related injury and claims she is unable to work as a result of that injury; and

WHEREAS, on or about May 31, 2006, Petitioner filed a Petition of Appeal, alleging that Respondent improperly charged her absences to her accumulated sick leave in violation of N.J.S.A. 18A:30-2.1; and

WHEREAS, Respondent filed a Motion to Dismiss arguing that the Division of Workers' Compensation is the proper forum to address Petitioner's claims and to resolve a work-related accident claim; and

WHEREAS, the Parties desire to amicably settle this matter;

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

NOW, THEREFORE, in consideration of the mutual promises contained herein, and for good and valuable consideration, receipt of which is hereby acknowledged, the Parties hereby agree as follows:

1. Settlement

Respondent shall pay Petitioner in the amount for \$4,620.56 based on the utilization to certain sick days by Petitioner.

2. Dismissal of Appeal

In further consideration of the mutual promises, all Parties consent and agree to the dismissal of the OAL Docket Number EDU 04718-2006S with prejudice and without costs to any Party.

3. No Admission of Liability

The Parties understand and agree that this Settlement Agreement is the compromise of disputed claims and that the payment and consideration set forth herein is not to be construed as an admission of liability on the part of any Party hereto. All Parties deny liability and have agreed to settle this matter and pay the amount referenced herein solely to avoid the expense and burden of litigation.

4. Execution of Release

All Parties have consulted with their respective attorneys regarding the terms and conditions of this Settlement Agreement, have carefully read the same and know and understand its contents. The Parties expressly acknowledge that they execute this Settlement Agreement of their own free will.

5. Effective Date

CERTIFICATE

I Geoffrey Hastings, Business Administrator/ Board Secretary of the Board of Education of the City of Asbury Park in the County of Monmouth, State of New Jersey, HEREBY CERTIFY that the foregoing annexed extract from the minutes of a meeting of the governing body of the Board of Education duly called and held on October 10, 2012 has been compared by me with the original minutes as officially recorded in my office in the Minute Book of the Board of Education and is a true, complete and correct copy thereof and of the whole of the original minutes so far as they relate to the subject matters referred to in the extract.

1. Settlement Agreement

Superintendent recommends that the Asbury Park Board of Education accept the terms of a settlement with Employee ID# 8877 for docket number EDU 04718-2006S, a copy of which shall be retained in the office of the Board Secretary.

Motion to approve: Ms. Brazile

Second: Mr. Brewington

Aye: 7 **Nay:** 0 **Abs:** 0 Upon roll call the motion was unanimously adopted.

IN WITNESS WHEREOF, I have here unto set my hand and affixed the corporate seal of the School District this 11th day of October 2012.



Geoffrey Hastings, Business Administrator/ Board Secretary

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

This Settlement Agreement shall be effective when the last Party shall have executed the same and provided a copy to all other Parties.

6. Counterparts

This Settlement Agreement may be executed in one or more counterparts, all of which shall be one instrument, and all of which shall be considered duplicate originals.

7. Full and Complete Agreement

This Settlement Agreement constitutes the full and complete agreement between the Parties with respect to its subject matter. Except as otherwise expressly provided herein, this Settlement Agreement supercedes all prior agreements, understandings, and discussions relating to the claims raised. There are no representations, agreements, arrangements or understandings, oral or written, concerning the subject matter between the Parties, which are not fully expressed or incorporated by reference herein. This Settlement Agreement may be amended, modified or waived only by an agreement in writing signed by all Parties hereto.

8. Authority to execute agreement

All signatories hereto state and affirm that they have the authority to execute this Settlement Agreement and Release and do hereby bind the Party, which they represent.

9. Severability

If any term, provision or section of this Settlement Agreement is unlawful, invalid or unenforceable, the remainder of this Settlement Agreement shall remain in full force and effect and shall remain binding on the Parties to this Settlement Agreement.

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed
this Settlement Agreement on the date specified below.

PETITIONER

Witness: Andrea Alderby By: Paula J. Licht
Paula Licht

Date: 10/18/12

ASBURY PARK BOARD OF EDUCATION

Witness: [Signature]

Date: 10/18/12

Witness: [Signature]

Date: 10/10/12

By: [Signature]
Board of Education President

By: [Signature]
Business Administrator

OAL DKT. NO. EDU 4660-12
AGENCY DKT. NO. 68-3/12

M.K., on behalf of minor child, I.T.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF CLIFTON, PASSAIC COUNTY,	:	
RESPONDENT.	:	
_____	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – along with copies of the notification sent to the parties by the OAL on October 23, 2012, providing petitioner thirteen days to submit an explanation for such nonappearance – have been reviewed. There being no explanation filed, this matter is no longer deemed to be a contested matter before the Commissioner, and is hereby dismissed with prejudice.¹

IT IS SO ORDERED.²


COMMISSIONER OF EDUCATION

Date of Decision: 11/21/12

Date of Mailing: 11/21/12

¹ It is noted that, by letter dated October 15, 2012 to the Administrative Law Judge, the Board reported that “[a]dditional information has been provided to the Board demonstrating that I.T.K. may be domiciled in Clifton.” This letter further went on to withdraw the Board’s counterclaim for tuition in this residency matter and requested that the petition be dismissed..

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36 (*N.J.S.A.* 18A:6-9.1).

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OAL DKT. NO. EDU 10137-12
 AGENCY DKT. NO. 140-5/12

J.P., on behalf of minor child, S.N.	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF CLIFTON, PASSAIC COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon full consideration, the Commissioner finds – for the reasons presented by the ALJ in her Initial Decision – that this matter is appropriately dismissed as moot.

Accordingly, the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.¹



COMMISSIONER OF EDUCATION

Date of Decision: 11/21/12

Date of Mailing: 11/21/12

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c.36* (N.J.S.A. 18A:6-9.1)

J.P., on behalf of minor child, S.N.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF CLIFTON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her child, S.N., in May 2012. The respondent Board filed an answer and a counterclaim for tuition. A hearing at the Office of Administrative Law (OAL) was scheduled for October 22, 2012. On October 15, 2012, the Board sent a letter requesting that the petition be dismissed because S.N. had transferred out of the district; the counterclaim for tuition was also withdrawn. Neither party appeared at the scheduled hearing.

The ALJ determined that this matter is no longer a contested case before the OAL; accordingly, the case was dismissed.

Upon full review and consideration, the Commissioner found that the matter is appropriately dismissed as moot.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 10137-12

AGENCY REF. NO. 140-5/12

J.P., ON BEHALF OF MINOR CHILD, S.N.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY OF
CLIFTON, PASSAIC COUNTY,**

Respondent.

J.P., on behalf of S.N., pro se (Failure to Appear)

Derlys M. Gutierrez, Esq., for respondent (Adams, Stern, Gutierrez &
Lattiboudere, attorneys)

Record Closed: October 22, 2012

Decided: October 25, 2012

BEFORE **KIMBERLY A. MOSS, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner J.P. appealed the determination of the respondent, City of Clifton Board of Education (Board), that minor child S.N. is not domiciled in its district. The appeal was filed with the Department of Education on May 23, 2012. The Board filed an

Answer and a Counterclaim for tuition reimbursement on July 24, 2012. The contested case was transmitted to the Office of Administrative Law (OAL), where it was filed on July 27, 2012. A notice was sent to petitioner at 4 Atkins Court, Clifton, New Jersey 07013, the address listed in her pro se appeal, notifying her that the case was at the OAL on July 30, 2012. Notice of an August 20, 2012, pre-hearing conference was sent to petitioner at the same address on August 9, 2012. The notice was returned stating "Return to Sender Not Deliverable as Addressed."

My secretary attempted to call petitioner but her phone number was disconnected. Attempts to determine petitioner's address were unsuccessful. I scheduled a hearing for September 17, 2012, and a Notice of Plenary Hearing dated August 21, 2012, was sent to the parties advising them of the hearing date. The Notice of Plenary Hearing was sent to petitioner at the address listed in her pro se appeal. On the date of the hearing counsel for the Board advised that petitioner has moved out of the district and that S.N. had been transferred. Counsel for the Board also submitted a new address for petitioner. A hearing was scheduled for October 22, 2012. Notice of the hearing was sent to petitioner's new address of 215 Route 206 South, Sandyston, New Jersey on September 28, 2012. On October 15, 2012, respondent sent a letter stating that since S.N. has transferred out of the district and into another district, it requests that the petition be dismissed. Respondent also withdrew its counterclaim for tuition. On October 22, 2012, both parties failed to appear. Petitioner has provided me with no explanation for her failure to appear.

FINDINGS OF FACT

Based on the documentary evidence presented to me, I find the following **FACTS:**

S.N. attended the Clifton Public Schools from September 2001 through June 2012. The Board denied the enrollment of S.N. after J.P. was unable to produce any documentation demonstrating that S.N. is domiciled in Clifton, New Jersey or in any way permitted to attend school in Clifton pursuant to N.J.S.A. 18A:38-1.

Initially, the Board sought reimbursement for tuition from the first day of S.N.'s attendance in or about September 2001, in accordance with the statutory formula for the period of days of ineligible attendance. The Board withdraws that request and is now requesting the petition be dismissed.

Counsel for the Board requested that this matter be dismissed due to S.N. being transferred out of Clifton's District. The Board submitted a letter withdrawing its counterclaim for tuition, which is attached hereto for reference.

Petitioner has not contacted me at any time since I received this matter. Further, petitioner has not responded to any notices in this matter.

CONCLUSION AND ORDER

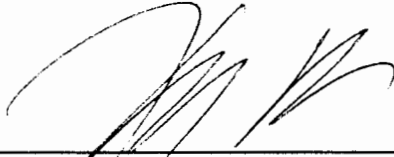
Accordingly, I **CONCLUDE** that this matter is no longer a contested case before OAL. It is hereby **ORDERED** that this matter be **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10-25-12
DATE

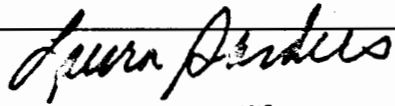

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

Date Mailed to Parties:

ljb

NOV - 1 2012


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DOCUMENTS RELIED UPON

- Letter from Board Counsel Deryls M. Gutierrez, dated October 15, 2012
- Copy of Transfer Card for S.N.
- Respondent's Answer and Cross-Petition

448-12

OAL DKT. NO. EDU 10411-11
 AGENCY DKT. NO. 213-8/11

VALERIE GUNSALUS,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF MILLSTONE,	:	
MONMOUTH COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter, the parties' proposed Agreement/Release, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 11/21/12

Date of Mailing: 11/21/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10411-11

AGENCY DKT. NO. 213-8/11

VALERIE GUNSALUS,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF MILLSTONE,
MONMOUTH COUNTY,**

Respondent.

Wayne J. Oppito, Esq., for petitioner

Michael Pattanite, Esq., for respondent (Lenox, Socey, Formidoni, Brown,
Giordano, Cooley and Casey, attorneys)

Record Closed: October 15, 2012

Decided: October 23, 2012

BEFORE **LISA JAMES-BEAVERS, ALJ:**

STATEMENT OF THE CASE

Petitioner Valerie Gunsalus alleged that the Board's decision to eliminate her position of Supervisor of Special Services was done in bad faith and intended to circumvent her tenure and seniority rights. The parties agreed to a settlement of all

issues in dispute and prepared a settlement agreement, which I have attached and fully incorporated herein.

FINDINGS OF FACT

I have reviewed the record and the terms of settlement and I **FIND**:

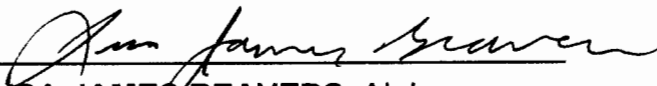
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 23, 2012
DATE


LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

Date Mailed to Parties:

10/25/12

cmo

RECEIVED

2012 OCT 15 P 12: 56

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

AGREEMENT/RELEASE

This Agreement and Release ("Agreement") is made this day of September, 2012, by and between Valerie Gunsalus ("Ms. Gunsalus"), and the Millstone Township Board of Education ("Board") and the New Jersey School Boards Association Insurance Group ("NJSBAIG").

WHEREAS, Ms. Gunsalus is a certificated employee of the Board; and

WHEREAS, the Board and Ms. Gunsalus have had a disagreement regarding tenure and seniority rights to the position of Director of Special Services, Gunsalus v. Millstone Twp. BOE, OAL Docket No. EDU 10411-2011S; and

WHEREAS, the Board and Ms. Gunsalus desire to resolve amicably and in good faith all matters and issues arising out of OAL Docket No. EDU 10411-2011S;

NOW, THEREFORE, in consideration of the foregoing and in consideration of their respective rights and obligations set forth herein and for other good and sufficient consideration, receipt of which is hereby acknowledged, Ms. Gunsalus and the Board agree as follows:

ARTICLE I
Release

1. Mutual Releases – In return for their obligations pursuant to this Agreement, Ms. Gunsalus and the Board hereby release and discharge each other as well as any and all of their former and current trustees, officers, employees, agents, contractors, representatives, predecessors, successors and assigns, as well as their heirs, executors and administrators, from liability on or for all claims, demands, causes of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, known or unknown, which they may have had or now have for any reason whatsoever on account or arising out of the allegations set forth in OAL Docket No. EDU 10411-2011, but not limited to:

A. Any claims or actions under Title VII of the Civil Rights Act of 1964, the Worker Adjustment and Retraining Notification Act, the Public Employee Relations Act, the Employee Retirement Income Security Act, the Americans With Disabilities Act, the Family and Medical Leave Act, the National Labor Relations Act, the Fair Labor Standards Act, Section 1981-1988 of Title 42 of the United States Code, the Equal Pay Act of 1963, the Vocational Rehabilitation Act of 1973, the Occupational Safety and Health Act of 1977; the Education Laws and Regulations;

B. Any other claims or actions under the New Jersey Equal Pay Act, the New Jersey Law Against Discrimination, the New Jersey Wage-Hour and Wage-Payment Laws, the New Jersey Worker Health and Safety Act, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act;

C. Any claims arising out the terms and conditions of Ms. Gunsalus' employment with the Board, including claims arising out of Ms. Gunsalus' acquisition of tenure, the termination of such employment, and/or any of the events relating directly or indirectly to or surrounding that termination;

D. Any and all claims related to compensation of any kind, except as set forth in this Agreement;

E. Any and all claims for damages of any kind;

F. Any and all claims arising out of the execution of this Agreement;

G. Any and all claims for attorney's fees, costs, disbursements or the like;

which they ever had, or have or hereafter can, shall or may have against each other for, upon or by reason of any act, omission, transaction or occurrence up to and including the effective date of this Agreement.

Ms. Gunsalus does not waive or release any rights she may have on the basis of tenure and/or seniority to the position of Supervisor of Special Services, if recreated by the Board in 2012-2013 school year or any future years, nor does she waive or release any rights she may have to any other position of Supervisor for which she may be certified and qualified for the 2012-2013 school year or future years. Nothing in this release shall be construed as waiving or releasing the Board's right to assert any defenses it may have to such a claim.

ARTICLE II
Terms of Settlement

2.1 **Consideration** - As consideration for Ms. Gunsalus' Release as set forth herein, the Board agrees to the following:

Ms. Gunsalus shall receive a lump sum of fifteen thousand dollars (\$15,000.00), payable on or about January 15, 2013, provided that the Commissioner of Education has approved this agreement on or before said date.

Ms. Gunsalus expressly acknowledges and represents that she understands that neither Wayne J. Oppito, Esq., her attorney or Michael A. Pattanite, Jr., Esq. the Board's attorney have given her any advice with regards to the tax implications of the payment above, but rather have given her an opportunity to discuss this payment with her tax advisor.

2.2 Ms. Gunsalus hereby withdraws OAL Docket No. EDU 10411-2011.

ARTICLE III
Miscellaneous

3.1. **Entire Agreement** - This Agreement sets forth the entire agreement between the parties with respect to the subject matter hereof and supersedes any and all prior agreements relating thereto. There are no other understandings or agreements between or among the parties with respect to the subject matter hereof, except as set forth herein, and as set forth in any other documents executed directly or in connection with this Agreement. No condition or provision of this Agreement may be modified, waived or revised in any way except in writing executed by all parties and referring specifically to this Agreement.

3.2. **No Admissions** - Nothing contained in this Agreement shall be construed to constitute an admission or acknowledgment by any party hereto of any wrongful or improper conduct, nor of any liability to any other party.

3.3 Binding Effect – This Agreement and all rights and duties set forth herein shall be binding upon and inure to the benefit of the parties hereto, as well as their respective successors and assigns.

3.4 Governing Law and Choice of Forum – This Agreement and its interpretation and performance shall be governed by the laws of the State of New Jersey, without giving effect to its conflicts of law rules.

3.5 Captions – The captions set forth in this Agreement are intended solely for the parties' convenience and ease of reference and are not intended to modify, limit, describe or affect in any way the scope, content or intent of this Agreement.

3.6 Signature in Counterpart – This Agreement may be executed simultaneously or in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

3.7 Authorization – The Board hereby represents and warrants that the undersigned officer of the Board is fully authorized to execute this Agreement on the Board's behalf.

3.8 Acknowledgments – The parties to this Agreement acknowledge and agree that they have entered into this Agreement and have executed it without duress or coercion, and have done so with the opportunity to consult counsel. Each party further acknowledges and agrees that no other party has made representations, warranties, promises or agreements not set forth herein and no party relies in any way upon any representation, warranty, statement of fact or opinion, understanding, disclosure or non-disclosure not set forth herein in entering into this Agreement and executing it, no party has been induced in any way, except for the consideration, representations, warranties, statements and covenants recited herein, to enter into this Agreement.

3.9 Construction and Enforcement – The terms of this Agreement are the product of negotiations between the parties, and shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

3.10 BY SIGNING THIS AGREEMENT MS. GUNSALUS STATES THAT:

- A. SHE HAS READ IT;**
- B. SHE UNDERSTANDS IT AND KNOWS THAT HE IS GIVING UP IMPORTANT RIGHTS INCLUDING, BUT NOT LIMITED TO, RIGHTS UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION, THE TENURE LAWS SET FORTH IN TITLE 18A OF NEW JERSEY STATUTES, THE NEW JERSEY FAMILY LEAVE ACT, THE PUBLIC EMPLOYEE RELATIONS ACT, THE AGE DISCRIMINATION IN EMPLOYMENT ACT, THE CIVIL RIGHTS ACT OF 1964, THE AMERICANS WITH DISABILITIES ACT OF 1990, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AND ANY OTHER CONSTITUTIONAL STATUTORY OR COMMON LAW CLAIMS AS MORE FULLY SET FORTH IN SECTIONS 1 and 2 HEREIN ABOVE;**
- C. SHE AGREES WITH EVERYTHING IN IT;**
- D. SHE HAS HAD THE OPPORTUNITY TO CONSULT WITH COUNSEL OF HIS CHOOSING;**
- E. SHE HAS SIGNED THIS AGREEMENT KNOWINGLY AND VOLUNTARILY, AND WITHOUT COERCION;**
- F. SHE HAS BEEN GIVEN AT LEAST 21 DAYS IN WHICH TO CONSIDER WHETHER TO SIGN THIS AGREEMENT, AND ACKNOWLEDGES THAT SHE CAN WAIVE SAID 21 DAYS; AND ACKNOWLEDGES THAT SHE HAS AN ADDITIONAL 7 DAYS FOLLOWING THE DATE ON WHICH SHE SIGNS THIS AGREEMENT TO RENUNCIATE IT, AND THAT THE AGREEMENT WILL NOT BE EFFECTIVE UNTIL AFTER THE 7 DAY PERIOD HAS LAPSED.**

IN WITNESS WHEREOF, the parties have executed this Agreement on the date above written.


VALERIE GUNSALUS

Dated:


WAYNE J. OPPITO, ESQ.
ATTORNEY FOR MS. GUNSALUS

Dated: 9/12/2012

MILLSTONE TOWNSHIP BOARD OF EDUCATION


BY: MICHAEL A. PATTANITE, JR., ESQ.
ATTORNEY FOR MILLSTONE TWP. BD. OF ED.

Dated: 9/13/12

BERNARD BIESIADA, BOARD SECRETARY

Dated: 10/3/12

OAL DKT. NO. EDU 13908-12
AGENCY DKT. NO. 307-10/12

S.V., M.R. and G.R., on behalf of minor children, K.V., E.R., and F.H.,	:	
	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION ON
	:	
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
	:	
RESPONDENT.	:	

The record of this emergent matter – which included a digital recording of the hearing conducted at the Office of Administrative Law (OAL) on October 22, 2012 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Although petitioners may ultimately prevail after a hearing on the merits, the record as it stands does not support the requested emergent relief under the applicable standard for granting such relief. *Crowe v DeGioia*, 90 N.J. 126 (1982).

Accordingly, the instant application for emergent relief is hereby denied. This matter shall proceed at the OAL for a hearing – as expeditiously as possible – on its merits, as contemplated by the ALJ and the parties.

IT IS SO ORDERED.¹


COMMISSIONER OF EDUCATION

Date of Decision: 11/21/12

Date of Mailing: 11/21/12

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36 (*N.J.S.A* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF

OAL DKT. NO. EDU 13908-12
AGENCY DKT. NO. 307-10/12

**S.V., M.R. and G.R., on behalf of
minor children, K.V., E.R., and F.H.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
CITY OF CAMDEN, CAMDEN
COUNTY,**

Respondent.

Patricia Bombelyn, Esq., for petitioners (Perez & Bombelyn, attorneys)

Julio C. Gomez, Esq., for petitioners (Gomez, LLC, attorneys)

Lester E. Taylor, Esq., for respondent (Florio, Perrucci, Steinhardt & Fader,
attorneys)

BEFORE **EDWARD J. DELANOY, JR., ALJ:**

This matter having been opened on the filing of a petition for emergent relief, submitted by petitioners, Patricia Bombelyn, Esq. and Julio C. Gomez, Esq. appearing, and respondent, Board of Education of the Township of the City of Camden, Camden

County ("Board or District"), Lester E. Taylor, Esq. appearing, and the undersigned having considered the moving papers in support of emergent relief, Verified Petition and exhibits submitted by the petitioners, and opposition papers and exhibits submitted by respondent, and having heard the arguments of counsel, and for good cause shown, has determined from the proofs that petitioners have failed to meet the standards to grant emergent relief as set forth in N.J.A.C. 6A:3-1.6, pursuant to Crowe v. DeGioia, 90 N.J. 126 (1986), as more particularly set forth herein.

Petitioners K.V., E.R. and F.H. are minor schoolchildren attending the public schools in the Camden District. These three schoolchildren, through their guardians ad litem, seek emergent relief during the pendency of this action, in the form of an order transferring or reassigning them immediately to another school or school district outside of the District's jurisdiction. However, neither the State of New Jersey, nor any such other school district that may be required by order of this tribunal to accept transfer or reassignment of these schoolchildren, has been identified or named as a party to this action by petitioners.

Petitioner K.V. attends seventh grade at the District's Pyne Point Family School ("Pyne Point") in Camden, New Jersey. (See Certification of S.V. attached to Request for Emergent Relief.) According to the most recent Department of Education (DOE) data, Pyne Point is not making adequate yearly progress, it has been classified as "in need of improvement" for ten years, and a large percentage of students at Pyne Point are failing the State's standardized assessment tests. K.V. is twelve years old and he started the seventh grade at Pyne Point this fall. He failed the State Language Arts test in the fourth and fifth grades, but he passed the State math test in those grades. However, his math score decreased, and his grades in these classes worsened throughout his attendance at the District's Dudley Elementary School ("Dudley"). (See Certification of S.V. attached to Request for Emergent Relief.)

Petitioner E.R. attends fourth grade at Dudley. (See Certification of M.R. attached to Request for Emergent Relief.) According to the most recent DOE data, Dudley is not making adequate yearly progress, it has been classified as "in need of

improvement,” and a large percentage of students at Dudley are failing the State’s standardized assessment tests. E.R. is nine years old and he started the fourth grade at Dudley this fall. His state test scores are not yet available; however, his grades in language arts and math have worsened throughout his attendance at Dudley. (See Certification of M.R. attached to Request for Emergent Relief.)

Petitioner F.H. attends first grade at the District’s Davis Elementary School (“Davis”). (See Certification of G.R. attached to Request for Emergent Relief.) According to the most recent DOE data, Davis is not making adequate yearly progress, it has been classified as a school “in need of improvement” for the past seven years, and a large percentage of students at Davis are failing the State’s standardized assessment tests. F.H. is five years old and he started the first grade at Davis this fall. However, due to his young age, he has not taken any state tests yet. (See Certification for G.R. attached to Request for Emergent Relief.)

Through their parents and/or guardians, these three children petition and demand their fundamental right to a thorough and efficient education, and they demand realization of the promise that their educational opportunity will enable them to achieve their full potential. They petition to end an alleged daily and on-going deprivation they each have endured and will continue to endure as students of Pyne Point, Dudley and Davis public schools in Camden.

On February 6, 2012, the then-Acting Commissioner of Education (“Commissioner”), Christopher D. Cerf, sent a letter to the District with the results of a District Performance Review (DPR) conducted under New Jersey’s Quality Single Accountability Continuum (QSAC). QSAC is the DOE’s system for “evaluating the thoroughness and efficiency of all the public schools of the State.” N.J.S.A. 18A:7A-10. QSAC is intended to “ensure that all districts are operating at a high level of performance.” Id. The law requires an assessment of a school district in five key areas: (1) Instruction and Program; (2) Operations; (3) Fiscal Management; (4) Personnel; and (5) Governance. Id. To conduct this assessment, the DOE established the DPR— a long-form questionnaire to be used by a school district to conduct a self-audit of its

practices. The questions on the DPR measure a school district's performance in the aforementioned five key areas. N.J.A.C. 6A:30-1.2. A school district is required to complete the DPR to ascertain whether it is fulfilling multiple tasks and responsibilities in each of these key areas. The DPR responses are supposed to be approved by a school district's board of education and submitted to the county superintendent upon completion for his review and evaluation of the responses. N.J.A.C. 6A:30-3.2(g). The DPR is then used by the Commissioner to score the school district, to report the percentage of performance indicators satisfied by the school district, and to place the district on a performance continuum. N.J.A.C. 6A:30-4.1. The Commissioner is required to notify the school district of these determinations. Id.

According to this review of District's public schools, the Commissioner determined that the District satisfied seven percent of its responsibilities in the area of Instruction and Program; nine percent in the area of Personnel; thirty-three percent in the area of Governance; forty-seven percent in the area of Operations; and seventy-nine percent in the area of Fiscal Management.¹ (Certification of Counsel, Julio C. Gomez ("Counsel Cert.") filed herewith, Ex. A). The Commissioner made the following additional findings of the District's performance in the area of Instruction and Program:

None of the nine mandated curricular areas are board approved and some are not aligned with the Core Content Standards. The curriculum is not articulated across grade levels and there is no evidence to support that students across all grades are being prepared to meet high school graduation requirements. Instruction does not address the performance of student subgroup populations. There is no evidence of programs for gifted and talented students across the district. District graduation requirements have not been revised since 2002 and therefore do not reflect the State requirements.

Additionally, the Commissioner determined that the District "did not comply with the requirements of violence and vandalism reporting, provide a counseling program and intervention and referral services throughout the District, or conduct training in a

¹ The Commissioner determined that Camden scored a seventy-nine percent in Fiscal Management "due largely to the capacity added by the state-appointed fiscal monitor." (Counsel Cert., Ex. A)

variety of areas including closing the achievement gap and safety and security.” (Counsel Cert., Ex. A). He determined that “personnel procedures and operations continue to inhibit student learning and effective management of the District.” (Counsel Cert., Ex. A). The Commissioner further noted, “not all staff are appropriately certified for their job assignments.” (Counsel Cert., Ex. A). Moreover, he found that

Principals of at least two schools are not being monitored. Staff professional development plans contain language that isn’t personalized to meet the improvement needs of employees from one year to the next. There is no evidence that professional development addresses student subgroup performance or that it focuses on improving student performance. Professional development for novice teachers to enhance their performance in the classroom is not being sustained. Id.

The District’s graduation rate is fifty-six percent – “far below the eighty percent graduation rate threshold set by the QSAC process.” (Counsel Cert., Ex. A). The Commissioner deemed the District’s “self-reported” graduation rate to be “overstated.” (Counsel Cert., Ex. A).

In addition, the Commissioner stated: “much work needs to be done for Camden City Public Schools to ensure that every student receives a high quality education. Camden’s public schools are not serving children at the consistently high levels they deserve.” (Counsel Cert., Ex. A).

In April 2012, the DOE further announced that twenty-three (out of twenty-six) District schools were among the lowest performing public schools in the State. (Counsel Cert., Ex. D). These are schools that have shown the lowest academic performance and lack of improvement over the past three years. (Counsel Cert., Ex. E). In these schools, less than one-third of the children are performing adequately. (Counsel Cert., Ex. E). The schools attended by the petitioner children – Pyne Point, Dudley and Davis Elementary – all appear on this list. (Counsel Cert., Ex. D).

On August 9, 2012, the Commissioner issued the final report of DOE's in-depth QSAC evaluation of the District which describes "a district in crisis – a district that has during the last decade failed to serve its mission of educating students." (Counsel Cert., Ex. F at p. 24). On page two of his transmittal letter to the District, the Commissioner concludes that the District "needs fundamental and transformational reform if it is to provide the children of Camden with a high-quality education and the opportunity to graduate from high school ready for college and career." (Counsel Cert., Ex. F).

On August 21, 2012, UPD Consulting and Cross & Jofus, private consultants hired and paid by the District, released a "Needs Analysis" of the Camden City public schools. The analysis revealed many deficiencies.

The Board argues that K.V. and E.R.'s mothers have publicly represented that their children are currently doing well academically, and that their sons receive A grades in school. The Board points out that while the petitioners claim that their children have demonstrated reduced proficiencies, they do not provide any specific information regarding the children's individual performances. The Board submits that petitioners have not carried their burden nor satisfied all of the legal prerequisites under applicable law to sustain this application for emergent relief.

Under Crowe v. DiGioia, 90 N.J. 126 (1982), N.J.A.C. 6A:3-1.6(b) and N.J.A.C. 1:1-12.6, emergency relief may be granted if the judge determines that:

1. the petitioner will suffer irreparable harm if the relief is not granted;
2. the legal right underlying the petitioner's claim is settled;
3. the petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Emergent relief is not appropriate unless all four of the above requisites are satisfied.

As for the first requirement for the granting of emergent relief, petitioners aver they will suffer irreparable harm if the relief is not granted. In support of their application, petitioners argue that as a result of the current state of the District's schools, and the rights of schoolchildren to receive a thorough and efficient education, they are suffering irreparable harm each day, and that there is no way they will ever be compensated for their loss of time and progress in their educational development. They urge that the petitioner schoolchildren should not have to endure another day of being denied their constitutional right to an appropriate education. The District argues that any alleged harms suffered by petitioners are capable of being remedied on an individual basis, that alleged statutory violations do not create a per se deprivation of an appropriate education constituting irreparable harm, and that petitioners have not demonstrated more than the possibility of future harm.

"Irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, supra, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications, Inc. v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). However, pecuniary damages may sometimes be inadequate because of the nature of the injury or the right affected. Crowe, supra, 90 N.J. at 133. For example, in Crowe the Court determined neither an unwarranted eviction nor reduction to poverty could be compensated adequately by monetary damages awarded after a distant hearing. Id.

In making their arguments, petitioners offer nothing beyond general statements in their certifications regarding the scholastic abilities of each of the respective children. E.R. has not yet received his state scores, and there is an unsupported allegation that his grades have worsened while at Dudley. F.H. has not yet taken any state tests, but because he attends Dudley, petitioner has assumed, without supporting proofs, that he will fall into the category of the two-thirds of children who fail to meet state standards. K.V. is now in the seventh grade, but he failed the Language Arts test in the fourth and fifth grades, and there is an unsupported allegation that his grades in language arts and

math had worsened during his time at Dudley. And while his scores decreased, K.V. did pass the most recent State math test.

Petitioners presented no credible evidence, in the form of a certification or affidavit from a qualified, certified educational professional, that would support a finding that each petitioner schoolchild will not receive an appropriate education if they remain in their current placements, and that the placement of each petitioner in another school outside the District is necessary in order to prevent irreparable harm. Petitioners ask this tribunal to find that because the District's schools which petitioners attend are not performing as required by State mandates, this is the sole and proximate cause of petitioners' worsening performances, without consideration of any other factors which may be causing the performance of each child to decline.

There have been no proofs submitted by petitioners, other than the broad allegations raised in their certifications, and their reliance on the general findings and reports of the DOE, to establish that E.R., F.H., and K.V. are hopelessly in danger of not receiving a thorough and efficient education during the pendency of this matter. Mere allegations that tests have been failed and that performance is decreasing does not necessarily distinguish these students from any other student in this State who may also have failed a test and/or have worsening grades. It would be unfair to place the blame for the alleged shortcomings of the petitioner schoolchildren solely at the feet of the District, without regard for some consideration of sufficient proofs to indicate that the District is to blame. Without those proofs, it cannot be determined whether or not these petitioner schoolchildren are currently receiving a thorough and efficient education.

The DOE reports submitted by petitioners do not indicate that one hundred percent of the children at the District's schools attended by the petitioner schoolchildren are failing. What is indicated in the reports is that the District has not met performance indicators as required by the State in five DPR areas. No proofs have been submitted to show that the failure of the District to meet the performance indicators as required by the State in the five DPR areas has deprived these three petitioner schoolchildren of a thorough and efficient education. Since a deprivation of education has not been proven,

no irreparable harm can be found. In short, given the lack of those necessary proofs, petitioners cannot meet their burden of proving that E.R., F.H., and K.V. will suffer irreparable harm if the request for emergent relief is denied. In addition, even if the petitioners did prove that the District failed to provide the petitioner children with a thorough and efficient education, no showing has been made that such a failure cannot be remedied through means other than a complete transfer out-of-district.

In addition, petitioners argue that, under New Jersey law, violations of statutes that provide for equitable remedies constitute irreparable harm per se. Petitioners' Brief, p. 17 (citing Matawan Reg'l Teachers Ass'n v. Matawan-Aberdeen Reg'l Bd. of Educ., 212 N.J. Super. 328 (Ch. Div. 1986)). Petitioners argue that the three schoolchildren are being deprived of the appropriate education they are entitled to receive, and that this deprivation is not only a violation of constitutional right, but also a violation of numerous school laws and regulations, including the School Funding Reform Act of 2008 (SFRA), N.J.S.A. 18A:7F-43 et seq. However, the allegation that the District has violated the SFRA is insufficient to find irreparable harm per se. Even if petitioners could show that the District has violated the SFRA by failing to provide its students with a constitutionally-mandated thorough and efficient education, petitioners have not shown that such violation would constitute per se irreparable harm that obviates the need to show that petitioners' children, individually, will suffer irreparable harm if their motion for emergent relief is not granted.

As petitioners acknowledge, "under New Jersey law, violations of statutes that provide for equitable remedies constitute irreparable injuries per se." Matawan, supra, 212 N.J. Super. at 335 (citation omitted). Thus, "[w]here injunctions are creatures of statute, all that needs be proven is a statutory violation." Matawan, supra, 212 N.J. Super. at 335 (citation omitted). Here, the SFRA does not provide for injunctive relief in response to a statutory violation. See N.J.S.A. 18A:7F-43 to -63. Thus, petitioners have not shown that they are entitled to a finding of irreparable harm per se.²

² Petitioners have also failed to show that in New Jersey, an alleged deprivation of a constitutional right, such as the one guaranteed by the thorough and efficient clause, triggers a finding of irreparable harm.

I therefore **FIND** that petitioners have failed to meet their burden of establishing that E.R., F.H., and K.V. will suffer irreparable harm if the relief sought is not granted.

Since I have determined that no irreparable harm exists at this time, it is not necessary for me to address the remaining criteria under Crowe, supra. Nevertheless, I will address the three remaining criteria.

As for the second and third requirements for the granting of emergent relief, petitioners argue that there is a clear legal right underlying their claim, and that there is a likelihood of prevailing on the merits of the underlying claim. The District counters that petitioners' claims are rooted in the unsettled legal theory that attendance at an underperforming school constitutes deprivation of a constitutionally adequate education, that petitioners have not established a legal right to attend a school outside of their district of residence, that petitioners cannot prevail due to their failure to join necessary parties, and that petitioners' claims are premature.

I **FIND** the legal right underlying petitioners' claims is not settled; and I further **FIND** petitioners do not, at this time, have a likelihood of prevailing on the merits of the underlying claim. Although the petitioners are correct when they argue that every child has a constitutional right to a thorough and efficient education, there remain issues as to whether these particular petitioner schoolchildren in their particular circumstances are receiving a thorough and efficient education. Petitioners have not established, through the proofs submitted herein, that they are not receiving a thorough and efficient education. Mere reliance on an overwhelmingly unfavorable general review of the District's schools, without more, is not enough to establish that petitioners are not receiving a thorough and efficient education in each of their particular circumstances. What role, if any, the failure of the District's schools to perform as required by state mandates played in the petitioners' progress or lack thereof, has yet to be determined. Further information that may be developed may show that there has not been a failure to educate each petitioner herein. However, that information has not yet been produced, and it is impossible to determine at this time that petitioners are likely to succeed on the merits of the underlying claim. In addition, petitioners are not likely to

prevail on their claims because of their failure to name all indispensable parties, including the State of New Jersey and other school districts that might be ordered to accept these students as a remedy to petitioners' concerns.

As for the fourth requirement for granting emergent relief, petitioners aver that the equities and interests of the parties are balanced, the petitioners will suffer greater harm than the District if emergent relief is not granted. They argue the greater loss and potential for loss will be suffered by the children without a corresponding risk of loss by the District. The District argues that petitioners will not suffer greater harm than the District. The petitioner schoolchildren are in school and receiving an education. Petitioners agree that the District, by the aforementioned letter from the DOE dated August 9, 2012, has been given six to eight months before the State may decide to exercise the full range of its authority. The District is still in the process of attempting to comply with the directives issued by the State. The District has an interest in, and is entitled to attempt to comply with the State mandates. The District also has an interest in complying with the State mandates because it faces a State-led intervention. Therefore, I **FIND** that the equities do not favor on balance the granting of emergent relief.

IT IS therefore on this 23rd day of October 2012, **ORDERED** that petitioners' application for emergency relief is **DENIED**.

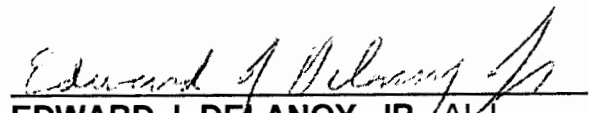
This order on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter.

A status conference shall be arranged with the parties to determine the scheduling of dates for a decision on the merits of this matter.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

October 23, 2012

DATE


EDWARD J. DELANOY, JR., ALJ

T.H., on behalf of minor children, S.K., S.H., and S.H.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF BURLINGTON AND BOARD OF EDUCATION OF THE CITY OF BEVERLY, BURLINGTON COUNTY,	:	DECISION
	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner appealed the respondent Board of Education of the City of Burlington's October 2010 determination that petitioner and her children did not reside in Burlington and were not eligible for a free public education in the Burlington City School District for the 2009-2012 and 2010-2011 school years. Petitioner asserted in her appeal that she and her family were homeless. In December 2011, petitioner presented acceptable proof of residency in the City of Burlington, and the Board dropped its challenge of petitioner's residency status. The Board of Education of the City of Burlington (Burlington) filed a letter requesting that the matter be dismissed as moot.

The ALJ found that Burlington's motion to dismiss was essentially a motion for summary judgment; there are no issues of material fact remaining between the parties, and the matter is ripe for summary decision. The ALJ concluded that no contested case exists between the parties, and the matter is moot. Accordingly, he dismissed the petition.

Upon full and careful consideration, the Commissioner concurred with the ALJ that the matter is appropriately dismissed as moot. In so concluding, the Commissioner referenced the July 12, 2012 letter from counsel for the Board of Education of the City of Burlington requesting that the matter be dismissed, as well another letter in the file – dated January 23, 2012 – which indicated that the matter of tuition payments for the period from September 2011 to November 2011 had been settled between the Beverly City and Burlington City Boards of Education, and as such there is no existing dispute between the two Boards of Education. Accordingly, the petition was dismissed as moot.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
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November 27, 2012

OAL DKT. NO. EDU 12093-11
AGENCY DKT. NO. 298-10/11

T.H., on behalf of minor children, S.K., S.H., and S.H.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF BURLINGTON AND BOARD OF EDUCATION OF THE CITY OF BEVERLY, BURLINGTON COUNTY,	:	DECISION
	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon full consideration, the Commissioner concurs with the Administrative Law Judge (ALJ) that this matter is appropriately dismissed as moot. In so concluding, the Commissioner notes that the record contains a letter, dated July 12, 2012, from counsel for the Board of Education of Burlington City to the ALJ which reports:

On December 6, 2011, the Petitioner presented a one-year rental lease for property located at 570 York Street, Burlington, New Jersey for the period beginning November 16, 2011 and ending November 16, 2012. The Burlington City Board of Education conducted due diligence and determined that Petitioner does reside at 570 York Street, Burlington, New Jersey. The Burlington City Board of Education no longer challenges the residency status of the Petitioner and, as such, this matter is resolved. In light of the above, we request that this matter be dismissed as moot.¹

¹ It is also noted that a prior letter, dated January 23, 2012, from Burlington City Board of Education counsel to the ALJ stated "[i]t is our understanding the Beverly City Board of Education has reimbursed the Burlington City Board of Education for tuition payments for the period from September 2011 to November 2011. As such, there is no existing dispute between the Beverly City and Burlington City Boards of Education."

Accordingly, the recommended decision of the OAL is adopted and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.²


COMMISSIONER OF EDUCATION

Date of Decision: 11/27/12

Date of Mailing: 11/30/12

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING
SUMMARY DECISION

OAL DKT. NO. EDU 12093-11
AGENCY DKT. NO. 298-10/11

T.H. ON BEHALF OF S.K., S.H., AND S.H.,
Petitioners,

v.

**BOARD OF EDUCATION OF THE CITY
OF BURLINGTON AND BOARD OF
EDUCATION OF THE CITY OF BEVERLY,
BURLINGTON COUNTY,**
Respondent.

T.H, on behalf of S.K., S.H, and S.H, petitioners, pro se

Sharon D. Larmore, Esq., for respondent Burlington City Board of Education
(Parker McCay, attorneys)

No appearance by or on behalf of Beverly Board of Education

Record Closed: September 10, 2012

Decided: November 1, 2012

BEFORE **ELIA A. PELIOS., ALJ:**

This matter comes before this tribunal on the motion of the respondent to dismiss the matter as moot. This matter involves a residency appeal to the October 2010 determination that the petitioner and her minor children did not reside in the City

of Burlington and were not eligible for a free public education in the Burlington City School District for the 2009-2010 and 2010-2011 school years.

On October 13, 2011, the parties appeared before the undersigned on petitioner's Motion for Emergent Relief. At that time, the undersigned denied the petitioner's Request for Emergent Relief. On October 21, 2011, the Acting Commissioner of Education issued an Order concurring that the petitioner failed to demonstrate entitlement to emergent relief and ordered the immediate enrollment of the petitioner's children in the Burlington City Public Schools pending the resolution of a dispute concerning homelessness.

On December 6, 2011, the petitioner presented a one-year rental lease for property located at 570 York Street, Burlington, New Jersey for the period beginning November 16, 2011 and ending November 16, 2012. The Burlington City Board of Education conducted due diligence and determined that petitioner does reside at 570 York Street, Burlington, New Jersey. The Burlington City Board of Education dropped its challenge of the residency status of the petitioner. The parties agreed pursuant to a telephone conference that the matter was resolved. Petitioner indicated that she would send a notice withdrawing her request for an appeal.

No such letter was ever provided, and several attempts to contact petitioner to determine the status of the letter were unsuccessful. Telephone conferences with due notice were scheduled in this matter on May 9, 2012 and July 10, 2012. The petitioner did not participate in these conferences, did not seek an adjournment of these conferences, and did not provide any explanation for her failure to participate in these conferences. Furthermore she did not in any way oppose or otherwise respond to this motion. When no opposition to the motion was forthcoming the record closed on September 10, 2012.

Respondent's motion to dismiss the herein matter as moot is essentially a motion for summary decision. Motions for summary decision are governed by N.J.A.C. 1:1-

12.5(a), (b). This regulation, similar to the Judiciary's R. 4:46-1 motion for summary judgment, is "the determination [of] whether there exists a genuine issue with respect to a material fact challenged

. . . that requires a consideration of whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 523 (1953).

In the present case, there are no issues of material fact remaining between the parties as to the issues raised in furtherance to respondent's motion. Accordingly, I **FIND** that summary decision is appropriate in this matter. Furthermore, given the respondent's dropping its challenge to petitioner's residency, coupled with petitioner's expressed willingness to withdraw the matter on the January 13, 2011, conference call and her failure to pursue this matter any further despite be given several opportunities to do so, I **FIND** and **CONCLUDE** that no contested case exists between these parties, and that the matter is moot.

Therefore, it is **ORDERED** that respondent's motion to dismiss this matter as moot be and is hereby **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 1, 2012

DATE



ELIA A. PELIOS, ALJ

Date Received at Agency:

November 7, 2012

Date Mailed to Parties:

11/8/12

EAP/mel

#452-12

C.B., on behalf of minor child, S.H.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF HAWTHORNE,	:	
PASSAIC COUNTY.	:	DECISION
RESPONDENT.	:	
AND	:	
BOARD OF EDUCATION OF THE	:	
BOROUGH OF HAWTHORNE,	:	
PASSAIC COUNTY.	:	
V.	:	
D.H. and C.B., on behalf of minor child,	:	
S.H.,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her sister, S.H., is ineligible to receive a free public education in the Hawthorne school district. D.H., the mother of S.H., requested to be joined in the litigation. C.B. contended that her sister came to live with her after her mother's house was damaged by hurricane Irene, thus enabling S.H. to complete her senior year at the Passaic County Technical Institute. The Board filed a counterclaim against both C.B. and D.H., seeking tuition for the period of S.H.'s ineligible attendance.

The ALJ found that: no evidence was presented – aside from broad statements by C.B. and a temporary guardianship agreement, which was not provided by a court of law – in support of S.H.'s domicile during the time in question, April through June 2011 and for the entire 2011-2012 school year; and the overwhelming evidence suggests that S.H. was residing at her mother's residence in Garfield during the period at issue; The ALJ concluded that S.H. was not domiciled in Hawthorne and accordingly D.H. and C.B. are liable for the costs of educating S.H. for the period in question. The ALJ stated that the Board provided certification that the per-student tuition rate for the 2011-2012 school year was \$11,864 and the daily cost was \$69.91.

Upon a full review, the Commissioner found that Initial Decision does not provide the information necessary to determine the tuition rate for the 2010-2011 school year, without which it is not possible to compute the exact amount of tuition owed. Accordingly, the Initial Decision was rejected and the matter was remanded to the OAL for a determination of the total amount of tuition due and owing.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 27, 2012

OAL DKT. NOS. EDU 14659-11 and EDU 6569-12 (CONSOLIDATED)
AGENCY DKT. NOS. 342-11/11 and 70-3/12

C.B., on behalf of minor child, S.H.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION
RESPONDENT.	:	
AND	:	
BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY.	:	
V.	:	
D.H. and C.B., on behalf of minor child, S.H.,	:	
RESPONDENTS.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. This consolidated matter involves a residency dispute between the Hawthorne Board of Education (Board) and D.H., the mother of S.H., and C.B., the sister of S.H. The Administrative Law Judge (ALJ) found that S.H. was ineligible to attend school in the district from April 1, 2011 through June 2011, and for the entire 2011-2012 school year. The ALJ also awarded tuition costs to the Board. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner finds that the Initial Decision does not adequately and completely address the tuition costs that D.H. and C.B. are required to reimburse the Board for S.H.'s ineligible attendance in the district. The ALJ ordered that "D.H. reimburse the respondent the full tuition costs associated with the attendance of S.H. in the Hawthorne School District between April through June 2011 and for the entire 2011-2012 school year." (Initial Decision, page 8). The testimony revealed that the per-student tuition rate for the 2011-2012 school year is \$11,864 with a per diem rate of \$69.91. There is no indication in the Initial Decision, however, as to what the tuition rate was for the 2010-2011 school year. As a result, the Commissioner cannot determine the amount of tuition costs that are owed to the Board for S.H.'s attendance in the district from April through June 2011 despite the fact that D.H. was found liable for those costs as well.

Additionally, the Initial Decision found that C.B. was only responsible for tuition costs associated with S.H. for a portion of the 2011-2012 school year beginning September 30, 2011. The specific amount of tuition costs that C.B. is liable for is also not stated in the Initial Decision. Accordingly the Initial Decision is rejected, and this matter is remanded to the OAL for a determination as to the exact amount of tuition costs that both D.H. and C.B. are liable for in connection with S.H.'s ineligible attendance in the district.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 11/27/12

Date of Mailing: 11/30/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36. (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

(CONSOLIDATED)

C.B., o/b/o MINOR CHILD, S.H.,

Petitioner,

v.

HAWTHORNE BOARD OF EDUCATION,

Respondent.

OAL DKT. NO. EDU 14659-11

AGENCY DKT. NO. 342-11/11

HAWTHORNE BOARD OF EDUCATION,

Petitioner,

v.

D.H. and C.B.,

Respondent.

OAL DKT. NO. EDU 06569-12

AGENCY DKT. NO 70-3 3/12

C.B., petitioner, appearing pro se and **D.H.**, petitioner, failed to appear

Robert T. Hara, Esq., for respondent (Fogarty & Hara)

Record Closed: September 10, 2012

Decided: October 16, 2012

BEFORE **JOANN LASALA CANDIDO**, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Petitioner appeals the determination by the Board of Education of Hawthorne (Board) that her sister, S.H., does not reside within the district. The Board filed a

Counterclaim for costs of tuition from April 1, 2011, to June 2012 at a cost of \$69.91 per day with an annual rate of \$11,864.

The appeal was transmitted to the Office of Administrative Law (OAL) on December 13, 2011, as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

On February 3, 2012, the undersigned was advised that the matter had been settled pending Board approval. A status conference was held on March 7, 2012, but the matter was not resolved. D.H., the mother of S.H., wanted a hearing and requested to be joined in the litigation.

On March 16, 2012, the Board filed a verified counterclaim not only against petitioner C.B. but also against D.H., the mother of S.H. On April 19, 2012, D.H. filed an Answer to the counterclaim. On June 28, 2012, both actions were consolidated. The matter was originally scheduled to be heard on July 13, 2012, but the Board requested an adjournment because one of its witnesses was unavailable. The matter was then rescheduled for August 28, 2012. Petitioner then requested an adjournment due to an injury she sustained. The matter was rescheduled for September 10, 2012.

On Sunday evening, September 9, 2012, D.H. left a message at the OAL stating that she worked twenty of the last twenty-four hours and was too tired to appear. D.H. was advised by the undersigned the following morning that the matter would be heard as scheduled and allotted her more time to arrive to the OAL for the hearing. D.H. failed to appear, but C.B. did. Since D.H. failed to appear at the hearing, her claim is **DISMISSED**. However, testimony was taken on the counterclaim to recoup the cost of education provided by the Board.

TESTIMONY

C.B. testified on her own behalf. She stated that when her mother's home in Garfield was damaged by hurricane Irene, her sister, S.H., came to live with her, so that she could complete her senior year at the Passaic County Technical Institute (PCTI). On September 15, 2011, C.B. and D.H. signed an agreement for the temporary

guardianship of S.H. commencing on September 1, 2011, and ending on July 14, 2011, when S.H. would become eighteen years of age. (R-5.) Although this document was prepared by an attorney, it was not filed with a court of law. It was not acceptable by the Board and she was provided with its own forms to complete.

C.B. did not receive any support from her mother, D.H., to care for S.H. S.H. had a car which she would sometimes use to stay with D.H. in Garfield. No proof was offered as to the owner of that car.

One of the documents given to C.B. was a residency affidavit for a non-parent resident, which she signed on September 30, 2011. (R-7.) She was also given a residency affidavit which required her landlord to acknowledge that another person would be residing with her. (R-8.)

Janice Maher, a senior secretary in the guidance department, testified for the Board. She stated that she sent registration notices to D.H. on April 21, May 24, and June 15, 2011, requiring that she provide proof of residency to the Board. (R-1.)

D.H. provided a utility bill for the prior Hawthorne address, 60 Sixth Avenue, that was for service at her current Garfield address of 7 Lizette Avenue. (R-3.) On August 4, 2011, a notice was sent to 60 Sixth Avenue, Hawthorne address provided by D.H. advising that proof of residency had not been provided and that S.H. would no longer be permitted attend school. (R-2.) Maher further testified that she received a call from the tenant who had advised that she moved into D.H.'s Hawthorne apartment on April 1, 2011, and to please stop sending petitioner's mail to that address. (R-9.)

Maher requested that the three previously mentioned documents be filled out and returned to the Board. A residency affidavit, dated September 30, 2011, was provided to the Board signed by D.H., appointing C.B. as temporary guardian of S.H. since Hurricane Irene destroyed her residence. (R-6.) A different form of residency affidavit also provided by the Board was signed by C.B. on September 30, 2011, and provided to the Board. (R-7.) The third form requested by the Board was an affidavit to be

completed by C.B.'s landlord, which was done on October 2, 2011, and returned to the Board. Maher then forwarded all affidavits to Superintendent Robert Mooney.

Peter Van Der Velde testified on behalf of the Board. He had conducted an investigation requested by Superintendent Robert Mooney as to the residency of S.H. at 147 Arlington Avenue, which was the Hawthorne address provided by petitioner. (R-12.) Van Der Velde stated that he went to that address on December 16, 2011, from 6:30 to 7:30 a.m. and observed no one leave the house.

On December 19, 2011, he returned to the same address and saw a lone female leave in a red jeep at 7:06 a.m. No one else left the house. He then proceeded to the bus stop where he observed S.H.

On December 20, 2011, at the end of the school day, Van Der Velde returned to the same school bus stop and observed no one return to 147 Arlington Avenue.

On December 21, 2011, he observed a red jeep parked in the driveway at 147 Arlington Avenue between the hours of 6:30 and 7:30 a.m. and then proceed to the school bus stop where he observed S.H. being dropped off by a white Chrysler Sebring convertible. He then returned to 147 Arlington Avenue and observed a lone female leave in a red jeep.

On December 23, 2011, he observed two females leave 7 Lizette Avenue in Garfield, NJ in a white Chrysler Sebring convertible and drop a student off at 7:14 a.m. at the same school bus stop that he had previously visited.

On January 3, 2012, Van Der Velde observed S.H. arrive at the same school bus stop after school and walk to 147 Arlington Avenue.

On January 4, 2012, Van Der Velde observed no one leaving 147 Arlington Avenue and observed S.H. being dropped off at the bus stop by the same Chrysler Sebring at 7:16 a.m. He returned to the bus stop after school and did not see any student get off the bus.

On January 5, 2012, Van Der Velde observed two females left 7 Lizette Avenue in the morning and proceeded directly to school bus stop in Hawthorne where he observed the student exit the car.

On January 10, 2012, Van Der Velde returned to the school bus stop after school but no student got off the bus.

On January 11, 2012, he saw the same white Chrysler Sebring convertible leave the Garfield residence and drop S.H. off at school bus stop in Hawthorne. After school, she did not return to the bus stop.

During the evening of January 13, 2012, Van Der Velde went to 7 Lizette Avenue in Garfield which belonged to D.H., and which appeared to be fully habitable. There were no storage containers in the driveway. Subsequently, he checked with the Office of Emergency Management in Garfield and learned that no damage had been reported, or evacuations made, at that address. Van Der Velde concluded that D.H. and S.H. lived at the Garfield address. He submitted a report of his findings to the superintendent.

Superintendent Robert Mooney testified on behalf of the Board in support of its counterclaim for tuition. Upon receipt of the investigation report prepared by Van Der Velde and the documents submitted by petitioner, he determined that S.H. had not been residing in Hawthorne since April 1, 2011. (R-12.) On December 20, 2011, Mooney sent a letter to D.H. advising of his determination and that she would be responsible for tuition, the rate being \$11,864 for the school year 2011-2012, since S.H. was no longer residing in Hawthorne. (R-14.) He did not withdraw S.H. from the Hawthorne school system and she was able to complete her senior year. Mooney determined that:

1. From April 1, 2011 until the end of the pertinent school year and for the 2011-2012 school year, S.H., the sister of C.B. and daughter of D.H., attended the Passaic County Technical Institute (High School).

2. The guardianship paper submitted by D.H. was of no significance to suggest that S.H. should be living in Hawthorne. Respondent C.B. never had custody or legal guardianship of S.H. while the latter attended the High School. S.H. resided in Garfield during her senior year.

3. Van Der Velde investigation showed that S.H. lived in Garfield with D.H. and not in Hawthorne with C.B.

[(R-15.)]

FINDINGS OF FACT

Based upon a review of the entire record, I **FIND** the following to be fact:

1. D.H. is S.H.'s mother. C.B. is S.H.'s sister.
2. The respondent sent registration notices to D.H. on April 21, May 24, and June 15, 2011, to 60 Sixth Avenue, the Hawthorne address on file for D.H., advising that she provide proof of residency to the Board.
3. A new tenant moved into the 60 Sixth Avenue, Hawthorne address on April 1, 2011.
4. On August 4, 2011, a notice was sent to 60 Sixth Avenue, Hawthorne, since it was the address on file, advising that proof of residency had not been provided and that S.H. would not be permitted attend school.
5. A residency affidavit dated September 30, 2011 was provided to the Board and signed by D.H. appointing C.B. as temporary guardian of S.H. The reason listed was that Hurricane Irene had destroyed her residence. (R-6.) Another residency affidavit provided by the Board was signed by C.B. on September 30, 2011, requesting to register S.H. and was returned to the Board. (R-7.) A third form requested by the Board, was completed by C.B.'s landlord on October 2, 2011, and returned to the Board.
6. Investigator Peter Van Der Velde found that S.H. resided with her mother, D.H., in Garfield while attending high school in Hawthorne.

7. On December 20, 2011, Mooney sent a letter to D.H. advising of his determination and that she would be responsible for tuition of \$11,864 for the school year 2011-2012, because S.H. was no longer residing in Hawthorne.
8. The Board provided certification that the per-student tuition rate for school year 2011-2012 is \$11,864 and the daily cost for the student at the rate of \$69.91.

LEGAL ANALYSIS AND CONCLUSION

The issue in this appeal is whether S.H. was a domiciled student from April 1, 2011, to the end of the school year and through the 2011-2012 school year.

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including individuals who are domiciled within the school district. N.J.S.A. 18A:38-1(a). A person who meets age requirements and is domiciled within a school district may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). A person may have many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). A child's domicile is normally that of his or her parents. Ibid. The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div. 1998), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999).

No evidence, other than broad statements by C.B. and a temporary guardianship agreement, which was not provided by a court of law, were presented in support of S.H.'s domicile during the time in question. Rather, the overwhelming evidence was that S.H. was residing at her mother's residence in Garfield. A thorough inspection conducted on behalf of the Board confirmed that S.H. was seen leaving that address in a convertible and dropped off at a school bus stop in Hawthorne. After school, the investigator waited at that bus stop and never observed S.H. exit a school bus.

In accordance with N.J.S.A. 18A:38-1(b)(2), a school board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend a school in its district. Further stated is that "[t]uition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance" Ibid. Mooney testified that the total annual per-pupil cost for the 2011-2012 school year was \$11,864.00 with a per diem rate for that school-year at \$69.91. S.H. was ineligible to attend Hawthorne from April 1, 2011, to June 2011 and for the whole 2011-2012 school year.

Therefore, I **CONCLUDE** that D.H. and C.B.¹ are liable to the Board for the costs of tuition for S.H. calculated at the rates previously referenced, from April through June, 2011 and for the entire 2011-2012 school year. The full tuition should be paid to the Board within ninety (90) days of the final decision of the Commissioner of Education, unless an alternative payment schedule has been agreed to by the parties.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that any claim by petitioner, D.H., be and is hereby **DISMISSED WITH PREJUDICE**.

It is further **ORDERED** that D.H. reimburse respondent the full tuition costs associated with the attendance of S.H. in the Hawthorne School District between April through June 2011 and for the entire 2011-2012 school year. C.B.'s liability for tuition is from September 30, 2011, to the end of the 2011-2012 school year. The Board provided certification that the per-student tuition rate for school year 2011-2012 is \$11,864 and the daily cost for the student at the rate of \$69.91.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

¹ The BOE is seeking reimbursement from C.B. retroactive to September 30, 2011.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 16, 2012
DATE

Joann Lasala Candido
JOANN LASALA CANDIDO, ALJ

Date Received at Agency:

Date Mailed to Parties:
ljb

OCT 17 2012

Lucia Berdies
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Petitioners:

C.B.

For Respondent:

Janice Maher

Peter Van Der Velde

Robert Mooney

EXHIBITS

For Petitioners:

None

For Respondent:

- R-1 Re-registration reminder notices
- R-2 Re-registration notices
- R-3 Re-registration sign off and approval
- R-4a and b Residency forms
- R-5 Temporary Guardianship Agreement dated September 15, 2011
- R-6 Residency affidavit
- R-7 Residency affidavit
- R-8 Residency affidavit
- R-9 Telephone call record
- R-10 Residential lease
- R-11 Residential lease listing
- R-12 Investigation report
- R-13 Follow-up investigation report
- R-14 Letter from Superintendent Mooney dated December 20, 2011
- R-15 Letter from Superintendent Mooney dated January 20, 2012

OAL DKT. NO. EDU 8935-12
 AGENCY DKT. NO. 163-6/12

IN THE MATTER OF THE TENURE :
 HEARING OF CYNTHIA RANSON, : COMMISSIONER OF EDUCATION
 SCHOOL DISTRICT OF THE CITY OF : DECISION
 BRIDGETON, CUMBERLAND COUNTY. :

The record of this matter, the parties' proposed Settlement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C. 1:1-19.1*. Upon careful review of the record, the Commissioner concurs with the Administrative Law Judge that, under the circumstances of this matter, the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C. 6A:3-5.6*.

According to the Agreement, the Board was required to pay the respondent \$25,000 ten days after the settlement was approved by the Board of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement. In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented certain settlement terms, or have agreed upon a mutually satisfactory alternate date for the effective date of those provisions. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.¹

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

Date of Decision: 12/05/12
 Date of Mailing: 12/05/12

¹ A copy of this decision shall be forwarded to the New Jersey State Board of Examiners for action as that body deems appropriate.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8935-12

AGENCY DKT. NO. 163-6/12

**IN THE MATTER OF THE TENURE
HEARING OF CYNTHIA RANSON,
SCHOOL DISTRICT OF THE CITY OF
BRIDGETON, CUMBERLAND COUNTY.**

A. Paul Kienzle, Jr., Esq., for petitioner, School District of the City of Bridgeton
(Casarow, Kienzle & Raczenbek, attorneys)

Ned P. Rogovoy, Esq., for respondent, Cynthia Ranson

Record Closed: October 23, 2012

Decided: October 24, 2012

BEFORE **W. TODD MILLER, ALJ**:

This matter was transmitted to the Office of Administrative Law on July 3, 2012, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement is in compliance with the standards set forth in In Re Cardonick, 1990 S.L.D. 842 (1990):
3. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

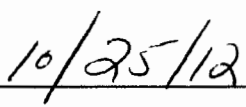
October 24, 2012

DATE


W. TODD MILLER, ALJ

Date Received at Agency:

Date Mailed to Parties:



/sd

Law Offices
NED P. ROGOVOY, ESQUIRE, L.L.C.
782 South Brewster Road, Unit A-6
Vineland, New Jersey 08361
(856) 205-9701
Attorney for Cynthia Ranson

IN THE MATTER OF THE TENURE
HEARING OF CYNTHIA RANSON,
SCHOOL DISTRICT OF THE CITY
OF BRIDGETON, CUMBERLAND
COUNTY

BEFORE THE COMMISSIONER OF
EDUCATION OF THE STATE OF
NEW JERSEY

OAL Docket No. EDU 8935-12
Agency Ref. No. 163-6/12

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (hereinafter referred to as the "Settlement Agreement") is made effective as of the 9th day of October, 2012 by and between the Petitioner, Bridgeton Board of Education, Cumberland County, New Jersey (hereinafter referred to as the "Board") and the respondent, Cynthia Ranson, (hereinafter referred to as the "Respondent") (collectively the "parties").

WHEREAS, the Board is a body corporate and politic of the State of New Jersey, charged with the statutory responsibilities for the management and administration of the Bridgeton Board of Education in Cumberland County, New Jersey; and

WHEREAS, the Respondent is presently employed by the Board as a tenured teacher; and

WHEREAS, the Board filed certain tenure charges against Respondent alleging unprofessional conduct, more specifically described in the tenure charges filed by the Board on June 15, 2012 (the "Tenure Charges") attached hereto as **Exhibit A**; and

WHEREAS, the Respondent, by formal response contested the Tenure Charge

and offered explanations for her actions and behavior, attached hereto as **Exhibit B**;
and

WHEREAS, the Commissioner of Education for the State of New Jersey (the "Commissioner") referred said charges to the Office of Administrative Law for a plenary hearing before the Honorable William T. Miller; and

WHEREAS, a telephonic pre-hearing conference was held on July 27, 2012; and

WHEREAS, a pre-hearing Order was prepared and filed on July 30, 2012; and

WHEREAS, prior to the first hearing date scheduled for October 3, 2012, the parties discussed terms and conditions of a Settlement Agreement which they believe will resolve the dispute; and

WHEREAS, the parties wish to settle all controversies among and between them, including the charges contained in the Tenure Charges, the defenses and counterclaims, if any, contained in the Response and any and all related or unrelated claims, known or unknown, which could have been asserted by the Board of Education and Respondent; and

WHEREAS, this agreement conforms to the discussions between the parties and their attorneys; and

WHEREAS, the parties acknowledge that the merits of the controversy are in dispute and that neither the Board nor Respondent admits any liability to either, but have reasons to desire that the matter be resolved; and

WHEREAS, the Board and Respondent specifically recognize and acknowledge that any settlement is contingent upon approval by the Commissioner as required by

and consistent with the New Jersey Administrative Code Section 6A:3-5.6 and *In the Matter of the Tenure Hearing of Frank Cardonick*, State Board of Education decision of April 6, 1983 (1990 School Law Decisions, S.L.C. 842, 846); and

NOW THEREFORE, in consideration of the agreements, promises, covenants and conditions contained herein, the adequacy and sufficiency of which are expressly acknowledged by the parties hereto, the parties agree as follows:

1. DISMISSAL OF ACTION.

Upon the following grounds:

(a) The respondent will irrevocably resign effective December 31, 2012, but shall not teach in the Bridgeton School System from this time forward.

(b) Ten (10) days after the Settlement Agreement is approved by the Bridgeton Board of Education, the Board will pay Respondent the sum of TWENTY-FIVE THOUSAND (\$25,000.00) DOLLARS in one lump sum and her release shall then become effective.

(c) The Board has and will continue to pay Respondent's health benefits through December 31, 2012.

(d) Said lump sum payment and health benefit received as provided in paragraphs 1(b) and (c) shall constitute full and absolute payment by the Board to Respondent for all monetary benefits, emoluments or other claims, including but not limited to salary for any period, accumulated sick leave, vacation or other paid leave, benefits, fringe benefits, pension contributions, in-kind or other contributions, opt-out or other payments. The Board, within ten (10) days of the Board of Education's approval

of this Settlement Agreement, shall issue a check payable to the order of Respondent or her assignee in the manner directed by the Respondent.

2. GENERAL RELEASE.

Respondent, personally and for her assignee, estate and/or heirs, waives, releases and gives up any and all other claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that she may have against the Board and any and all of its officers, directors, agents, representatives and employees (present and forever) and their respective successors and assigns, heirs, executors and legal or personal representatives, based upon any act, event or omission occurring before the execution of this Settlement Agreement including, but not limited to, any events related to, arising from or in connection with Respondent's employment with the Board or the Tenure Charges. Respondent specifically waives, releases and gives up any all claims arising from or relating to her employment and/or association with the Board based upon any act, event or omission occurring before the execution of this Settlement Agreement including, but not limited to, any claim that was asserted or could have been asserted under any Federal or State statutes, regulations or common law or board Policies or regulations.

3. NO CLAIMS PERMITTED/COVENANT NOT TO SUE.

Respondent waives her right to file any charge or complaint on her own behalf, to participate as a complainant, a plaintiff or a charging party in any charge or complaint, or to collect damages as a result of any charge or complaint which may be made by any other person or organization on her behalf, with respect to anything which

has happened up to the execution of this Settlement Agreement, before any Federal, State or local court of administrative agency against the Board except as such waiver is prohibited by law.

4. ATTORNEY'S FEES.

Each party agrees that each party will bear its own costs and attorney's fees which have been incurred in connection with the within matter and in conjunction with the negotiation and preparation of this Settlement Agreement.

5. NO ADMISSION OF LIABILITY.

It is expressly understood that neither the execution of this Settlement Agreement, nor any other action taken by the Respondent in conjunction with the Board's claims or this settlement, constitute admission by the Respondent or any violation of any law, duty or obligation. It is also understood that the acceptance of this settlement does not constitute any representation by the Board as to the merits of its claims or the lack thereof.

6. ENTIRE AGREEMENT.

This Settlement Agreement contains the sole and entire agreement between the parties hereto. Each party represents and acknowledges that prior to executing this Settlement Agreement, they consulted with or had an opportunity to consult with counsel, have had ample time to do so and that no party relied upon any representation or statement not set forth in this Settlement Agreement made by any other party hereto, or their counsel or representatives, with regard to the subject matter of this Settlement Agreement. No other promises or agreements shall be binding unless in writing, signed

by the parties hereto, and expressly stated to represent an amendment to this settlement Agreement.

7. BOARD RESOLUTION.

Attached hereto as **Exhibit C** is a true copy of a Resolution of the Board, adopted in compliance with the laws of the State of New Jersey, including the Open Public Meetings Act, duly satisfying this Settlement Agreement and authorizing the Board's signatory to sign this Settlement Agreement on its behalf.

8. COMMISSIONER'S APPROVAL.

It is expressly understood that this Settlement Agreement, and the settlement pursuant to the terms listed in this Settlement Agreement, must first be approved by the Commissioner of Education and must meet the following standards as enumerated in N.J.A.C. 6A:3-5.6(a):

(a) Accompaniment by documentation as to the nature of the charges: Petition of Charges are attached hereto and incorporated herein as **Exhibit A** with the Response attached hereto and incorporated herein as **Exhibit B**.

(b) Explanation of the circumstances justifying the settlement or withdrawal: The Board agrees to request that the Commissioner of Education approve the Board's voluntary dismissal of tenure charges, OAL Docket No. EDU 11928-2011S, Agency Reference No. 282-9/11 with prejudice in light of Ms. Ranson's resignation which is attached hereto as **Exhibit D** and the lump sum consideration paid by the Board in exchange for a general release. In executing this agreement, Ms. Ranson understands the ultimate decision with regard to the resolution of the Tenure Charges lies with the

Commissioner of Education and in the event that the New Jersey Commissioner of Education rejects the settlement between the Board and Ms. Ranson, then this agreement is completely null and void and the Tenure Charges currently pending will continue to be processed. Ms. Ranson understands and has been advised by her counsel of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate. Attached as **Exhibit E** is Ms. Ranson's Affidavit showing that she has been counseled in every respect and knows that the Board of Examiners can act independently.

(c) Consent of both the charged and charging parties is evidenced by this Settlement Agreement.

(d) Indication the charged party entered into the agreement with a full understanding of her rights is evidenced by this Settlement Agreement.

(e) A showing that the agreement is in the public interest as evidenced by this Settlement Agreement. This Settlement Agreement is also shown to be in the public interest as a result of the parties' separation and satisfaction of any and all claims related to the Tenure Charges. In addition, the public interest is supported by the saving of valuable witness education time in the form of avoidance of students missing class time to testify in court and of teachers and administrators missing time in school during which time their services are required in order to continue providing a thorough and efficient education to the Board's students. The avoidance of subjecting student witnesses to the stress of testifying in court is also evidence that this Settlement

Agreement is in the public interest. Furthermore, the cost savings to the Board and the public as a result of settling this matter, which is significantly less than the cost associated with litigating the Tenure Charges, including appeals, evidence that this Settlement Agreement is in the public interest.

(f) Where the charged party is a teaching staff member, a showing that the teaching staff member has been advised by counsel and, by recitation of this provision, Respondent is advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

9. **NON-DISCLOSURE.**

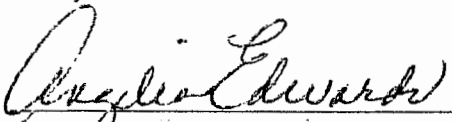
Except as may be otherwise required of the Board pursuant to the Open Public Records Act and/or Open Public Meetings Act, such obligations may be modified by Federal or State statutory or administrative provisions as to the privacy of personnel records, no party will broadcast or publicize financial or other elements of this settlement to any third party. The parties are free to respond to inquiries made of them by indicating that the matter has been amicably resolved or satisfactorily settled, and recognize that the Board may disclose the substantive details of this settlement pursuant to a lawful request by providing a lawful request with a copy of this Settlement Agreement.

10. **RESPONSE BY HUMAN RESOURCES TO NEW EMPLOYER INQUIRIES.**

In the event the Bridgeton School System is contacted by a prospective employer inquiring as to Cynthia Ranson's employment with the Bridgeton School

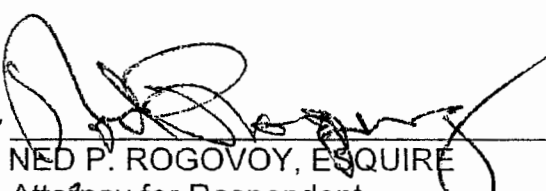
System, they shall be immediately referred to the Human Resources Department (H.R.) and their response to the inquiry shall be to provide the date of hire and date of resignation only.

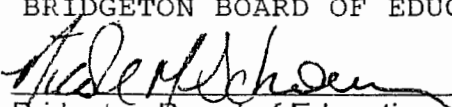
IN WITNESS WHEREOF, the parties have set their hands and seals the day and year first written.


ANGELIA EDWARDS, PRESIDENT
BRIDGETON BOARD OF EDUCATION

10-10-12

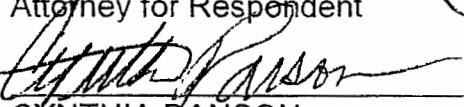
Date


NED P. ROGOVOY, ESQUIRE
Attorney for Respondent


Bridgeton Board of Education
Board Secretary

10-10-12

Date


CYNTHIA RANSON
Respondent

468-12E

OAL DKT. NO. EDU 12266-12
AGENCY DKT. NO. 233-8/12

ELSIE DUBAC,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	
V.	:	DECISION ON
BOARD OF EDUCATION OF THE	:	APPLICATION FOR EMERGENT RELIEF
BOROUGH OF SPRING LAKE,	:	
MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 N.J. 126 (1982), codified at N.J.A.C. 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner’s application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 12/13/12
Date of Mailing: 12/13/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING

EMERGENT RELIEF

OAL DKT. NO. EDU 12266-12

AGENCY DKT. NO. 233-8/12

ELSIE F. DUBAC,

Petitioner,

v.

BOARD OF EDUCATION OF THE

BOROUGH OF SPRING LAKE,

MONMOUTH COUNTY,

Respondent.

Ronald S. Gasiorowski, Esq., for petitioner (Gasiorowski & Holobinko,
attorneys)

Bernard M. Reilly, Esq., appearing for petitioner for emergent relief only (Dowd
& Reilly, attorneys)

Anthony P. Sciarrillo, Esq. and Paul E. Griggs, Esq., for respondent
(Lindabury, McCormick & Estabrook, attorneys)

BEFORE **EDWARD J. DELANOY, JR., ALJ:**

This matter having been opened on the filing of a petition for emergent relief,
submitted by petitioner Elsie Dubac, Ronald S. Gasiorowski, Esq. on the brief, and

Bernard M. Reilly, Esq., appearing; and respondent, Board of Education of the Borough of Spring Lake, Monmouth County (hereinafter Board or District), Anthony P. Sciarrillo, Esq. on the brief, and Paul E. Griggs, Esq., appearing, and the undersigned having considered the moving papers in support of emergent relief and exhibits submitted by the petitioner, and opposition papers and exhibits submitted by respondent, and having heard the arguments of counsel, and for good cause shown, has determined from the proofs that petitioner has not met the standards to grant emergent relief as set forth in N.J.A.C. 6A:3-1.6, pursuant to Crowe v. DeGioia, 90 N.J. 126 (1986), as more particularly set forth herein.

Petitioner Dubac is the owner and resident of the single family home located at 415 St. Clair Avenue in Spring Lake, New Jersey. Her residence is immediately across the street from the recreation facilities area of the H.W. Mountz Elementary School that is proposed to be reconstructed and expanded by the Board with a new full sized basketball court being located immediately across from Dubac's home, and adjacent to several of her neighbors.

The H.W. Mountz Elementary School is an elementary school of approximately 300 students. Adjacent to the school for a number of years has been an accessory recreation area – consisting of a small basketball court, a playground, a baseball field, a softball field, and a soccer field. The school and accessory recreation area are located in a residential neighborhood, between St. Clair Avenue and Tuttle Avenue in Spring Lake.

Dubac came to believe that the reconstruction/renovation was being actively promoted by the Spring Lake Education Foundation (hereinafter SLED), the H.W. Mountz Booster Club (hereinafter Booster Club), and the Parent-Teacher Association (hereinafter PTA). These private groups apparently offered to fund the cost of the reconstruction/renovation project, provided the new improvements met certain demands or requirements proffered by these groups.

Dubac learned that the Board had established an Ad Hoc Committee to study the matter and make recommendations to the Board as to a reconstruction project for the playground/basketball court area. From published reports, the Ad Hoc Committee consisted of members of SLED, the Booster Club, PTA, two Board Members (Petrosini and Panzini), and others.

Eventually, the proposed project as recommended by the Ad Hoc Committee came before the Board in May and June 2012. The recommended proposal expanded the physical size of the basketball court itself to be ninety-four feet by sixty feet, including a five foot border, with six backboards/rims. The current court is forty feet by sixty-eight feet with two backboards/rims. The new court will be relocated and constructed on the south side of the recreation area near St. Clair Avenue and immediately across from Dubac's house. The previous location was on the north side of the site approximately one hundred feet from the nearest neighbor.

The matter came before the Board at a Board public meeting on June 4, 2012, and Dubac and many of her neighbors along St. Clair Avenue submitted written statements or made statements expressing their opposition. Nevertheless, the Board voted to authorize/approve the reconstruction/renovation project going forward by a vote of three to two, based on the concept of the Ad Hoc Committee's recommended plan. Thereafter, on June 25, 2012, the Board approved the final plans by a vote of four to one.

Dubac alleges that Board member Petrosini, who was an Ad Hoc Committee member, is affiliated with and active in SLED. Dubac also alleges that Board member Panzini has long been active in the Mid-Monmouth Basketball League, which is a basketball league for pre-high school boys and girls, and has coached teams in that league. His wife Colleen Panzini was a Trustee of that league through approximately June 2011, and his sons apparently participated in that league. By consent of the Board, that league utilizes that school gymnasium in the Mountz School for practices and games. Dubac believes that the league would also propose and intend to utilize the new high school sized basketball court in this proposed renovated Mountz field. It is

suggested by Dubac that reasonable discovery will establish personal and perhaps funding connections between the Mid-Monmouth Basketball League and those organizations, and members of the Board, and that pursuit by the Board of placing a full sized basketball court (that should not be necessary for elementary students) near residential homes was in response to positions of those organizations.

Dubac is opposed to the proposed reconstruction/renovation. She urges that it will have a severe and detrimental effect upon the neighborhood, her property, and quality of life. The new, oversized court, with six backboards, is now going to be immediately across the street from Dubac's house. Dubac believes that the court is well beyond anything necessary or appropriate to serve the elementary school or its students and that it will likely be used for various league or adult play outside of school use. This will introduce adults to a grammar school environment. It will completely disrupt the neighborhood and cause irreparable damages and loss of quality of life.

Dubac requests that she be allowed to explore, with reasonable discovery and expert proofs, (1) the connection and conflicts of interest involved in the Board decision, and (2) that the proposed recreational field renovations are not required or appropriate given the needs of the students and the impact on the neighborhood. Dubac requests that emergency relief be granted to disallow construction of the basketball court during the pendency of the case. She argues that if the Board goes forward at this time with the actual reconstruction work, there will be no real opportunity for a proper hearing and a proper decision, and her rights and the rights of other neighbors will be violated or precluded without a hearing or opportunity to have the matter heard.

This litigation was initially commenced by a Complaint and Order to Show Cause filed in Superior Court, Law Division, Monmouth County on July 22, 2012, shortly after the Board adopted a Resolution approving final plans for this project and publicly indicating an intention to commence construction, or allow the commencement of construction by a private group, within a few days. The initial Superior Court Complaint raised procedural objections as to the failure of the Board to present the proposal to the Planning Board as required by N.J.S.A. 40:55D-31 and to present the proposal to the

State Commissioner of Education for review and approval. The Complaint also raised substantive objections as to conflict of interest of certain Board members as being affiliated with private groups advocating the expansion and that the expansion was arbitrary and damaging the plaintiffs' property.

The Superior Court Order to Show Cause seeking temporary restraints was primarily based on the procedural issues. That Order to Show Cause was deferred when the Board agreed or advised that it was submitting the proposal to the Planning Board for its review, and would further submit the proposal to the State Board of Education, Bureau of Facility Planning Services, for its review as per N.J.S.A. 18A:18A-16, and the Board would not be commencing construction pending those submissions and approvals.

The Board did present its proposal to the Planning Board at the Planning Board meeting of August 8, 2012. The Planning Board attorney subsequently sent a letter to the State Board of Education advising of the Board's review comments.

The Board thereafter received a letter from the State Board of Education indicating that the proposed expansion/renovation had been reviewed and approved by the State Board. The instant Petition of Appeal as to the Board's determination regarding the field expansion/renovation, raising issues as to conflict of interest and the suitability of the proposed renovation for educational purposes, was then filed by the Dubac, and it has been referred by the State Board to the Office of Administrative Law (hereinafter OAL).

In the Superior Court lawsuit, the Board in August 2012 filed a Motion to Dismiss the Complaint on the basis that jurisdiction rested in the State Commissioner of Education (and the OAL). That Motion was eventually granted by Judge Lawrence Lawson by written Decision in late October 2012. An Order was also entered on November 12, 2012.

While that case was still pending in Superior Court, the project commenced. Dubac believes the Board is intending to allow the Booster Club to actually perform the renovation before the instant case is heard and decided by this tribunal and/or the Commissioner of Education.

When the Order to Show Cause for Injunctive Relief was filed in Superior Court, Judge Lawson was on vacation and Judge Baumann entered a short term Injunctive Order pending Judge Lawson's return. Judge Lawson, in his written decision in October 2012, extended that Injunctive Relief through November 25, 2012, and also decided that further action on the merits and/or Injunctive Relief should be decided by the Administrative Law Judge and/or the Commissioner of Education pursuant to the pending Petition.

Dubac argues that the Board's re-initiating commencement and performance of the renovation will cause an irreparable harm to the petitioner and an irreparable change in the situation, and will preclude a proper assessment and determination on the petition and issues raised by petitioner. If the work is actually substantially commenced or performed, there will be no way to reverse the improvements and reconstruct the recreational fields/equipment the way they were, if the Board's action is invalidated. The Board has proceeded with this major proposed change and construction while this case is pending, and given that public money and/or public property is involved and there is a challenge pending by citizens and taxpayers, such construction should be stopped. Such action is without basis and will cause an irreparable change in position before the matter is adjudicated.

Petitioner also argues that there are meritorious issues to present regarding the conflict of interest arising from certain Board members being affiliated with or members of private groups advocating the particular contested design and layout of the renovation/expansion, and also as to the education validity of this proposed substantial expansion of the basketball court. The petitioner is not totally opposed to improving the recreation fields/equipment, the petitioner's position is opposing and challenging the relocation and enlargement of the present basketball court with multiple baskets located

with a few feet of petitioner's (and other) residences. Consequently, the petitioner seeks emergency relief precluding the construction work from irreparably changing the situation prior to this petition and these issues being decided by this Administrative Court and/or the Commissioner of Education.

The Board submits that petitioner has not carried their burden nor satisfied all of the legal prerequisites under applicable law to sustain this application for emergent relief. It argues that the conflict of interest issue has already been decided in favor of the two school board members in a case previously decided by the school ethics Commission in the matter of Close v. Panzini and Petrosini, Spring Lake Board of Education, Monmouth County, Dkt. 22-12. As a result, the conflict of interest allegation has been rendered moot. It also urges that a board of education's actions are entitled to a presumption of lawfulness and good faith, and that the actions of the Board were not arbitrary and/or capricious.

Under Crowe v. DiGioia, 90 N.J. 126 (1982), N.J.A.C. 6A:3-1.6(b) and N.J.A.C. 1:1-12.6, emergency relief may be granted if the judge determines that:

1. the petitioner will suffer irreparable harm if the relief is not granted;
2. the legal right underlying the petitioner's claim is settled;
3. the petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Emergent relief is not appropriate unless all four of the above requisites are satisfied.

As for the first requirement for the granting of emergent relief, petitioner argues that in allowing the commencement of work to relocate the substantially expanded basketball court to within a few feet of her home prior to this dispute being heard and decided will cause harm. The work itself will substantially and detrimentally affect her

home and quality of life. Allowing the work to go forward will eliminate the possibility of maintaining the status quo, should petitioner be successful. The impact upon her home and quality of life from the initiation of construction of these facilities, including the substantial basketball court with six backboards/rims being located within approximately twenty feet of her home will be immediate, sever, and adverse.

The Board argues that the petitioner does not set forth any facts as to how the basketball court will impact her adversely. Without more specific facts, the record will not support the issuance of an emergent order. Mr. Gasiorowski's and petitioner's Certification are void of any facts that support the argument that petitioner will incur "substantial injury to a material degree" if construction of the basketball court goes forward. While she may not approve of the construction of a basketball court, without more her application must be denied. Where the concerns are speculative, relief should not be granted merely to allay the fears and apprehensions or to soothe the anxiety of the parties. Adams v. Freedom Forge Corp., 204 F.3d 475, 490 (3d Cir. 2000); Continental Group, Inc. v. Amoco Chemicals, Corp., 614 F.2d 351, 359 (3d Cir. 1992); N.J. State AFL-CIO v. State Fed. of Dist. Bds. of Educ. Of N.J., 93 N.J. Super. 31, 41 (Ch. Div. 1966). Petitioner's stated reasons for relief are not enough to meet the standard necessary for immediate and irreparable harm.

In this case, the facts do not demonstrate that petitioner, and the public, will be irreparably damaged if the respondent Board and its agents go forward with this work and it is ultimately determined as invalidly authorized. "Irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, supra, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications, Inc. v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). However, pecuniary damages may sometimes be inadequate because of the nature of the injury or the right affected. Crowe, supra, 90 N.J. at 133. For example, in Crowe the Court determined neither an unwarranted eviction nor reduction to poverty could be compensated adequately by monetary damages awarded after a distant hearing. Id.

In making her arguments, petitioner has offered no credible evidence, other than the general and broad certifications of Dubac and counsel for Dubac, which could support a finding that the Board should be enjoined from commencing work on this project in order to prevent irreparable harm. The certifications contain nothing more than unsupported allegations that petitioner will suffer harm. Petitioner presented no credible evidence, in the form of a certification or affidavit from a qualified, certified expert that would support a finding that the basketball court is unwarranted or that its impact on the neighborhood will be arbitrary, and that petitioner would suffer some specific harm as a result. There is no evidence in the record, other than mere allegations, to support that the work must be suspended in order to prevent irreparable harm. Petitioner asks this tribunal to find that hypothetical harm will come to petitioner as a result of construction of the basketball court. Hypothetical harm is insufficient to show irreparable harm. Without the necessary proofs, it cannot be determined whether or not this petitioner will be harmed by the continuance of the construction. If the Board moves forward with construction, the Board risks the possibility of having to undo the work if petitioner is successful in her challenge to the Board's action. That is a calculated decision that the Board has the right to make.

Since a deprivation of property rights has not been proven, and any potential harm to petitioner is merely speculative, no irreparable harm can be found. Given the necessary proofs as outlined in the moving papers, petitioner has not met her burden of proving that she will suffer irreparable harm if the request for emergent relief is denied, the project moves forward, and she is successful in her challenge. In short, given the lack of those necessary proofs, petitioner cannot meet her burden of proving that she will suffer irreparable harm if the request for emergent relief is denied.

I therefore **FIND** that petitioner has failed to meet her burden of establishing that she will suffer irreparable harm if the relief sought is not granted. Since I have determined that no irreparable harm exists at this time, it is not necessary for me to address the remaining criteria under Crowe, supra. Nevertheless, I will address the three remaining criteria.

As for the second and third requirements for the granting of emergent relief, petitioner argues that there is a clear legal right underlying her claim, and that there is a likelihood of prevailing on the merits of the underlying claim. The Board counters that as set forth hereinbefore, the conflict of interest allegation was decided in James Close v. James Panzini and Anthony Petrosini, M.D., Spring Lake Board of Education, Monmouth County, School Ethics Commission Docket #22-12. Therefore, the conflict of interest claim is moot. With regard to the action of the Board in approving the project, petitioner has submitted no facts to support the claim that the Board's actions were arbitrary and/or capricious. In fact, petitioner has failed to set forth any legal basis that supports their claim regarding the actions of the Board. Respondent's approval of the project and plans, like that of any administrative agency, must be upheld unless it is deemed "arbitrary, capricious and unreasonable." Non-Profit Affordable Housing v. COAH, 265 N.J. Super. 475, 479 (App. Div. 1993); Shuster v. Bd. of Ed. of Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676, adopted Comm'r. 96 N.J.A.R.2d (EDU) 677. A board of education's actions "are entitled to a presumption of lawfulness and good faith." Accordingly, where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, or arbitrary, capricious and unreasonable. Shuster, 96 N.J.A.R.2d at 676 (citing Schinck v. Westwood Bd. of Ed., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. North Bergen Bd. of Ed., 73 N.J. Super. 40, 46 (App. Div. 1962)).

The "arbitrary, capricious and unreasonable" standard of review is narrow in its scope, and consequently imposes a heavy burden on the challengers of board actions. The New Jersey courts have defined this standard as follows:

In the law, 'arbitrary' and 'capricious' means having no rational basis . . . Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached . . . Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling.

[Bayshore Sewage Co. v. Dept. of Env'tl. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), *aff'd.* 131 N.J. Super. 37 (App. Div. 1974) (internal citations omitted)(emphasis added).] As such, "absent a clear showing of abuse of discretion," the Commissioner will not "substitute his judgment for that of the Board of Education." Massaro v. Bd. of Ed. of the Borough of Bergenfield, 1965 S.L.D. 84, 85. In Kopera v. Bd. of Ed. of West Orange, 60 N.J. Super. 288 (App. Div. 1960), the Appellate Division discussed the "well established rule that action of the local board [of education] which lies within the area of its discretionary powers may not be upset unless patently arbitrary without rational basis or induced by improper motives." *Id.* at 94 (emphasis added).

The actions of the Board as set forth in the record, including its actions in approving the project after numerous public meetings, demonstrate the Board's actions were not arbitrary or capricious. There does not appear to be a well-settled legal right supporting the petitioner and not the Board. I **FIND** the legal right underlying petitioner's claim is not settled; and I further **FIND** that petitioner does not, at this time, have a likelihood of prevailing on the merits of the underlying claim. Petitioner has not established, through the proofs submitted herein, that she is likely to prevail on the merits. As that information has not yet been produced, it is impossible to determine at this time that petitioner is likely to succeed on the merits of the underlying claim.

As for the fourth requirement for granting emergent relief, petitioner argues that she will suffer greater harm than the Board if emergent relief is not granted. She urges the greater loss and potential for loss will be suffered by petitioner without a corresponding risk of loss by the Board. The Board argues that petitioner will not suffer greater harm than the Board, and that petitioner has failed to identify any hardship. Fears and apprehension are not enough to suggest a hardship. In fact, the Board urges that the Board and the H.W. Mountz School students will suffer a greater hardship. Specifically, the playground portion of the project has been completed, however, the basketball court portion now exists in a condition where the dirt has been excavated and the area cannot be used by the students. Therefore, granting the requested relief will cause far greater harm to the Board than to the petitioner. I **FIND** that the equities do

not favor on balance the granting of emergent relief. Petitioner has not alleged any facts, other than speculation, to support the finding of a hardship.

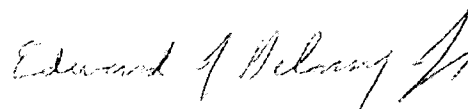
IT IS therefore on this 3rd day of December, 2012, **ORDERED** that petitioner's application for emergency relief is **DENIED**.

This order on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

December 3, 2012

DATE



EDWARD J. DELANOY, JR., ALJ

/cb

L.D., on behalf of minor child, D.F., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF BOUND BROOK,
SOMERSET COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner filed a *pro se* appeal in March 2012, challenging the respondent Board's decision not to accept her son under the School Choice program. A hearing at the Office of Administrative Law (OAL) was scheduled for November 2, 2012, but the petitioner failed to appear despite having received appropriate notice and provided no explanation for her nonappearance. Having received no explanation from petitioner for her failure to appear, the OAL returned the file to the Commissioner.

There being no explanation filed, the Commissioner dismissed the petition with prejudice.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 14, 2012

OAL DKT. NO. EDU 7237-12
AGENCY DKT. NO. 65-3/12

L.D., on behalf of minor child, D.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF BOUND BROOK,	:	
SOMERSET COUNTY,	:	
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – along with copies of the notification sent to the parties by the OAL on November 15, 2012, providing petitioner thirteen days to submit an explanation for such nonappearance – have been reviewed. There being no explanation filed, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 12/14/12

Date of Mailing: 12/14/12

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

OAL DKT. NO. EDU 0473-12
 AGENCY DKT. NO. 369-12/11

IN THE MATTER OF THE TENURE HEARING	:	
		COMMISSIONER OF EDUCATION
OF JENYA KNOX, SCHOOL DISTRICT OF THE	:	
		DECISION
TOWNSHIP OF UNION, UNION COUNTY.	:	

The record of this matter, the parties' proposed Settlement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon careful review of the record, the Commissioner concurs with the Administrative Law Judge that – under the circumstances of this matter – the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. A copy of this decision and its underlying record shall be forwarded to the State Board of Examiners for review and action as that body deems appropriate.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

Date of Decision: 12/14/12

Date of Mailing: 12/14/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 00473-12
AGENCY DKT. NO. 369-12/11

**IN THE MATTER OF THE TENURE
HEARING OF JENYA KNOX, SCHOOL
DISTRICT OF THE TOWNSHIP OF UNION,
UNION COUNTY**

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, P.C.)

James L. Plosia, Jr., Esq., for respondent (Apruzzese, McDermott, Mastro &
Murphy, attorneys)

Record Closed: November 19, 2012

Decided: November 21, 2012

BEFORE JOANN LASALA CANDIDO, ALJ:

This matter involves tenure charges of insubordination and conduct unbecoming certified by the School District of the Township of Union (District) against Jenya Knox (Knox) , is a tenured teacher employed by the District since January 1, 2000, under the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 to -18.1.

Subsequently, the matter was referred by the Commissioner of the Office of Administrative Law (OAL) on January 10, 2012 for a hearing as a contested case.

After numerous status conferences and adjournment requests, both parties have agreed to a proposed settlement, subject to approval by the Commissioner. In accordance with the decision of the State Board of Education in In re Cardonick, State Board decision of April 6, 1983 [1990 School Law Decisions (S.L.D.) 842, 846] and as codified by N.J.A.C. 6A:3-5.6, the record of any proposed settlement must include:

. . . the nature of the charges, the length of the teacher's employment, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the administrative law judge's finding that the teacher entered into the agreement with a full understanding of his or her rights and [a finding] that the agreement is consistent with the public interests.

Based upon my review of the record, I **FIND** that the proposed settlement is consistent with the public interests for the following reasons:

1. Knox has been employed as a special education teacher with the District since January 1, 2000.
2. She achieved tenure as a special education teacher in the Union Township School District in January 2, 2003.
3. It is anticipated that the hearing in this matter would be protracted and costly.
4. If a hearing becomes necessary, the District has identified school personnel who are potential witnesses.
5. Litigation of the charges would lead to the disruption of the District's educational program due to the great amount of time lost by administrators and other personnel who would be required to testify to the incidence which led to the filing of the tenure charges against an employee who has resigned her tenured teaching position with the District effective July 1, 2012.
6. Knox agrees to pay the District the sum of \$5,854.29 which represents a repayment to the District of monies that the District maintains it overpaid her in salary.
7. The monies will be paid to the District no later than March 31, 2013.
8. As required by State law, the District will provide written notification to the New Jersey State Board of Examiners that Knox resigned her tenured teaching staff position in

the District, while tenure charges for unbecoming conduct were pending against her.

9. Under the best of circumstances, the hearing needs to be conducted and then the administrative law judge would have forty-five days to prepare an initial decision and the
10. Commissioner would have an additional forty-five days for review and issuance of a final decision.
11. If the tenure matter proceeds to hearing, both parties would incur costs of paying their attorneys for a likely lengthy hearing.
12. The settlement fully disposes of all issues in controversy.

Based upon the foregoing, I **CONCLUDE** that the terms of settlement are in the public interest.

It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings are hereby concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 21, 2012
DATE

11-29-12
Date Received at Agency:

Date Mailed to Parties:

ljb

Joann Lasala Candido
JOANN LASALA CANDIDO, ALJ

APRUZZESE, McDERMOTT,
MASTRO & MURPHY, P.C.
25 Independence Boulevard
P.O. Box 112
Liberty Corner, New Jersey 07938
908-580-1776
Attorneys for Petitioner Union Township Board of Education

2012 NOV 19 A 10:56
OFFICE OF NEW JERSEY
OFFICE OF ADMIN LAW
VED

UNION TOWNSHIP BOARD OF
EDUCATION,

Petitioner

v.

KNOX, JENYE,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No.: EDU 00473-2012N
Agency Ref. No.: 369-12/11

STIPULATION OF SETTLEMENT

Petitioner Union Township Board of Education ("District") and Respondent Jenye Knox ("Ms. Knox") in the above-captioned matter hereby agree to resolve all outstanding issues with respect to the Tenure Charges the Board has filed against Ms. Knox pursuant to the following terms:

1. The Tenure Charges are hereby dismissed with prejudice.
2. Ms. Knox resigned her tenured teaching position with the Union Township School District effective July 1, 2012.
3. Ms. Knox agrees to pay to the Union Township School District the sum of \$5,854.29. This payment represents a repayment by Ms. Knox to the District of monies that

JMK

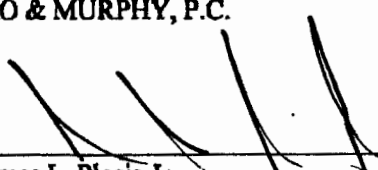
the District claims it overpaid Ms. Knox in salary. Ms. Knox denies the claim that the District overpaid her and further claims that she was entitled to retain those monies, and, without any admission of liability, is willing to make payment to the District to end these proceedings. Those monies will be paid to the District no later than March 31, 2013. Payment of these monies will be guaranteed by a Promissory Note given by Ms. Knox, which Promissory Note provide for imposition of interest, penalties, and attorney fees against Ms. Knox if the aforementioned monies are not paid in full by Ms. Knox to the Union Township School District on or before March 31, 2013. A copy of the executed Promissory Note is attached hereto as Exhibit A.

4. As required by State law, the District will provide written notification to the New Jersey State Board of Examiners that Ms. Knox resigned her tenured teaching staff position in the Union Township School District, while Tenure Charges for unbecoming conduct were pending against her. Once Administrative Law Judge Candido issues her Initial Decision in this matter accepting this Stipulation of Dismissal, the District will complete paperwork related to Ms. Knox's disability pension application to the New Jersey Division of Pensions. In that paperwork, the District will inform the Division of Pensions of the precise status of this case (i.e., a Stipulation of Dismissal approved by ALJ Candido which has not yet been approved by the New Jersey Department of Education). The District further agrees that, if and when the Commissioner of Education accepts this Stipulation and issues it as a Final Decision, the District will notify the Division of Pensions of that fact.

5. The parties hereby agree that they have entered into this Settlement voluntarily and willingly, and without being under any duress. They further aver that they had the opportunity to consult with respective counsel concerning the terms of this Settlement, and they acknowledge by their signatures below that they are satisfied with the representation provided to them by their respective attorneys.



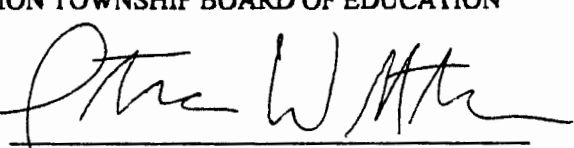
APRUZZESE, McDERMOTT,
MASTRO & MURPHY, P.C.

By: 

James L. Plosia Jr.

Dated: 11/19/12

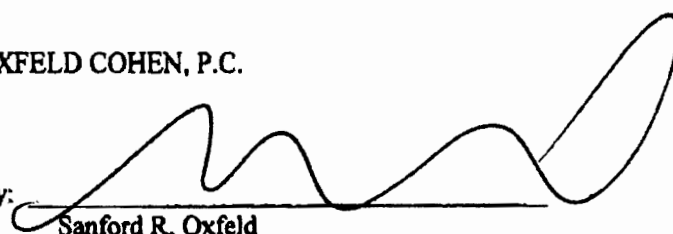
UNION TOWNSHIP BOARD OF EDUCATION

By: 

Dr. Patrick Martin, Superintendent

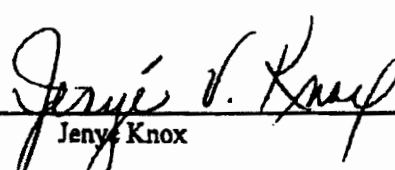
Dated: 11/14/12

OXFELD COHEN, P.C.

By: 

Sanford R. Oxfeld

Dated: 10-31-12

By: 
Jenye V. Knox

Dated: 10/26/2012

I hereby accept the foregoing Stipulation of Dismissal having been voluntarily entered into by the parties, and shall forthwith issue the Stipulation of Dismissal as a final decision and order in this matter.

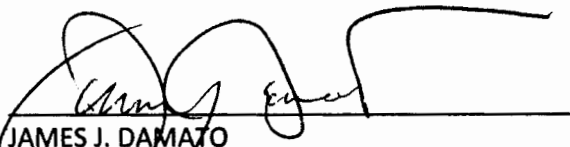
JoAnn LaSala Candido, ALJ

Dated:



- *L-1. The committee recommends and I so move that the board approve Stipulation of Settlement in connection with the matter of Union Township Board of Education v. J.K. in accordance with the information in the hands of each board member and recorded in the non-public portion of these minutes.

I CERTIFY THAT THE FOLLOWING RESOLUTION WAS ADOPTED BY THE TOWNSHIP OF UNION BOARD OF EDUCATION AT ITS WORKSESSION MEETING ON NOVEMBER 13, 2012.



JAMES J. DAMATO
BOARD SECRETARY

BOARD OF EDUCATION OF THE TOWNSHIP	:	
OF NORTH BERGEN, HUDSON COUNTY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE INTERSCHOLASTIC	:	DECISION
ATHLETIC ASSOCIATION,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner sought reversal of the final decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) stripping North Bergen High School (North Bergen) of the 2011 North Jersey, Section 1, Group IV, State Football Championship, for recruiting violations. The petitioner did not challenge the underlying recruiting violations as determined by the NJSIAA Controversies Committee, but contends that the matter should never have come before the Executive Committee and was not afforded the requisite due process before that committee. The matter had come before the Executive Committee when Montclair High School – the school that lost the state championship game to North Bergen – appealed the penalty decision of the Controversies Committee, which placed North Bergen on probation for two years and required the school to comply with a corrective action plan regarding its process for determining student eligibility. The Controversies Committee’s penalty determination had not required North Bergen to forfeit its state championship.

The petitioner argued, *inter alia*, that the Executive Committee wrongly considered Montclair’s appeal of the Controversies Committee’s decision, and emphasized that Montclair was not a party to the original hearing and thus should have been precluded by NJSIAA bylaws from filing an appeal. The NJSIAA contended that the Executive Committee enacts the bylaws and has the authority to interpret and administer its own rules – including Article XIII, Section 5, which states that “in the event any party is aggrieved by a decision of the Controversies Committee, it may appeal to the Executive Committee.” The NJSIAA interpreted any aggrieved party to include Montclair because it was the member school that had lost the state title to North Bergen, and that Montclair’s interest did not become real until after the Controversies Committee determined that North Bergen had cheated. Accordingly, the NJSIAA contended that the Executive Committee’s decision to allow Montclair to appeal the penalty aspect of the case was not arbitrary or capricious; the NJSIAA also asserted that their bylaws are clear that the Executive Committee has the final word on penalty decisions.

The Assistant Commissioner – to whom this matter has been delegated to pursuant to *N.J.S.A.* 18A:4-34 – upheld the NJSIAA’s decision and dismissed the petition, finding that the petitioner did not meet its burden so as to entitle it to prevail on appeal. In so deciding, the Assistant Commissioner – whose judgment may not be substituted for that of the NJSIAA on appeal – noted that the NJSIAA’s decision to modify the penalty against North Bergen was not arbitrary, capricious or unreasonable as it was based upon the Controversies Committee’s findings of significant recruiting violations.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

AGENCY DKT. NO. 246-9/12

BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF NORTH BERGEN,	:	
HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE	:	DECISION
INTERSCHOLASTIC	:	
ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	

For Petitioner, North Bergen Board of Education, Patrick J. Jennings, Esq.

For Respondent, New Jersey State Interscholastic Athletic Association, Steven. P. Goodell, Esq.

For Montclair Board of Education, Derlys Maria Gutierrez, Esq.

This case involves an appeal of a decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) Executive Committee stripping North Bergen High School (North Bergen) of the 2011 North Jersey, Section 1, Group IV, State Football Championship, for recruiting violations.¹ On appeal, North Bergen is not challenging the underlying recruiting violations, but rather contends that this matter should not have come before the Executive Committee, and that it was not afforded the requisite due process before the Executive Committee.

Athletic competition in New Jersey's public schools is overseen by the NJSIAA, a voluntary, non-profit organization which promulgates the rules and regulations governing high school athletics. *See, B.C. v. Cumberland Reg. Sch. Dist.*, 220 N.J. Super. 214, 234 (App. Div. 1987). The

¹ Montclair High School was not named as a party to the appeal; however Montclair brought the matter before the Executive Committee, challenging the fact that North Bergen had not been stripped of the football championship despite the recruiting violations found by the Controversies Committee. Montclair filed an Answer to the appeal as well as a brief in support of its position.

NJSIAA member schools have adopted a number of eligibility rules for student athletes that have been approved by the Commissioner of Education pursuant to *N.J.S.A.* 18A:11-3 and are published in the NJSIAA Handbook. One of the eligibility rules is the Athletic Recruitment Rule, which prohibits schools – or anyone associated with the school – from pressuring, urging or enticing a student to enroll in or transfer to the school for athletic purposes. NJSIAA Bylaws, Article V, Section 4.D. Schools accused of recruiting are subjected to a hearing before the Controversies Committee, and face potential penalties including probation, forfeiture of games and/or championship rights and the suspension of players and/or coaches. NJSIAA Bylaws, Article X, Penalties.

On December 3, 2011 the North Bergen High School football team won the 2011 North Jersey, Section 1, Group IV, State Football Championship. Thereafter, on January 22, 2012, the Star Ledger published an article alleging that two of North Bergen's star players, D.L. and E.M., had been recruited to play football and were living in apartments rented out by the football coach, Vincent Ascolese. As a result of the Star Ledger article, the NJSIAA asked North Bergen to conduct an investigation and report its findings. On February 9, 2012, North Bergen issued a report prepared by special counsel Michael Gannaio.

NJSIAA Executive Director Steven Timko reviewed North Bergen's report and determined that a hearing should be held before the NJSIAA Controversies Committee to determine whether North Bergen or Coach Ascolese had broken NJSIAA rules prohibiting recruiting. Following a hearing where testimony was taken,² the Controversies Committee found that North Bergen and Coach Ascolese violated NJSIAA's recruitment rule. Specifically, the Controversies Committee found that two students, D.L. and E.M., were recruited by North Bergen; both students received special treatment at the time of registration; and Coach Ascolese himself provided subsidized housing to the students in the

² At the hearing, testimony was given by: D.L.; D.L.'s father; E.M.'s mother; Coach Vincent Ascolese; Vincent Ascolese, Jr.; Jerry Maietta, North Bergen High School's athletic director; and John Belluardo, North Bergen's supervisor of residency.

district without a written lease. Additionally, the Controversies Committee concluded that D.L. was provided monetary assistance by Coach Ascolese's family during a trip to the top-prospect combine (an event which provides players an opportunity to demonstrate their abilities) in Oklahoma. Finally, the Controversies Committee determined that either North Bergen knew or should have known that D.L. was living alone and that he was not a bona fide permanent resident of North Bergen. Based on the recruitment violations, the Controversies Committee placed North Bergen on probation for two years and required North Bergen to comply with a corrective action plan describing the school's process for determining student eligibility. The Controversies Committee did not require North Bergen to forfeit its state football championship.

On May 25, 2012, Montclair High School – the school that lost to North Bergen in the state championship game – appealed the decision of the Controversies Committee to NJSIAA's Executive Committee. Montclair's appeal challenged the penalty imposed by the Controversies Committee, not the findings or conclusions. Following a hearing on June 6, 2012, the Executive Committee: denied the request of North Bergen for an adjournment of the hearing on behalf of Coach Ascolese due to the coach's health condition; found that Montclair had standing to challenge the Controversies Committee's decision; and modified the penalty imposed on North Bergen. The Executive Committee held that the recruitment violations found by the Controversies Committee warranted the forfeiture of the 2011 Section I, Group IV State Football Championship, and as a result no championship was awarded in that Section.

On September 4, 2012, North Bergen filed a petition with the Commissioner of Education challenging the decision of the NJSIAA. On appeal, North Bergen argues that the Executive Committee's decision should be reversed because the committee wrongfully entertained Montclair's appeal of the Controversies Committee's decision. North Bergen emphasizes that Montclair was not a

party to the Controversies Committee's hearing and thus is precluded under the NJSIAA bylaws from filing an appeal. North Bergen claims that if Montclair was truly a party, it would have received notice of the hearing before the Controversies Committee and it would have participated in that hearing. Additionally, North Bergen contends that the Executive Committee improperly denied its request to adjourn the June 6, 2012 hearing. Finally, North Bergen asserts that the Executive Committee abandoned its role as an objective appellate body and instead improperly substituted its judgment for the judgment of the Controversies Committee. As a result, North Bergen argues that the NJSIAA's decision should be reversed and Montclair's appeal should be dismissed.

In reply, the NJSIAA maintains that the Executive Committee's decision to hear Montclair's appeal was not arbitrary, capricious or unreasonable and is entitled to wide deference. The NJSIAA stresses that the Executive Committee enacts the bylaws and has the authority to interpret and administer its own rules. Article XIII, Section 5, states that "in the event any party is aggrieved by a decision of the Controversies Committee, it may appeal to the Executive Committee." The Executive Committee interpreted any aggrieved party to include Montclair because it was the member school that had lost the state title to North Bergen in the championship game and as a result Montclair could appeal the Controversies Committee's determination that North Bergen should not be stripped of the football championship even though it was guilty of recruiting violations. The NJSIAA argues that the Executive Committee's interpretation of the rule was reasonable because it was not until after the Controversies Committee found that North Bergen had cheated that Montclair's interest became real. Montclair had nothing to do with the recruiting violations, but rather had an interest in seeing that the state title it had lost was awarded to a school that had followed the rules of the Association. Further, the NJSIAA notes that Montclair did not appeal the Controversy Committee's findings and conclusions, only the penalty.

As a result, NJSIAA contends that the Executive Committee's decision to allow Montclair to appeal this limited aspect of the case was based on a solid foundation of reason and was not arbitrary or capricious.

The NJSIAA also argues that the Executive Committee had the power to affirm, reverse or modify the decision of the Controversies Committee because the bylaws make clear that the Executive Committee has the final word on any penalty. Moreover, the NJSIAA claims that the penalty imposed by the Executive Committee was reasonable in this case in light of the willful nature of the recruiting violations found by the Controversies Committee. The NJSIAA further stresses that forfeiture of games and forfeiture of championship rights are both penalties allowed under the bylaws.

The NJSIAA maintains that North Bergen was provided with the proper due process. Although North Bergen states that its request for the adjournment of the June 6, 2012 hearing was wrongfully denied, the NJSIAA contends that North Bergen never argued it was prejudiced by the timing of the hearing, but rather merely requested a delay so that Coach Ascolese could be present for the hearing. The NJSIAA points out that only oral argument was permitted at the Executive Committee hearing; Coach Ascolese's attorney was present to argue his case; and Montclair did not appeal any penalty regarding the coach. Therefore, the NJSIAA requests that the Commissioner affirm the decision of the Executive Committee.

It is well-established that the Commissioner's scope of review in matters involving NJSIAA decisions is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. The Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a)(2); *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Nor may the Commissioner substitute

his own judgment for that of the NJSIAA, where due process has been provided and where there is sufficient credible evidence in the record to serve as a basis for the decision reached by the NJSIAA. *N.J.A.C. 6A:3-7.5(a)(1)*; *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259. Additionally, New Jersey courts have spoken as to the narrow scope of arbitrary, capricious, or unreasonable, noting that “where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.” *Bayshore Sew. Co. v. Dep’t of Env’t. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff’d* 131 *N.J. Super.* 37 (App. Div. 1974) (citations omitted) .

Upon consideration of the record and in light of the prescribed standard of review, the Assistant Commissioner – to whom this matter has been delegated to pursuant to *N.J.S.A. 18A:4-34* – finds that North Bergen has not met its burden on appeal. More specifically, the Assistant Commissioner cannot find that the NJSIAA applied its rules in a patently arbitrary or unreasonable manner when the Executive Committee interpreted its bylaws to find that Montclair had standing to appeal the penalty imposed on North Bergen by the Controversies Committee. The Executive Committee – which is charged with interpreting its own rules and bylaws – determined that under the circumstances present in this case Montclair, who lost the championship game to North Bergen, was a “party... aggrieved by” the Controversies Committee’s decision in accordance with Article XIII, Section 5. Although North Bergen played the championship game with the benefit of two star players who were illegally recruited, the Controversies Committee did not strip North Bergen of the title. It is without question that the Executive Committee applied a broad interpretation of the phrase “any party... aggrieved”; however, the Assistant Commissioner cannot find that the interpretation was unreasonable under the circumstances in this matter. Moreover, in the absence of any precedent narrowly defining what constitutes “any party... aggrieved,” there is nothing to demonstrate that the NJSIAA applied the phrase

arbitrarily in this case. Further, the NJSIAA's determination that Montclair's interest did not culminate until the Controversies Committee found that North Bergen had cheated is likewise not unreasonable.

Additionally, based on the Controversies Committee's findings with respect to the significant recruiting violations, the Executive Committee's decision to strip North Bergen of the State Football Championship was not arbitrary, capricious or unreasonable. As the NJSIAA points out, the Executive Committee did not consider new information during its hearing but rather it took the Controversy Committee's findings and modified the penalty based upon those findings and conclusions. The Executive Committee believed that the recruiting violations were egregious, warranting the forfeiture of the championship, and there is no doubt that the Executive Committee is fully authorized to modify a penalty imposed by the Controversies Committee. See Article X, Penalties.

Accordingly, the NJSIAA's decision is upheld and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.³



ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 12/14/12
Date of Mailing: 12/17/12

³ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.

OAL DKT. NO. EDU 15867-12
AGENCY DKT. NO. 342-11/12

BOARD OF EDUCATION OF THE TOWN
OF KEARNY, HUDSON COUNTY,

PETITIONER,

V.

DEBORAH LOWRY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON

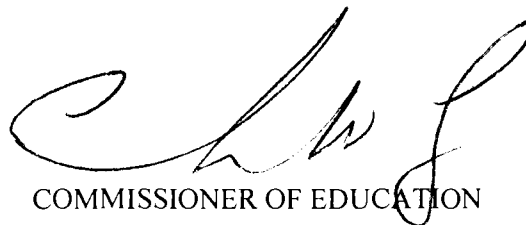
APPLICATION FOR EMERGENT RELIEF

The record of this emergent matter – which included a digital recording of the hearing conducted at the Office of Administrative Law (OAL) on December 5, 2012 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon full consideration of the entire record, the Commissioner adopts the recommended Order granting emergent relief as he concurs with the ALJ – for the reasons expressed in her oral decision rendered on the digital recording and her written Order here – that petitioner has satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 N.J. 126 (1982).

Accordingly, petitioner's emergent application is granted. Respondent, Deborah Lowry, is hereby declared to be currently ineligible – pursuant to N.J.S.A. 18A:12-2 – to serve as a member of the Kearny Board of Education, and she is, therefore, restrained and enjoined from being sworn in and seated as a member of this board at the January 3, 2013 reorganization meeting unless her ongoing contractual entitlement to payment for accumulated sick leave is satisfied or extinguished by voluntary action of the parties prior to this meeting. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.¹



COMMISSIONER OF EDUCATION

Date of Decision: 12/19/12

Date of Mailing: 12/20/12

¹ Pursuant to P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING

EMERGENT RELIEF

OAL DKT. NO. EDU 15867-12

AGENCY DKT. NO. 342 – 11/12

**TOWN OF KEARNY BOARD OF EDUCATION,
HUDSON COUNTY,**

Petitioner,

v.

DEBORAH LOWRY,

Respondent

David B. Rubin, Esq., for petitioner (Law office of David R. Rubin, attorney)

Frank Pomaco, Esq., for respondent (Gaccione Pomaco & Malanga, attorneys)

This matter having been transmitted to the Office of Administrative Law for disposition of an application for emergent relief pursuant to N.J.A.C. 6A:3-1.6, and the parties having appeared for oral argument on December 5, 2012, and it appearing that respondent has a disqualifying interest in a contract with petitioner prohibited by N.J.S.A. 18A:12-2, for the forgoing reasons and for the additional reasons expressed in an oral decision rendered on the record, having found that the petitioner demonstrated irreparable harm would ensue to the consistency and integrity of the Board voting process; that the legal right to the petitioner's claim is well settled that no board member shall be interested directly or indirectly in any contract with the board; that the petitioner

accordingly demonstrated a likelihood of success on the merits given the respondent's annual sick leave pay out until 2015, which is a viable legal obligation from the Board; and that the equities and interests of the parties weigh in favor of the petitioner, who would suffer greater harm;

ORDER

IT IS ORDERED, that petitioner's application for emergent relief is hereby **GRANTED**; it is further

ORDERED, that respondent, Deborah Lowry, is hereby declared ineligible to serve as a member of the Kearny Board of Education, and restrained and enjoined from being sworn in and seated at the January 3, 2013 reorganization meeting of the Kearny Board of Education, unless her ongoing contractual entitlement to payment for accumulated sick leave is satisfied or extinguished by voluntary action of the parties prior to said reorganization meeting pending any further proceeding in a plenary due process hearing.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

December 7, 2012
DATE


TIFFANY M. WILLIAMS, ALJ

B.B. and M.B., on behalf of minor child, K.B.; :
 L.S. and T.H., on behalf of minor child, J.H.; :
 R.V. and T.V., on behalf of minor child, A.V.; :
 and M.T. and O.T., on behalf of minor child, :
 K.T., :

 PETITIONERS, : COMMISSIONER OF EDUCATION

 V. : DECISION

 BOARD OF EDUCATION OF THE :
 BOROUGH OF DUMONT, BERGEN :
 COUNTY, :

 RESPONDENT. :

SYNOPSIS

On June 18, 2012, the petitioners, on behalf of their minor children, filed an appeal asserting that "bullying" charges against each of the minors – which stemmed from a single incident that occurred in March 2012 – should be downgraded to "inappropriate behavior," and that all references to bullying should be removed from each student's file. The matter was transmitted to the Office of Administrative Law (OAL) in July 2012. Petitioners R.V. and T.V., on behalf of minor child A.V., and M.T. and O.T., on behalf of minor child K.T., failed to appear at a prehearing conference on September 17, 2012 despite having received appropriate notice. No explanation for their failure to appear was provided to the OAL.

The ALJ found that the aforementioned petitioners failed to appear at the preconference hearing and offered no explanation for their absence. Accordingly, the ALJ concluded that this matter is no longer a contested case in regard to these petitioners, and dismissed their appeal.

Upon review of the file, the Commissioner concurred with the ALJ's partial Initial Decision that this matter is appropriately dismissed – with respect to the above named parties – for failure to prosecute. Accordingly, the Commissioner adopted the partial Initial Decision as the final decision in connection with petitioners R.V., T.V., M.T. and O.T., and dismissed the within appeal.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 8798-12
 AGENCY DKT. NO. 161-6/12

B.B. and M.B., on behalf of minor child, K.B.;	:	
L.S. and T.H., on behalf of minor child, J.H.;	:	
R.V. and T.V., on behalf of minor child, A.V.;	:	
and M.T. and O.T., on behalf of minor child,	:	
K.T.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE	:	
BOROUGH OF DUMONT, BERGEN	:	
COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the partial Initial Decision of the Office of Administrative Law have been reviewed.¹ This matter involves a petition of appeal that was filed by several parents on behalf of their minor children. The Administrative Law Judge (ALJ) found that four of the petitioners, R.V., T.V., M.T. and O.T., failed to appear at the settlement conference and they did not provide any explanation for their failure to appear. As a result, the ALJ dismissed those parties from the case for the failure to prosecute. The parties did not file exceptions to the partial Initial Decision.

Upon such review, the Commissioner adopts the partial Initial Decision as the final decision in connection with petitioners, R.V., T.V., M.T. and O.T., for the reasons set forth therein. Accordingly, the petition is hereby dismissed with respect to those parties.

IT IS SO ORDERED.²


 COMMISSIONER OF EDUCATION

Date of Decision: 12/19/12
 Date of Mailing: 12/19/12

¹ Although the ALJ referred to the decision as an Initial Decision, it is actually a partial Initial Decision because the recommended decision only involved four petitioners and it did not dispose of the entire case. The remaining petitioners are continuing to pursue this matter at the Office of Administrative Law.

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 08798-12

AGENCY DKT. NO. 161-6/12

**B.B AND M.B., O/B/O MINOR CHILD,
K.B.; L.S. AND T.H. O/B/O MINOR
CHILD, J.H.; R.V. AND T.V. O/B/O
MINOR CHILD, A.V.; M.T. AND O.T.
O/B/O MINOR CHILD, K.T. V. BOARD
OF EDUCATION OF THE BOROUGH
OF DUMONT, BERGEN COUNTY.**

No appearances on behalf of Petitioners

James L. Plosia, Jr., Esq., for Respondent, (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: September 17, 2012

Decided: November 13, 2012

BEFORE **LELAND S. McGEE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent charged the Petitioners with "bullying" as a result of an incident that occurred on or about March 24, 2012. On June 18 2012, the Petitioners filed a Petition

with the Commissioner of the New Jersey Department of Education against the Respondent. They asserted that the "bullying" charges should be infractions that are downgraded to "inappropriate behavior," and that all references to bullying should be removed from their files.

The matter was transmitted to the Office of Administrative Law (OAL) on July 2, 2012, as a contested case. On July 10, 2012, an in-person prehearing conference was scheduled for September 17, 2012. On September 17, 2012, two of the parties R.V. and T.V. O/B/O minor child, A.V., and M.T. and O.T., O/B/O minor child, K.T., failed to appear.

FINDINGS OF FACT

I **FIND** that Petitioners R.V. and T.V. on behalf of minor child, A.V., and M.T. and O.T., on behalf of minor child, K.T., failed to appear at the settlement conference. They have not corresponded with this office to explain their failure to appear and therefore, I **FIND** that they have failed to cooperate with the prosecution of this matter.

CONCLUSIONS AND ORDER

For the foregoing reasons, as to these Petitioners, I **CONCLUDE** that this matter is not a contested case and I therefore **ORDER** that this matter shall be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 13, 2012

DATE

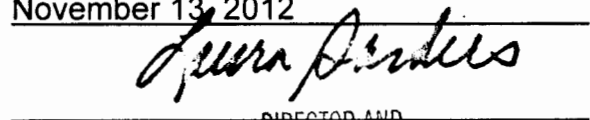

LELAND S. McGEE, ALJ

Date Received at Agency:

November 13, 2012

Date Mailed to Parties: NOV 14 2012

lr



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

481-12

OAL DKT. NO. EDU 15867-12
AGENCY DKT. NO. 342-11/12

BOARD OF EDUCATION OF THE TOWN
OF KEARNY, HUDSON COUNTY,

PETITIONER,

V.

DEBORAH LOWRY,

RESPONDENT.

COMMISSIONER OF EDUCATION

SUPPLEMENTAL DECISION ON

APPLICATION FOR EMERGENT RELIEF

ALJ'S DECISION CLARIFICATION LETTER

Subsequent to the Commissioner's adoption of the Administrative Law Judge's (ALJ) grant of emergent relief to the Board in this matter (Commissioner Decision No. 478-12E, December 19, 2012), upon the request of counsel for the Board the ALJ – on December 20, 2012 – issued a letter to the parties clarifying her decision. Therein she determined that respondent's proposed alternative method of curing her current conflict – pursuant to *N.J.S.A. 18A:12-2* – precluding her from serving as a Board member on the Kearny Board, *i.e.*, assignment of her future compensation payments from the Board to a third party, would not constitute a proper method of curing respondent's conflict. The ALJ emphasized that the only curing options supported by case law at this time are respondent's forfeiting her right to receive additional compensation or by the Board's decision to issue a payout of the compensation prior to the respondent taking office.

Upon review of the ALJ's clarification letter, the Commissioner – based on the record currently before him – adopts the clarification of the ALJ. This matter shall proceed at the OAL with such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.¹



COMMISSIONER OF EDUCATION

Date of Decision: 12/21/12

Date of Mailing: 12/24/12

¹ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625-0049
(609) 689-4057
Fax No. (609) 689-4100



Tiffany M. Williams
Administrative Law Judge

December 20, 2012

David B. Rubin, Esq.
Bridgepointe
44 Bridge Street
Metuchen, NJ 08840

Frank Pomaco, Esq.
Gaccione, Pomaco & Malanga
524 Union Avenue
Belleville, NJ 07109

Re: Town of Kearny BOE v. Deborah Lowry
OAL Dkt. No. EDU 15867-12

Counsel:

Please be advised that I am in receipt of correspondence from M. Kathleen Duncan, Director of the Bureau of Controversies and Disputes, dated December 19, 2012, requesting my review and decision on an enclosed letter from Mr. Rubin. In reviewing the enclosed letter from Mr. Rubin, which was directed initially to Ms. Duncan, the letter seeks the Commissioner's binding determination on whether the respondent's proposed assignment of her future compensation payments to a third party suffices to cure her conflict. This matter was referred back to me from the Commissioner, which I interpret as a request to clarify my initial emergent relief ruling with respect to the circumstances that have been described in the enclosed letter.

As you are aware, on December 5, 2012, the Board appeared before me on an emergent application to bar the respondent from being seated as a Board of Education member due to her conflict of interest created by the Board's outstanding obligation to pay future compensation over the course of the next few years. The emergent application was granted, subject to the respondent's opportunity to cure her conflict by either forfeiting her right to receive additional compensation or by the Board's decision to issue a payout of the compensation prior to the respondent taking office.

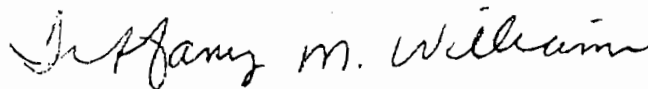
On December 19, 2012, the Commissioner of the Department of Education adopted my decision to grant the emergent relief requested.

Based on my review of the correspondence that has been forwarded by the Commissioner, it does not appear that the respondent has chosen either of these options, but rather has proposed an alternative option of assigning her interests in the payments to a third party. To further clarify my ruling in the emergent application that has been adopted by the Commissioner, the alternative proposed currently by the respondent would not constitute a proper method of curing the conflict. Moreover, the options that are supported by the case authority cited in my oral decision include forfeiture or issuance of a lump sum prior to the respondent taking office.

Notwithstanding my clarification of my emergent relief decision, please be advised that any further consideration of the merits of this matter would need to be raised in the context of a full plenary hearing or a separate emergent application for relief by one of the parties.

Thank you for your courtesy.

Very truly yours,



Tiffany M. Williams
Administrative Law Judge

TMW/rr

Cc: Kathleen M. Duncan, Director

STATE BOARD OF EXAMINERS DKT. NO. 0607-271
 AGENCY DKT NO. 5-6/12A

IN THE MATTER OF THE :
 SUSPENSION OF THE CERTIFICATE : COMMISSIONER OF EDUCATION
 OF SHERYL GLEIM BY THE : DECISION
 STATE BOARD OF EXAMINERS. :

Order of Suspension by the State Board of Examiners, May 17, 2012

For the Respondent-Appellant, Alan L. Zegas, Esq.

For the Petitioner-Respondent State Board of Examiners, Caroline Jones, Deputy
 Attorney General (Paula T. Dow, Attorney General of New Jersey)

This case involves an appeal of the State Board of Examiners' (Board) Order of May 17, 2012, suspending appellant Sheryl Gleim's teacher of Elementary School Certificate for one year.¹ On appeal, the appellant maintains that the Board's decision to suspend her for one year was arbitrary, capricious and unreasonable because it is an unduly harsh penalty.

This matter was referred to the Board in the aftermath of tenure charges that were filed against the appellee by her previous employer, the Green Brook Board of Education. The appellant resigned after the tenure charges were filed and she is currently employed by the Plainfield School District. Following a hearing at the Office of Administrative Law (OAL), the Administrative Law Judge found that the appellant engaged in unbecoming conduct and insubordination for the following behavior that occurred between 2000 and 2006: failure to comply with administrators' directives when she was told on more than one occasion not to direct children to phone home to report missing homework; violating school policy for not getting parental permission before showing a PG rated film, Labyrinth, to her students; isolated

¹ On July 26, 2012, the Board granted appellant's motion to stay the suspension pending her appeal to the Commissioner.

loss of her temper when she was confronted by her principal regarding the showing of Labyrinth; one instance of lateness upon returning to school from lunch; two adequately explained instances of improper cell phone use; allowing a sixth grader to leave the building unescorted to retrieve something from the appellant's car; and viewing a dating website that did not contain any graphic material on the school's computer when children were not present. Although the ALJ found that the appellant was guilty of insubordination and unbecoming conduct, she recommended that the appellant retain her teaching certificate because the evidence as a whole falls far short of demonstrating that the appellant lacks the ability or temperament to be an effective teacher. Thereafter, the Board adopted the Initial Decision of the ALJ, but modified the penalty to include a one-year suspension of the appellant's teaching certificate.

In her brief, the appellant maintains that the Board's decision to suspend her for one year was arbitrary, capricious and unreasonable. Specifically, the appellant argues that the Board acted in an arbitrary and capricious manner when it failed to give the requisite deference to the ALJ's credibility determinations, and in fact the Board did not even allude to the ALJ's credibility findings in the Order of Suspension. The appellant notes that in the Initial Decision, the ALJ repeatedly pointed out how she favored the credibility of the appellant over the three administrators who testified against her at the hearing. For example, the appellant cited the following finding by the ALJ:

The Examiners offered the testimony of three school administrators from Green Brook, each of whom spoke to the various allegations against Gleim, but with testimony that either relied on hearsay or revealed a less than vivid recollection of the events. Conversely, Gleim shared details that put the charges in context; and her testimony made sense and was convincing. Gleim gave much of her testimony through tears, and the pain that this proceeding was causing her was palpable. It was apparent that when her performance was less than stellar this hurt and frustrated her; in hindsight she appeared to know where she could have done better. Gleim was candid about occasional violations of school rules. She pointed out that some of the policies she violated were widely breached, but never contended that this should excuse her conduct. [Initial Decision, page 3]

As a result, the appellant alleges that the Board erred in ignoring the ALJ's credibility determinations concerning the appellant and the administrators who testified against her at the hearing when the Board rendered the one-year suspension.

The appellant also contends that the Board erred in imposing the drastic sanction of a one-year suspension which will likely result in her current employer – the Plainfield School District – terminating her employment. The appellant argues that the penalty imposed by the Board far outweighs any misconduct that she may have committed. Again the appellant cites to the Initial Decision to support her contention that the Board's penalty is excessive:

The Board of Examiners urges that Gleim's teaching certificate must be revoked. I vehemently disagree. The Examiners' case is built upon a series of unrelated instances of misconduct, many of which were unproven, and many of which the Examiners did not even attempt to prove. None of the proven charges, standing alone, are of sufficient gravity to warrant the relief the Examiners seek. I am well aware that our case law has recognized that unfitness to teach is best evidenced by a "series of incidents." Redcay v. State Bd. of Educ., 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E & A 1944). But Redcay envisioned a "series of incidents" that built to an inescapable conclusion of unfitness. Here, the Examiners have created a "series of incidents" by providing a few lapses in judgment over a long successful career, and then embedding them in a litany of unproven or trivial complaints. This is not the "series of incidents" to which our Commissioner of Education and courts refer when they rely upon Redcay. [Initial Decision, page 23]

The appellant argues that the determination by the ALJ with respect to the nature of the charges emphasizes that the conduct proven does not deserve a one-year suspension.

The appellant also contends that even if it was determined that she occasionally used poor judgment, in applying the guidelines of *In re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967) the conduct in this case does not warrant a one-year suspension. The appellant points out that she received a series of performance reviews that recommended a salary increment, she has had an otherwise unblemished career and the ALJ found her to be a sincere and credible witness. Additionally, the appellant argues that the ALJ determined that there was plenty of evidence in the record to support the conclusion that the charges brought against her were at least partially

the result of an animus toward her by the school administrators. Finally, the appellant cites to prior case law that she contends is analogous to her case where the Board did not impose any punishment on the teaching staff member. Therefore, the appellant requests that the Commissioner reverse the Board's decision to suspend her teaching license for one year and instead adopt the recommendation of the ALJ that appellant's conduct does not merit the imposition of any suspension.

In reply, the Board maintains that the decision to suspend the appellant for one year was not arbitrary, capricious or unreasonable, and as such it should be affirmed by the Commissioner. The Board stresses that it did not reject or modify any findings of fact, nor any of the ALJ's conclusions with respect to the findings of unbecoming conduct and insubordination, and the only modification of the decision was the penalty imposed. Pursuant to *N.J.A.C. 1:1-18.6*, the Board is free to "reject or modify conclusions of law, interpretations of agency policy, or findings of fact not relating to the issues of credibility of lay witness testimony..." As a result, the Board asserts that it was fully authorized to use its discretion and expertise to impose a greater penalty than was recommended by the ALJ for the unbecoming conduct and insubordination. The Board also argues that the appellant's claim that the Board failed to give the ALJ's credibility determinations due deference is incorrect. The Board contends that it adopted the factual determinations and legal conclusions of the ALJ which necessarily embody her own findings of fact and credibility. Further, the Board maintains that the issue of the appropriate penalty does not rely on credibility determinations.

The Board also emphasizes that its modification of the penalty imposed on the appellant was not arbitrary, capricious or contrary to law because the reasons for the modification of the ALJ's recommended penalty were clearly stated in the Order of Suspension. The Board points out that it properly found that the ALJ erred because, despite finding that

appellant's behavior was insubordinate and constituted unbecoming conduct, she wrongfully determined that the appellant did not deserve a penalty since no students were adversely affected. The Board contends that a lack of impact does not negate the fact that the appellant engaged in inappropriate behavior and her insistence on violating administrative directives and policies merits a penalty regardless of its direct impact on students. Moreover, the Board contends that it was correct in choosing not to simply ignore the appellant's proven conduct because the appellant's actions clearly demonstrate a lack of restraint and self-control. Further, the Board asserts that the penalty imposed was reasonable because the appellant's failure or recalcitrance to bring her conduct into the norms expected of her by her employer, and to persistently disregard their directives, evidences a lack of maturity and control required by a certified teacher. Finally, the Board also maintains that the cases cited by the appellant are not analogous to the instant appeal because here it was proven that the appellant engaged in conduct unbecoming and insubordination.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute his judgment for that of the Examiners so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C. 6A:4-4.1(a)*.

After full consideration of the record and all of the submissions, the Commissioner concurs with the Board that the appellant is guilty of unbecoming conduct and insubordination. The Board's determination in connection with the characterization of appellant's behavior as unbecoming conduct and insubordination is fully supported by the record and consistent with applicable law. The crux of this issue on appeal, however, involves the extent of the penalty assessed by the Board. While in no way minimizing the appellant's

infractions, the Commissioner finds that the Board's penalty determination in this case was unreasonable as the one-year suspension of the appellant's teaching certificate is not supported by the evidence in the record and as such it is an unduly harsh penalty.

The Board is fully authorized to modify a penalty recommended by the ALJ in her Initial Decision pursuant to *N.J.A.C.* 1:1-18.6; however, the appropriate penalty must be assessed based upon the evidence in the record. Although the Board maintains that the appellant's conduct cannot be lightly dismissed, it does not provide a reasonable justification for the imposition of a one-year suspension in light of the extent of the conduct proven at the OAL. Notably, the ALJ determined that the proven conduct generally amounted to either minor or trivial infractions and the Board adopted the factual determinations and legal conclusions of the ALJ. Despite the list of charges, the Board effectively proved that the appellant's behavior was at times inappropriate but the conduct did not rise to the level of establishing that she is unfit to discharge the duties and functions of her position as a teacher. Additionally, the appellant's prior record contained several positive evaluations which the Board specifically recognized as an otherwise untarnished career. As a result, there is simply too significant a disparity between the nature of the conduct proven at the OAL and the severe one-year suspension imposed by the Board.

Although a one year suspension in this case is not warranted, the Commissioner agrees with the Board that the proven conduct necessitates some form of penalty. It is without question "that teachers carry a heavy responsibility by their actions and comments in setting examples for the pupils with whom they have contact." *In the Matter of the Tenure Hearing of Blasko, School District of the Township of Cherry Hill*, 1980 *S.L.D.* 987, 1003. Appellant's conduct does indicate that she has displayed questionable judgment in the past that does not meet the implicit standard of good behavior required by teaching staff members. Further, despite the

fact that the infractions were generally minor, the appellant engaged in more than one incident where she violated administrative directive and school policy. Therefore, the Commissioner finds and concludes that the loss of the appellant's teacher of Elementary School Certificate for two months to be served in July and August of 2013 is a sufficient penalty to impress upon the appellant the significance of her errors in judgment displayed in this matter.

Accordingly the decision of the State Board of Examiners is modified with respect to the penalty.²


COMMISSIONER OF EDUCATION

Date of Decision: 12/21/12
Date of Mailing: 12/24/12

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATE OF	:	STATE BOARD OF EXAMINERS
SHERYL GLEIM	:	ORDER OF SUSPENSION
_____	:	DOCKET NO: 0607-271

At its meeting of July 19, 2007, the State Board of Examiners (Board) reviewed information it had received from the Green Brook Township School District (Green Brook) regarding Sheryl Gleim. Green Brook reported that Gleim had resigned from her teaching position after the district filed tenure charges alleging unbecoming conduct, insubordination and other just cause for dismissal. The district alleged that Gleim humiliated students by sending them out of the classroom to the office to phone their parents when they were missing assignments and refused to discontinue the practice even after being reprimanded by her principal; failed to properly supervise students; using her cell phone and accessing personal dating websites in class; ignored administrative directives to keep 9/11 remembrances low key and instead allowed her students to view a CD that was upsetting; assigned extra-credit projects involving the viewing of R rated movies by sixth grade students; engaged in several incidents where she publicly humiliated students; discussed matters of a personal nature regarding students with other individuals and had angry outbursts in the hallway or in the principal's office in front of other individuals, including students. Gleim holds a Teacher of Elementary School certificate, issued in June 1993. Upon review of the above information, at its October 17, 2007 meeting, the Board voted to issue an Order to Show Cause to Gleim as to why her certificates should not be revoked.

The Board sent Gleim the Order to Show Cause by regular and certified mail on November 15, 2007. The Order provided that Gleim must file an Answer within 30 days. Gleim responded on December 13, 2007. In her Answer, Gleim noted that the Board had listed the incorrect certificate for her in its Order. (Answer, ¶ 1). Gleim admitted that she resigned from the district and stated that the allegations were either false "or do not constitute actionable wrongdoing." (Answer, ¶ 3). She admitted to certain allegations in the Order to Show Cause, including allowing a student to retrieve a camera from Gleim's car, arriving late to her classroom after lunch on one occasion, and having to use a cell phone in

class for emergency reasons approximately five times. Gleim either denied or cited as “vague” all of the other allegations in the Order to Show Cause. (Answer, ¶¶ 4, 5). She also vehemently denied any wrongdoing. (Answer, ¶ 6). Gleim stated that she never admitted any guilt or wrongdoing, but resigned “in the hope that she could have a new beginning in a different school district.” (Answer, ¶ 6). She urged the Board to consider her “lengthy and honorable commitment to the teaching profession.” (Answer, ¶ 6). In the remainder of her Answer, Gleim recounted her many successes throughout her teaching career. (Answer, pp. 5-8).

The Board amended the Order to Show Cause on February 23, 2009 to reflect Gleim’s correct certificate. In all other respects the Order was identical to the previous one. By letter dated March 19, 2009, Gleim notified the Board that she would rely on the Answer she submitted to the Board’s original Order to Show Cause.

Since there were material facts in dispute, on April 23, 2009, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. After protracted litigation over procedural issues, Administrative Law Judge (ALJ) Ellen Bass heard the matter on several days in December 2011. The record closed on March 16, 2012 and the ALJ issued an Initial Decision on April 13, 2012. *In the Matter of the Teaching Certificate of Sheryl Gleim*, Dkt. No. EDE 05065-09 (Initial Decision, April 13, 2012).

In that decision, ALJ Bass found that Gleim was employed by Green Brook for almost ten years. (Initial Decision, slip op. at 2). ALJ Bass noted that after the Board presented its case, only certain charges remained at issue.¹ *Id.* at 4. ALJ Bass found that Gleim would occasionally direct students who failed to complete their homework three times in a row to go to the school office and phone home. *Ibid.* The ALJ also found that Gleim continued this practice even though her principal, Linda Pollard, had previously directed her to stop. *Id.* at 4-6. ALJ Bass also found that Gleim had, on one occasion, sent a child out to the parking lot to retrieve something from her car. *Id.* at 6 8. The ALJ noted that Gleim

¹ For purposes of clarity, only those instances where ALJ Bass sustained the charge in whole or in part against Gleim will be discussed here.

expressed remorse at her mishandling of the situation and no evidence was presented that she did it again. *Id.* at 8. The ALJ also found that on one occasion during in-class recess, a student momentarily jumped onto a window ledge to catch a ball. *Id.* at 8-9. However, ALJ Bass also found that the incident “was not indicative of a lack of control by Gleim.” *Id.* at 9. ALJ Bass also determined that, in an aberration, Gleim returned seven minutes late from lunch one time. *Ibid.* The ALJ found, and Gleim admitted, that she visited dating websites on the school computer. *Id.* at 10. However, the ALJ also found that Gleim did not do so when children were present. *Id.* at 11-13. ALJ Bass also found that Gleim violated school policy by showing her students a PG-13 rated film without securing prior parental approval. *Id.* at 16. She did, however, secure permission to show the remainder of the movie after Pollard stopped the initial showing midway through. *Ibid.* The ALJ also found that Gleim angrily approached Pollard in the hallway after the movie incident and confronted her within the earshot of children. *Id.* at 19. Gleim later continued the altercation in the Superintendent’s office, where it took her some time to compose herself. *Ibid.*

After assessing the evidence, ALJ Bass concluded that the Board had not proven four of the charges against Gleim. *Id.* at 21. The ALJ further determined that the Board “technically have met their burden” with regard to the allegations that Gleim showed a PG rated movie without parental permission and continued to direct children to phone home when they were missing homework despite an administrative directive to cease the practice. *Ibid.* However, ALJ Bass ruled that even as to those two charges, Gleim’s insubordination was not willful and that the Board had failed to prove that she was guilty of conduct unbecoming a teacher. *Id.* at 21-22. As to Gleim’s “cell-phone use, lateness and intemperate altercation with Pollard” the ALJ was “compelled to **CONCLUDE** that the Examiners have met their burden of proving unbecoming conduct” since Gleim “technically violated the standard of good behavior expected of school employees.” *Id.* at 22. ALJ Bass also determined that the Board proved unbecoming conduct with regard to Gleim’s personal use of the school’s computer and allowing a student to leave the building unescorted. *Ibid.*

In assessing the appropriate penalty, ALJ Bass “vehemently disagreed” that Gleim’s certificate should be revoked, noting that “none of the proven charges, standing alone, are of sufficient gravity to warrant [revocation].” *Id.* at 23. Moreover, the ALJ observed that Gleim should not “have lost her tenure, much less her certificate.” *Id.* at 24. ALJ Bass found that, at most, Gleim should have suffered a loss of her increment, not the loss of her tenure and that there was “little likelihood that the complained-of conduct will recur.” *Ibid.* Accordingly, ALJ Bass held that under the totality of the circumstances, the Order to Show Cause should be dismissed with prejudice. *Id.* at 25. The parties submitted Exceptions and Reply Exceptions in the case.

In her Exceptions, the Deputy Attorney General (DAG) representing the Board agreed with the ALJ’s finding that Gleim engaged in unbecoming conduct but disagreed with the ALJ’s assessment that no penalty was warranted. (DAG Exceptions, pp. 1-2). The DAG argued that although the nature of Gleim’s violations differed, “the common trend is that Respondent repeatedly demonstrated a failure or recalcitrance to bring her conduct within the norms and expectations of her place of employment, and a systemic lack of judgment as to what is appropriate for a certificated teacher conducting herself in a school setting.” (DAG Exceptions, p. 2). The DAG cited Gleim’s use of her school computer to access dating websites, her altercation with her superior after being admonished for showing an unapproved movie and her sending a child alone to the school parking lot as instances which demonstrated a lack of judgment of appropriate behavior in a school setting. (DAG Exceptions, pp. 2-4). The DAG also took issue with the ALJ’s assumption that Green Brook’s delay in bringing tenure charges militated against a penalty in the certification case, arguing that “the reactions of a school district are not controlling in the instant matter.” (DAG Exceptions, pp. 4-5). The DAG further argued that ALJ Bass erred when she determined that the Board took no action against Gleim’s certificate for close to five years after it served the Order to Show Cause, thereby proving that the charges were not serious. (DAG Exceptions, pp. 5-6). The DAG noted that since the Board has no mechanism to take action against a certificate holder absent a hearing, the ALJ’s analysis on that issue should be disregarded. (DAG Exceptions, p. 6). In her Exceptions, the DAG also challenged ALJ Bass’ findings that certain instances of conduct, *i.e.*, showing a

PG rated movie without permission, while insubordinate, were not conduct unbecoming. (DAG Exceptions, pp. 6-8). Finally, the DAG challenged ALJ Bass' determination that Gleim's personal use of her school computer, while conduct unbecoming and insubordinate, did not warrant any action against her certificate. (DAG Exceptions, pp. 8-11). The DAG therefore argued that since the Initial Decision contained some "erroneous analysis and conclusions of law" it should not be adopted as the Final Decision in the case. (DAG Exceptions, p. 11).

In her Reply Exceptions, Gleim reiterated the ALJ's finding that none of the tenure charges, standing alone, would warrant revocation of tenure "much less suspension or revocation of a teaching certificate." (ReplyExceptions, p. 2). Gleim claimed that the Board did not challenge any of ALJ Bass' fact findings but merely took exception to her legal conclusion that no action should be taken against Gleim's certificate. (Reply Exceptions, p. 2). Moreover, Gleim noted that all credibility determinations were rendered in her favor. (Reply Exceptions, p. 3). She also urged that the ALJ was correct in dismissing the Order to Show Cause because all of her supposed infractions were minor and Green Brook itself waited years to proffer tenure charges regarding some of the incidents, underscoring their lack of seriousness. (Reply Exceptions, pp. 5-7). Gleim argued that the ALJ was correct in noting her overall teaching record in Green Brook as well as her current record at Plainfield, since "the teacher's prior record and present attitude" were relevant factors in determining a penalty in a tenure context and were equally relevant here. (Reply Exceptions, pp. 6-8). Finally, Gleim argued that the Board should reverse the ALJ's findings that she had engaged in unbecoming conduct or acted insubordinately in any instance, since the ALJ had found the insubordination as "technical" and the unbecoming conduct as "minor." (Reply Exceptions, p. 9). Those determinations, coupled with the district's delay in bringing the tenure charges, "undercuts the rationale for labeling them as insubordinate or unbecoming." (Reply Exceptions, p. 10). Gleim therefore asked that the Initial Decision be affirmed as to its conclusion to dismiss the Order to Show Cause with prejudice and reversed as to the findings of insubordination and unbecoming conduct. (Reply Exceptions, p. 11).

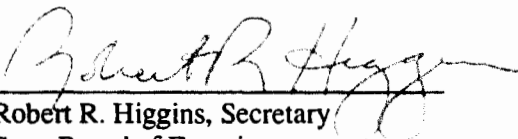
The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of May 17, 2012, the Board reviewed the Initial Decision, Exceptions and Reply Exceptions. After full and fair consideration of the Decision and submissions, the Board voted to adopt the Initial Decision, with modification as to penalty.

As noted above, ALJ Bass concluded that Gleim's behavior, at times, was insubordinate and constituted conduct unbecoming a teaching staff member. (Initial Decision, slip op. at 21-22). The Board agrees. The Board disagrees with the ALJ, however, as to the consequences that Gleim's behavior merits. "Teachers ... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 S.L.D. 302, 321. ALJ Bass specifically found that "Gleim's superiors did have to tell her more than once not to direct children to phone home to report missing homework." (Initial Decision, slip op. at 21). Nevertheless, the ALJ would have the Board ignore Gleim's conduct simply because, according to the ALJ, no students were adversely affected. Yet Gleim's insistence on violating administrative directives or policies on more than one occasion, whether by showing unauthorized movies, having students phone home because of missing assignments or using school computers to visit personal dating sites, merits a response regardless of its impact on students. The Board finds that the ALJ has erred by focusing on the seeming lack of an impact on students of Gleim's conduct. It further finds that this seeming "lack of impact" does not negate Gleim's responsibility in engaging in the aforementioned behaviors and therefore Gleim's conduct should be penalized.

The Board is also well aware of Gleim's otherwise untarnished career. And while the Board agrees that no one incident, standing alone, or even all of them, taken as a whole, merits revocation, Gleim's actions, both insubordinate and conduct unbecoming, cannot and should not be lightly dismissed. Thus, when weighing these counterbalancing considerations, the Board believes that a one year suspension of Gleim's certificate is the appropriate penalty.

Finally, the Board would be remiss if it did not address an error in the ALJ's analysis of the appropriate penalty. To assume that the Board took "no action in the close to five years since it served its Order to Show Cause to prevent Gleim from continuing to teach the children of our state" misstates the facts of this case. (Initial Decision, slip op. at 24). From the moment the Board issued the original Order to Show Cause in October 2007 and received Gleim's Answer in December 2007, it has followed all procedures authorized by statute and regulation.² Moreover, once the matter was transmitted to OAL in early 2009, the protracted length of the litigation stemmed, in part, from the legal wrangling over various procedural issues, a legal right to which Gleim is entitled and availed herself. It is mistaken for the ALJ to suggest otherwise, as she herself had provenance of the litigation for most of the time the case was at OAL.

Accordingly, on May 17, 2012, the Board voted to adopt, with modification, the Initial Decision and ordered to suspend Gleim's teaching certificate for a period of one year. On this 21st day of June 2012, the Board formally adopted its written decision to adopt, with modification, the Initial Decision in this matter, and it is therefore ORDERED that Sheryl Gleim's Teacher of Elementary School certificate be hereby suspended for one year effective July 31, 2012. It is further ORDERED that Gleim return her certificate to the Secretary of the State Board of Examiners, Office of Licensure, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.


Robert R. Higgins, Secretary
State Board of Examiners

Date of Mailing: 6/21/12
(VIA E-MAIL)

Appeals may be made to the Commissioner of Education pursuant to *N.J.S.A. 18A:6-38.4*.

² The Board's sole delay, in issuing the Amended Order to Show Cause, was due to an unanticipated staff shortage.

CERTIFICATION OF SERVICE

I hereby certify that on June 22, 2012, I caused this office to serve via hand delivery an original and two copies of the following documents:

1. Notice of Appeal of the Board of Examiners Order of Suspension with attached Board of Examiners Order of Suspension; and
2. This Certification of Service

I/M/O the Certificate of Sheryl Gleim, Docket No. 0607-271 to:

c/o Jennifer Campbell, DAG
Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625

In the event of willfully false statements in regard to this certification, I hereby acknowledge that I am subject to punishment.

LAW OFFICES OF ALAN L. ZEGAS


Joan Guarino, Assistant

G.H., on behalf of minor children, M.H.,	:	
S.A. and I.H.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF GLOUCESTER, CAMDEN	:	
COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a pro-se residency appeal contesting the April 2011 determination of the respondent Board that petitioner and her children, M.H., S.A. and I.H., no longer resided in the City of Gloucester and were not eligible for a free public education in the Gloucester school district for the 2010-2011 school year. Petitioner contended that she is homeless, and that this matter stems from a lease that she had signed on an apartment in Audubon which she never actually occupied because the landlord terminated the lease before she could move in. The respondent Board contended that G.H. and her children resided in Audubon and filed a counterclaim for tuition.

The ALJ found: that this matter should not have been filed as a residency appeal under *N.J.A.C.* 6A:22; rather, Gloucester should have notified the county superintendent of its determination that Audubon became the district of residence once the homeless parent signed a lease to live within that school district; *N.J.A.C.* 6A:17-2.6(h) provides that homeless children are allowed to stay in the district of residence – in this case, Gloucester City – for the remainder of the academic year even if the children become permanently housed elsewhere during the academic year; and this case should have been presented to the appropriate county superintendent so that he or she could determine where the children should have been enrolled for the 2010-2011 school year. The ALJ concluded that the OAL does not have jurisdiction to grant relief to any of the parties, and accordingly dismissed the petition for lack of jurisdiction.

Upon a full and independent review of the record, the Commissioner, *inter alia*, concurred with the ALJ that the issue in this case is not a residency dispute under *N.J.A.C.* 6A:22; rather, a homelessness determination must be made pursuant to *N.J.A.C.* 6A:17-2.6(h). The Commissioner noted that the ALJ was not barred from deciding this matter, however, as the Commissioner does have jurisdiction to hear the matter under *N.J.S.A.* 18A:6-9. Petitioner, however, did not appear at the July 29, 2011 hearing and there appear to be facts in dispute in this matter. Accordingly, the Commissioner dismissed the petition and the Board's counterclaim without prejudice.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 6300-11
 AGENCY DKT. NO. 118-5/11

G.H., on behalf of minor children, M.H., :
 S.A. and I.H., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
 CITY OF GLOUCESTER, CAMDEN :
 COUNTY, :

DECISION

RESPONDENT. :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.¹ This matter was initiated by the petitioner, G.H., as a *pro se* residency appeal, and the Board of Education filed a counterclaim for tuition. The Administrative Law Judge (ALJ) dismissed the petition of appeal and the Board's counterclaim for lack of jurisdiction.

Upon review of the record, the Commissioner is in accord with the ALJ's determination that the issue in this case is not a residency dispute under *N.J.A.C.* 6A:22; rather, a homelessness determination must be made pursuant to *N.J.A.C.* 6A:17-2.8. Although the ALJ properly determined this matter was not a residency appeal, the Commissioner notes that the ALJ was not barred from deciding this matter because the Commissioner has jurisdiction "to hear and determine ... all controversies and disputes arising under school law." *See N.J.S.A.* 18A:6-9. However, in light of the fact that the petitioner did not appear at the July 29, 2011 hearing and

¹ The parties did not file exceptions to the Initial Decision.

there appear to be facts in dispute regarding an alleged lease agreement, the ALJ would not have been able to reach a conclusion on the homelessness issue based upon the current record.

Under these circumstances, the petition of appeal and the Board's counterclaim are hereby dismissed without prejudice.

IT IS SO ORDERED.²


COMMISSIONER OF EDUCATION

Date of Decision: 12/21/12
Date of Mailing: 12/26/12

² Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 6300-11

AGENCY DKT. NO. 118-5/11

G.H.ON BEHALF OF MINOR CHILDREN,

M.H., S.A. and I.H.,

Petitioner

V.

BOARD OF EDUCATION OF THE CITY

OF GLOUCESTER, CAMDEN COUNTY,

Respondent.

G.H., Petitioner, pro se

Sharon Hudak Esq., for respondent Board (Parker McCay, attorneys)

Record Closed: October 21, 2012

Decided: November 13, 2012

BEFORE **RONALD W. REBA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, G.H., is the mother of minors, M.H., S.A. and I.H., who prior to 2011 were homeless and registered as students in the City of Gloucester in Camden County. During the 2011 school year the petitioner entered into a lease for an apartment in

Audubon, New Jersey located at 223 South Whitehorse Pike. However, the petitioner claimed that the lease was subsequently terminated by the landlord before she could establish residency and that she then registered her children back into Gloucester City's school system. Respondent, Gloucester City takes the position that once the petitioner entered into a lease for an apartment in Audubon, New Jersey, that Audubon now became the venue of residency and that her children were registered in the Gloucester City school system illegally. Petitioner filed a residency appeal to keep her children in the Gloucester school system and respondent answered and filed a cross claim for tuition for the remainder of the school year and is seeking substantial monies from her. The question presented was whether to honor Gloucester City's motion to dismiss G.H.'s petition because the children were no longer eligible to attend its school district when G.H. signed a lease to live in Audubon. If correct, should now the counter claim for tuition be ordered because of the actions of the petitioner.

On April 21, 2011, Gloucester City Public Schools sent a letter to G.H., denying eligibility for Petitioner's children to attend the Gloucester City School District. because G.H. no longer resided in Gloucester City but rather at 223 South Whitehorse Pike, Audubon, New Jersey. G.H. opposed the action and filed on May 3, 2011 a petition for a pro se residency appeal with the Gloucester City Public School District. The matter was referred to the Office of Administrative Law on June 3, 2011. A hearing was scheduled for July 29, 2011. At that time the respondent, Gloucester City Board of Education appeared and provided testimony on the defense of the petition and also on its counterclaim. The petitioner did not appear at the hearing. I left the matter open in order for the petitioner to contact the proper authorities regarding whether testimony would be allowed. Thereafter, I did not hear from respondent's counsel after several attempts to inquire about the status of the matter with petitioner, other than at some point its counsel asking for a decision on its counterclaim for tuition.

DISCUSSION

I have reviewed the submissions from counsel, as well the testimony of respondent's witnesses and the pertinent law which I find controls this situation.

Question Presented:

Whether to grant Gloucester City's motion to dismiss G.H.'s petition because G.H.'s children were no longer eligible to attend the district's schools when G.H. signed a lease to live in Audubon and to approve respondent's counterclaim for tuition.

Brief Answer:

No. I must dismiss this matter for lack of jurisdiction because it should not have been filed here as a residency appeal under N.J.A.C. 6A:22. Instead, Gloucester City should have immediately referred this matter to the County Superintendent of Schools when Gloucester City first determined that the children should have been enrolled in the Audubon school district. Gloucester City must submit this matter to the County Superintendent for a determination of the children's proper placement at the time that the lease issue arose.

LEGAL ANALYSIS

Any child between the ages of five and twenty years old is entitled to a free public education if the child's parent "moves from one school district to another school district as a result of being homeless and whose district of residence is determined pursuant to [N.J.S.A. 18A:7B-12]."¹ N.J.S.A. 18A:38-1(f). According to N.J.S.A. 18A:7B-12(c), "[t]he district of residence for children whose parent . . . temporarily moves from one school district to another as the result of being homeless shall be the district in which the parent . . . last resided prior to becoming homeless."² The district of residence shall be responsible for the education of a homeless child for as long as the parent remains homeless. N.J.A.C. 6A:17-2.4(a) and (c). In addition, "[e]nrollment in the school district of [residence] . . . shall continue for the duration of homelessness, including . . . for the remainder of the academic year if the homeless child becomes permanently housed during the academic year." N.J.A.C. 6A:17-2.6(h). If "a dispute

¹ The education laws equate residence with domicile. N.J.S.A. 18A:1.1. The education laws also define "homeless" as an individual who "lacks a fixed, regular and adequate residence." N.J.S.A. 18A:7B-12(c); N.J.A.C. 6A:17-2.2.

occurs regarding the determination of the school district of enrollment made by the school district of [residence], the chief school administrator of the school district of [residence] . . . shall immediately notify the county superintendent of schools.” N.J.A.C. 6A:17-2.8(c). Then, “[t]he county superintendent shall immediately determine where the child shall be enrolled based on the child’s best interest.” Ibid. (citing N.J.A.C. 6A:17-2.6(b) (best interest factors)).

The Commissioner recently recognized the proper appeal procedure for disputes arising from homelessness determinations. In L.E.H v. Bd of Education of the Twp. of West Orange, EDU 3787-09, Initial Decision (May 19, 2009), rejected, Comm’r (July 2, 2009), <<http://njlaw.rutgers.edu/collections/oal/>>, the Commissioner held that even though a parent failed to appear at an OAL hearing regarding a residency dispute, the parent’s assertions that she did not receive notice of the hearing and that she was homeless required further proceedings to determine the child’s eligibility for continued attendance in the district. More importantly, however, the Commissioner noted that “[a]ny dispute concerning the determination of homelessness must first be brought to the Executive County Superintendent of Schools pursuant to N.J.A.C. 6A:17-2.8.” (Emphasis added).

Here, this matter should not be here as a residency appeal under N.J.A.C. 6A:22. Instead, under N.J.A.C. 6A:17-2.8, Gloucester City should have immediately notified the county superintendent of its determination that Audubon became the children’s school district of enrollment for the 2011-2012 school year once the homeless parent signed a lease to live in Audubon. Indeed, the parent disputes that she ceased to be homeless after she signed a lease to live in Audubon because the landlord terminated the lease shortly after she signed it due to what she alleged was a DYFS investigation initiated by respondent which caused her landlord to take such action. Given the dispute regarding Gloucester City’s determination of the district of enrollment, and in light of N.J.A.C. 6A:17-2.6(h), which provides that homeless children are allowed to stay in the district of residence, which in this case was Gloucester City, for the remainder of the academic year even if the children become permanently

² “District of residence” is also referred to as “district of origin.” See N.J.A.C. 6A:17-2.2.

housed during the academic year, this matter should be presented to the relevant county superintendent so that he or she can determine where the children should have been enrolled for the 2010-2011 school year.

CONCLUSION

Accordingly, I **CONCLUDE** that this office does not have the jurisdiction to grant the relief to any of the parties which I **FIND** should have been brought to the appropriate County Superintendent of Schools for a determination of the children's proper place of enrollment.

ORDER

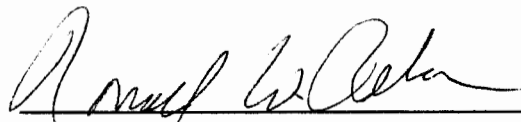
Petitioner's petition for residency and the Counterclaim made by the Board of Education of the City of Gloucester for tuition as well as its motion for Summary Judgment are **DISMISSED** for lack of jurisdiction.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

NOVEMBER 13, 2012
DATE


RONALD W. REBA, ALJ

Date Received at Agency:

11/14/12

Mailed to Parties:

11/15/12
DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

#486-12

NOELLE JACQUELIN,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF DENNIS, CAPE MAY	:	
COUNTY, CHRISTINE OSTRANDER,	:	
PRESIDENT OF THE BOARD OF	:	
EDUCATION, AND GEORGE PAPP,	:	
SUPERINTENDENT OF SCHOOLS,	:	
DENNIS TOWNSHIP SCHOOL DISTRICT,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner – formerly employed by the respondent Board under tenure in the position of Director of Curriculum and Instruction/Principal – asserted that her tenure and seniority rights were violated when the school district failed to employ her in other director-level positions after her job was eliminated in a reduction in force (RIF) on April 30, 2010. Petitioner also alleged that a staff member (the intervenor) who holds the title of Director of Special Education/Child Study Team is unqualified to hold this position; petitioner claimed that she is entitled to this job, and also claimed re-employment rights to the position of principal. The respondent Board contends that petitioner was RIF'd in good faith, that she had no re-employment rights, and that the intervenor was properly qualified to hold the position of Director of Special Education/Child Study Team. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; petitioner earned tenure under her administrative certificate in the position of Director of Curriculum and Instruction/Principal in December 2005; petitioner's job description indicates that she was a backup to the building principal when that staff member was absent, but that her primary duties were related to curriculum and instruction; whether petitioner actually performed the duties of principal sufficient to become tenured in that position is not developed in the instant record; the intervenor is qualified to hold the title of Director of Special Education/Child Study Team under her administrative certificate with a principal endorsement and instructional certificate with a Teacher of the Handicapped endorsement; there exists no principal vacancy to which petitioner could claim entitlement at the time the petition was filed, nor can it be determined from the instant record whether petitioner is tenured as a principal; any remaining claims for reemployment rights raised by petitioner are contained in a separate action filed with the Commissioner on July 2, 2012, and are not part of this proceeding. The ALJ concluded that summary decision in favor of respondent is appropriate; he denied petitioner's cross motion for summary decision, and ordered the instant appeal dismissed.

Upon independent review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 21, 2012

OAL DKT. NO. EDU 9335-10
AGENCY DKT. NO. 165-7/10

NOELLE JACQUELIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF DENNIS, CAPE MAY	:	
COUNTY, CHRISTINE OSTRANDER,	:	
PRESIDENT OF THE BOARD OF	:	
EDUCATION, AND GEORGE PAPP,	:	
SUPERINTENDENT OF SCHOOLS,	:	
DENNIS TOWNSHIP SCHOOL DISTRICT,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Noelle Jacquelin, and the Board of Education's (Board) reply thereto.

The petitioner's exceptions substantially reiterate the substance of her submissions at the OAL, recasting the arguments therein to support the contention that the Administrative Law Judge (ALJ) erroneously granted summary decision in favor of the Board. First, the petitioner maintains that the ALJ wrongfully determined that the intervenor, Joann Shilinsky, was qualified to hold the position of Director of Special Education/Child Study Team. The petitioner argues that the position of Director of Special Education/Child Study Team involves services at a district level and as a result the position requires an Administrator Endorsement pursuant to *N.J.A.C.* 6A:9-12.3(a). The petitioner emphasizes that since the intervenor does not hold an Administrator Endorsement, she is not qualified for the position. The petitioner maintains that when her position of Director of Curriculum and

Instruction/Principal was eliminated as a result of a reduction in force, she was entitled to the position of Director of Special Education/Child Study Team because she is a tenured director in the district and she holds the required Administrative Certificate with a School Administrator Endorsement.

In addition, the petitioner contends that the ALJ erred in not requiring the intervenor to submit to a deposition or having a hearing to determine the intervenor's level of responsibilities as the Director of Special Education/Child Study Team. The petitioner argues that there are genuine issues of material fact related to the intervenor's job duties, and the ALJ improperly decided the case on a motion for summary decision. Further, the petitioner asserts that the ALJ simply relied upon the May 3, 2000 job description of the position of Supervisor of Special Education/Child Study Team. The petitioner contends that the ALJ should have evaluated each of the job duties in the intervenor's job description to determine whether those duties were performed on a district-wide basis or on behalf of one school. Finally, the petitioner argues that the ALJ erroneously determined that Robert Schwartz was not disqualified from representing the intervenor.

In reply, the Board asserts that the petitioner's exceptions are a reiteration of the multiple filings submitted by the petitioner at the OAL. The Board relies on its submissions below, as well as the April 4, 2012 Order and the Initial Decision of the ALJ in support of its request that the Commissioner adopt the Initial Decision of the ALJ.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ that the position of Director of Special Education/Child Study Team held by the intervenor did not require a School Administrator Endorsement because the position was not a district-wide administrative position. The Commissioner is also in accord with the

ALJ's conclusion that no principal vacancy existed at the time of the filing of the petition on July 20, 2010, and as a result it is not necessary at this juncture to speculate as to whether the petitioner has obtained tenure as a principal.¹

With respect to the position of Director of Special Education/Child Study Team, it is undisputed that an Administrative Certificate is required for the position. The issue in this matter is whether a School Administrator Endorsement is required or whether a Principal's Endorsement is appropriate. The Commissioner finds the objections advanced in the petitioner's exceptions unpersuasive, largely reflecting arguments previously raised before the ALJ and clearly taken into account by him in rendering the April 4, 2012 Order and the Initial Decision.

Under *N.J.A.C.* 6A:9-12.3(a), if the position is a district-level administrative position, a School Administrator Endorsement is required. If the position, however, involves services that are generally provided to a school or other comparable unit within the district, under *N.J.A.C.* 6A:9-12.3(b), only a Principal Endorsement is required. Here, the job description of the Director of Special Education/Child Study Team indicates that the position is primarily a department head position, and there is nothing in the description that suggests it is the type of high level district-wide position that incorporates supervisory authority over high level managers.² Therefore, pursuant to *N.J.A.C.* 6A:9-12.3(b), the Director of Special Education/Child Study Team position requires only a Principal Endorsement. The intervenor has

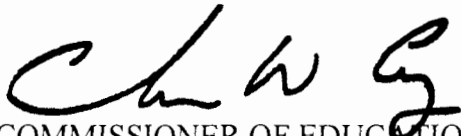
¹ Petitioner filed another petition on July 24, 2012 that is currently pending at OAL in the case of *Noelle Jacquelin v. Board of Education of the Township of Dennis, Cape May County*, OAL Dkt. No. EDU 9939-12. That matter involves a dispute related to the petitioner's assertion that she has tenure as a principal and as a result she had re-employment rights when the Board elevated the intervenor to acting principal in April 2012. The cases were not consolidated at the OAL; therefore, this final decision only addresses the scope of the issues raised in the instant matter.

² It should be noted that the Director of Special Education/Child Study Team is an unrecognized title and is subject to the requirements of *N.J.A.C.* 6A:9-5.5. This regulation requires school districts to submit a request for permission to use the proposed title to the county superintendent, along with a detailed job description. If the county superintendent approves of the title, the appropriate certification must be specified as well as the title under which the teaching staff member will accrue tenure and seniority rights.

a Principal Endorsement and as such she attained tenure in that position in 2009. As a result, the petitioner was not entitled to the position of Director of Special Education/Child Study Team when her position was eliminated as a result of a reduction in force.

Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter.³

IT IS SO ORDERED.⁴


COMMISSIONER OF EDUCATION

Date of Decision: 12/21/12

Date of Mailing: 12/26/12

³ The ALJ's determination that Robert Schwartz was not disqualified from representing the intervenor in this matter was appealable only to the Director of Administrative Law and only on an interlocutory basis, not after issuance of the Initial Decision. *See, N.J.A.C. 1:1-14.10(j)5 and (l).*

⁴ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

(On Motion for Summary Decision)

OAL DKT. NO. EDU 9335-10

AGENCY DKT. NO. 165-7/10

NOELLE JACQUELIN,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF DENNIS, CAPE MAY
COUNTY; CHRISTINE OSTRANDER,
PRESIDENT OF THE BOARD OF
EDUCATION; AND GEORGE R. PAPP,
SUPERINTENDENT OF SCHOOLS,
DENNIS TOWNSHIP SCHOOL DISTRICT**

Respondent.

Carmen R. Faia, Esq., for petitioner (Faia and Frick, attorneys)

Cynthia A. Sautter, Esq., for respondent (Law Offices of Stephen E. Gertler,
attorneys)

Paul N. Barger, Esq., co-counsel for respondent (Kalac and Barger, attorneys)

Robert M. Schwartz, Esq., for intervenor (Joann Shilinsky)

Record closed: October 3, 2012

Decided: November 16, 2012

BEFORE **W. TODD MILLER, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was filed at the OAL on September 3, 2010, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. Petitioner was the subject of a reduction in force (RIF) on April 30, 2010. Her position as Director of Curriculum and Instruction/Principal was eliminated.

Petitioner asserts respondent Dennis Township Board of Education (District or Township) violated her tenure and seniority rights, together with her right to other director positions. Petitioner alleges that Joann Shilinsky (Shilinsky or intervenor), a staff member who currently holds the title of Director of Special Education/CTS, is unqualified to hold same, and petitioner is entitled to the Shilinsky's position. Petitioner also claims re-employment rights to the position of principal.

The parties previously filed cross-motions for summary decision. Therein Dennis Township asserted that petitioner was RIF'd in good faith, petitioner had no re-employment rights and that the intervenor was properly qualified to hold the position of Director of Special Education/CST. Conversely petitioner claimed she had rights to the position of Director held by intervenor Shilinsky.

On April 4, 2012, an Order was entered by undersigned concluding that Dennis Township Board of Education (1) implemented a RIF for reasons of economy and efficiency; (2) intervenor Shilinsky was qualified to hold the position of and is tenured as Director of Special Education/CST; (3) intervenor Shilinsky has seniority rights as Director of Special Education/CST over petitioner Jacquelin; (4) Robert Schwartz, Esquire was not disqualified as counsel for intervenor; and (5) petitioner's claim to reinstatement as principal is not dismissed as untimely; however, the record is insufficient to determine this issue summarily. Accordingly, partial summary decision was granted in favor of respondents. And it was further ordered that petitioner's cross-motion for summary decision was denied. A plenary hearing was going to be scheduled.

On July 13, 2012, Dennis Township filed another motion for summary decision. The motion for summary decision assumes, only for purposes of the motion, that petitioner, Noelle Jacquelin, has some tenure rights as a principal. Nevertheless, a plenary hearing on that factual issue is not necessary because no vacancy ever existed for the position of principal and; therefore, she has no standing to make a claim for special re-employment rights to this title. N.J.S.A. 18A:28-12.

Petitioner filed opposition to Dennis Township's motion for summary decision asserting, primarily, that Superintendent Papp was made Superintendent/Principal in violation of the Open Public Meetings Act (OPMA) (N.J.S.A. 10:4-7 et seq.). Petitioner also filed a cross-motion for summary decision. The cross-motion was in effect a motion for reconsideration asserting that intervenor Shilinsky does not hold an administrator's endorsement under her administrative certificate and, therefore, is ineligible to be Director of Special Education/CST. Petitioner renewed her contention that the Director of Special Education/CST is a district-wide position necessitating an administrator's endorsement.

Oral argument on the aforesaid motions was heard on October 3, 2012. For the reasons discussed below, summary decision is **GRANTED** in favor of Dennis Township. Petitioner's cross-motion for summary decision is **DENIED**. This matter is **CONCLUDED**.

BACKGROUND

Noelle Jacquelin

Petitioner, Noelle Jacquelin, was hired as the Director of Curriculum and Instruction/Principal for the Dennis Township School District (District) beginning on or about October 15, 2002. Jacquelin holds an **Administrative Certificate** with endorsements as a School Administrator (2002), Principal (2008), and Supervisor (1998). She also holds an **Instructional Certificate** with endorsements as an Elementary School Teacher (1998) and Teacher of English (1996). She received

tenure under her Administrative Certificate in the position of Director of Curriculum and Instruction/Principal on or about December 15, 2005. Petitioner served as the Director of Curriculum and Instruction/Principal through the 2009-2010 school year.

It is clear from petitioner's job description that she was a backup to the building principal when the building principal was absent. But her primary duties were related to curriculum and instruction. Merely because petitioner's job description contains the word "principal" does not mean she meets the statutory requirements to acquire tenure as a principal. Whether she actually performed the duties of principal sufficient to become tenured is not in this record.

On April 29, 2010, the Board voted to eliminate the position of Director of Curriculum and Instruction/Principal through a Reduction in Force (RIF). By the end of the day on April 30, 2010, petitioner vacated her office. The Board Secretary certified a written resolution documenting the RIF on May 11, 2010.

Joann Shilinsky

Intervenor Joann Shilinsky (Shilinsky) was approved by the district to be Director¹ of Special Education/CTS on March 2, 2005. Shilinsky received her provisional **Administrative Certificate** as a Principal/Supervisor in 2003, which became permanent in 2006. She received an **Instructional Certificate** as a Teacher of the Handicapped (1995) and Teacher of Production, Personal or Service Occupations: Cosmetologist/Hair stylist (issued and expired in 1988). She obtained tenure² in the District as the Director of Special Education /CST because she worked more that three years in this title. Shilinsky continued in the position of Director of Special Education/CST after the 2010 RIF, and continues to hold that title.

¹ Shilinsky's title of director is periodically interchanged with supervisor which created one of the contested issues this case. The job description uses supervisor while the Resolution and contracts state director.

² Petitioner asserts that if Shilinsky was not qualified to serve in the position of Director she is not tenured. As discussed below, I concluded that Shilinsky was qualified to work as in the title of Director pursuant to N.J.A.C. 6A:9-13.3(b) and therefore having worked for the requisite period of three years, she is tenured. No further fact finding was necessary on this issue based upon this conclusion.

Shilinsy's Job description dated May 3, 2000, entitled "Supervisor³ of Special Education/Child Study Team" entails the following:

REPORTS TO: Superintendent

- A. The individual will function as a working member of the child study team, as an integral part of the job.
- B. Directs the activities of the other members and participates in the functions of the child study team and/or, while directing and participating in the activities of the child study team members, evaluates the performance of the other members of the team while functioning as part of and as the team leader for the child study team.
 - Serves as a case manager for special education students.
 - Serves as a mediator between other child study team members and parents.
- C. Supervises and evaluates the special education personnel; i.e. teachers and speech therapists. Perform professional observation evaluations on staff members who work with students with disabilities.
- D. Prepare applications for P.L. 94:142 (ages 3-21) and P.L. 99:457 (ages 3-5) Flow Through Funds for each calendar school year for submission to the Board of Education for approval prior to State and County submission. Works with the Business Administrator to expend IDEA Grant Funds.
- E. Prepare annual reports to the County Office in September and June of each year.
- F. Prepare applications for County waivers and out-of-district placements.
- G. Assists the Superintendent in developing and updating special education policies and procedures.
- H. Compose and distribute annual survey of special education services supplemented with P.L. 94:142

³ The job description denotes the title as "supervisor" and not "director."

funds to teachers, administrators, and community members.

- I. Prepare information to be submitted to the Business Administrator for ASSA Report. Coordinate information from Middle Township High School and Special Services School District regarding low income, special education tier funding and COMPACT School.
- J. Coordinate the testing of special education students for pre and post testing each year. Determine exemptions from local school district standardized testing. Coordinates testing exemption schedule for staff and special education students.
- K. Develop scheduling of special education students in resource room and self-contained classes.
- L. Attend meetings relevant to programs coordinated.
- M. Develop scheduling of high school special education students, in conjunction with Child Study Team staff of receiving school.
- N. Prepare applications for special education students attending out-of-district placements.
- O. Devise, implement, distribute and evaluate Three Year Plan for Dennis Township School District Special Education Program.
- P. Assist the Superintendent in monitoring district compliance to Federal and State Special Education Regulations.
- Q. Facilitate communication among out-of-district placement providers. Monitor student progress and documentation in relationship to N.J. Administrative Code, through on-sight visitations and telephone contacts.
- R. Interviews staff for special education openings; teachers aides, individual nurse.
- S. Meets weekly with Child Study Team members, speech therapist, guidance staff to in-service and/or develop plans for individual students.

- T. Delegate positions of 504 officer, homeless liaison and DYFS liaison. Monitoring of these positions.
- U. Serve as a member of the Pupil Assistance Committee.
- V. To work with principals in regards to discipline suspension – to schedule behavioral manifestation plans and facilitate Child Study Team case managers in conducting behavioral assessments.
- W. To develop Professional Improvement Plans (P.I.P.) for staff members. To monitor these plans.
- X. To work with staff to determine textbook selection. To supervise the ordering of textbooks. To keep a record of students and their textbook levels for ordering purposes.
- Y. To provide contract with other agencies for additional outside related services: Occupational Therapy, Physical Therapy, one-to-one aides. To monitor these services for the purpose of correct billing.
- Z. Performs such other related duties as prescribed by law and as may be directed by the Superintendent within the scope of his/her certification.

(Certification of Faia February 11, 2012, Ex Q.)

DISCUSSION

PETITIONER'S CROSS-MOTION FOR SUMMARY DECISION/RECONSIDERATION

Petitioner asserts that this tribunal's April 4, 2012, Order must be revisited as it incorrectly concluded that the Director of Special Education is a supervisory/director's position. Petitioner urges that the special education director's position involves district-wide responsibility. And this would necessitate an administrator's endorsement pursuant to N.J.A.C. 6A:9-12.3(a). This regulation provides, in part:

(a) The **school administrator endorsement** is required for any position that involves services as a **district-level administrative officer**. Such positions shall include superintendent, assistant superintendent, and **director**. Holders of this endorsement are authorized to provide educational leadership by directing the formulation of district-wide goals, plans, policies and budgets, by recommending their approval by the district board of education and by directing their district-wide implementation. Holders of this endorsement are authorized to recommend all staff appointments and other personnel actions, **such as terminations, suspensions and compensation, including the appointment of school business administrators**, for approval by the district board of education. Holders of this endorsement are authorized to direct district operations and programs, and to **supervise and evaluate building administrators and central office staff, including school business administrators**. They are also authorized to oversee the administration and supervision of school-level operations, staff and programs.

(b) The **principal endorsement** is required for any position that involves service as **an administrative officer of a school or other comparable unit within a school or district**. Such positions shall include assistant superintendent for curriculum and instruction, principal, assistant principal, vice-principal and **director**. The holder of a standard principal endorsement is also authorized to serve in the position of supervisor. **Holders of this endorsement are authorized to provide educational leadership by directing the formulation of goals, plans, policies, budgets and personnel actions of the school or other comparable unit**, and recommending them to the chief district administrator, and by directing their implementation in the school or **other comparable unit**. Holders of this endorsement also are authorized **to direct and supervise all school operations and programs, to evaluate school staff, including teaching staff members and to direct the activities of school-level supervisors**.

[Emphasis added]

This tribunal's prior Order reviewed both provisions under the aforesaid regulation. Section (a) of the aforesaid regulation describes district-wide functions that would require a school administrator's endorsement. These include formulation of

district-wide goals, plans, policies and budgets. Holders of the administrator's endorsement are eligible to supervise and evaluate building administrators and central office staff, including school business administrators. They are also permitted to oversee the administration and supervision of school-level operations, staff and programs. These are all high level management jobs and tasks.

Conversely, section (b) of the aforesaid regulation describes the level of authority for a director with an administrative/principal's endorsement. This is the credential held by Shilinsky. Holders of a principal's endorsement are authorized to be supervisors and directors. Holders of a principal's endorsement can formulate goals, plans and policies, budgets and personnel actions of the school or other comparable units. They report to the chief district administrator, which is where the director of special education reports in the present matter. The holder of a principal's endorsement acting as a director is authorized to direct and supervise all school operations and programs, to evaluate staff, including teaching staff members and to direct the activities of school level supervisors. The director's duties described under section (b) are largely consistent with the May 2000 job description for "Supervisor" of Special Education. (Certification of Faia February 11, 2012, Ex.Q.)

Petitioner claims that if Shilinsky works with the school board administrator on grants, prepares waivers, or submits annual reports it necessitates her to possess an administrator's endorsement. The focus under section (a) is the managerial level of staff programs managed by the district-wide director. Examples include school business administrator, all school operations and programs, compensation, terminations, and suspensions). School administrators are primarily concerned with broad management and district-wide business affairs. These are much higher than those of a department head.

In the previous Order, the undersigned concluded that N.J.A.C. 6A:9-12.3(b) clearly provides the holder of an administrative certificate with a principal/supervisor endorsement can serve as a director of school or other comparable unit within the school or district. The director of the special education department/CST serves

primarily as a department head and reports to the chief school administrator, i.e. the superintendent. They do not report to the Board of Education, and are not authorized to supervise and evaluate building administrators and central office staff, including school business administrators as more particularly articulated under section (a) of the aforementioned regulation. Nothing in the Supervisor of Special Education job description indicate high level supervision of staff categories such as building administrators, central office staff, and school business administrators.

While special education director's responsibilities might overlap, or appear drift into district wide areas, this is unavoidable in small districts. But the director of special education does not have district-wide supervisory authority over other high level managers. The obvious distinction between section (a) and section (b) is that holders of an administrator's endorsement under section (a) serve at a much higher level in the managerial hierarchy. And the director of special education is not included in that hierarchy, at least as reflected in Dennis Township's special education job description.

Petitioner's renewed cross-motion for summary decision/reconsideration offers no new factual evidence establishing that Dennis Township's Director of Special Education serves at such a high managerial level requiring an administrator's endorsement. In the absence of any factual information suggesting that the position in question does, in fact, involve day-to-day district-wide supervisory responsibilities, petitioner's cross-motion/motion for reconsideration must be **DENIED**.

Finally, intervenor Shilinsky was appointed as the Director of Special Education in March 2005. Petitioner is challenging Shilinsky's appointment to this title in a petition filed on July 20, 2010. Petitioner and Shilinsky worked for the same school district for the entire period in dispute. Petitioner voiced no concern regarding petitioner's title of Director of Special Education from March 2005 to July 2010. It wasn't until petitioner was RIF'd in 2010 that she decided to challenge Shilinsky's credentials as a director. I am mindful that all staff members must possess the appropriate certificate for their title. N.J.S.A. 18A:26-2. Likewise, an aggrieved party must assert a claim under the school law, "no later than the 90th day from the date of receipt of the notice of a final order,

ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.” N.J.A.C. 6A:3-1.3(i). Petitioner’s claim was timely filed if measured against the date she was RIF’d (April 29, 2010 to July 20, 2010). But petitioner’s long delay in challenging Shilinsky’s promotion to Director of Special Education in 2005, when buttressed against the Shilinsky Administrative Certificate as a Principal/Supervisor (2006) and her Instructional Certificate and Endorsement as a Teacher of the Handicapped (1995); both of which uniquely and lawfully qualify her to be a “director” or “supervisor” of special education in some capacity, stretch the limits of legal logic and creativity.

Petitioner’s long delay in seeking to unseat Shilinsky could face a laches argument. While the expressed scope of authority granted to “directors” under the administrator’s endorsement verses a principal’s endorsement is not perfect, clearly the legislature authorized the holder of a principal’s endorsement to be a “director” with significant authority. And I **CONCLUDED** that Shilinsky has the proper credentials to be a Director of Special Education. To upset the district’s management alignment on a questionable interpretation of term “director” as it appears in both section (a) and (b) of the statute in question, after Shilinsky has been in that title for seven years, would be a disservice to the district, the staff and students. The delay, costs and expense to a district that is already experiencing financial difficulties would only compound matters.

PETITIONER’S CLAIM OF A PRINCIPAL VACANCY

Starting in 2007-2008, the district considered a restructuring plan. In 2009-2010 the loss of state aide triggered a budget crisis. In response, the district reduced its principal titles down to one by 2010. (Respondent’s July 13, 2013, brief, exhibits B, C, F, & G). The district also reduced a secretarial position from a twelve month position to a ten month position. (Respondent’s July 13, 2013, brief, Ex. K).

Dennis Township has two building locations and three schools. Consequently, the district is required to have two building principals to cover the respective locations. In this instance, the two principals were James DeCarlo and Dr. Joseph LaRosa. Dr.

LaRosa was RIF'd effective March 17, 2010. And one principal title was eliminated and abolished for reasons of economy and efficiency. DeCarlo retired effective August 1, 2010. LaRosa had special re-employment rights as a tenured staff member. Dennis Township offered to bring Dr. LaRosa back in his capacity as principal on or about the same date DeCarlo retired. (See Respondent's brief dated July 13, 2012 pages 1-5 and attached Certifications of Sara M. Teefy, President of the Dennis Township Board of Education and Patricia Ziolkowski, Vice President of the Dennis Township Board of Education, attached to the brief - hereinafter Board Member Certifications).

The district's plan was to have Superintendent Papp fill the role as both superintendent and principal in order to cover the second building. Papp's December 2009 contract provides that he is "to assume responsibilities of principal when that person is not in the district. In that event, the responsibilities therein will be performed and discharged by him or by staff under his direction." (Respondent's July 13, 2013, brief, Ex. D, p. 3.) Dennis Township contends that Papp contractually fulfilled his contractual obligation to fill in as building principal for one of the district's two buildings from 2009 to April 18, 2012. The district had already eliminated one principal's position for reasons of economy. It is therefore believable that the Board would not create a new principal's position, undermining its intended costs saving achieved through a RIF and abolishment of titles.

Papp corresponded with the county superintendent asking for advice and other information in connection with his intention of serving as both superintendent and principal. The county superintendent indicated that no action was required on its part. (Respondent's July 13, 2013, brief, Ex. C & D). Papp assumed the role of superintendent/principal at no further cost to the taxpayers.

There were no formal resolutions issued by the Board approving or codifying Papp's new role. Petitioner asserts that if the Board authorized Papp to become the new superintendent/principal, it did so in violation of the OPMA. However, Dennis Township correctly points out that the OPMA, found at N.J.S.A. 10:4-15, provides that

challenges and remedies for violations of the Act must be filed in Superior Court. And the claim must be brought within forty-five days of the action sought to be voided. Id.

This presents two threshold problems for petitioner. First, the conduct challenged by petitioner dates back to August 2010. Clearly, petitioner is out of time to assert a claim based under the OPMA. Moreover, the OPMA provides that the Superior Court of New Jersey has exclusive jurisdiction over violations. Consequently, this tribunal is without jurisdiction to decide that claim, assuming it is even timely.

Staying within this tribunal's jurisdiction, the question remains as to whether there was a principal's vacancy to which petitioner could make a claim under her re-employment rights. N.J.S.A. 18A:28-12. At the time of the filing of the first petition (July 20, 2010) there was no vacancy in the principal's position. DeCarlo retired in August 2010. Both DeCarlo and LaRosa were tenured and senior to petitioner. One principal's position was eliminated in March 2010 leaving only one principal's position open. LaRosa exercised his re-employment right and was rehired, filling the one principal's title. Superintendent Papp took over the as the acting principal for one building location while LaRosa remained as principal for the other building location. Therefore, the district's two building locations were covered with principals, as required. Under these arrangements there is no principal vacancy.

For petitioner to succeed on the principal vacancy claim, she must establish (1) a violation of the OPMA knocking Papp out as superintendent/principal and (2) that she was tenured as a principal so as to be eligible for re-employment rights in that title. OPMA challenges lie with the Superior Court. Challenges must be filed within forty-five days of the action to be voided. In this instance, no challenge was ever filed. I **CONCLDUE**, therefore, that no principal vacancy exists.

Finally, petitioner raises and argues facts in this docketed matter that more properly relate to another petition filed by petitioner on July 24, 2012. (Jacquelin v. Dennis Twp. BOE, OAL Dkt. No. EDU 9939-12). In the newly filed action, petitioner asserts that Shilinisky was elevated to acting principal effective April 19, 2012.

Petitioner holds a principal's endorsement under her administrative certificate. If petitioner were tenured as a principal at the time she was RIF'd, she would have special re-employment rights as a principal. But petitioner has not established that she is tenured as principal. Principal tenure requires proof that petitioner served in the position of principal for the requisite period of time (two years for promotional tenure). And petitioner would have to establish that she has seniority to Shilinsky. All of these facts and claims relate to a second petition that is pending before the OAL under a separate docket. Consequently, I **CONCLUDE** that these claims do not belong in and should not be adjudicated in this case. It was filed two years after the present action was filed with the Commissioner of Education.

Summary Judgment

The OAL rules governing motions for summary decision are found at N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 and the Supreme Court's decision in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary decision should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. I **CONCLUDE** that summary decision is appropriate based upon the myriad of exhibits and certifications submitted with this round of motions and those previously submitted in connection cross-motions for summary decision. The material facts necessary to make a determination were sufficiently developed in the papers submitted.

CONCLUSIONS

Based upon the reasons set forth above, I **CONCLUDE** as follows:

1. Intervenor Shilinsky is qualified to hold the title Director of Special Education/CST under her Administrative Certificate with a Principal Endorsement and Instructional Certificate with a Teacher of the Handicapped Endorsement.

2. No vacancy existed in the position of Principal in the Dennis Township school district from the date petitioner was RIF'd (April 30, 2010) to the date Superintendent Papp was retired/terminated from the district (April 18, 2012). Any remaining claims for reemployment rights raised by petitioner are contained in a separate action filed on July 2, 2012, with the Commissioner of Education, and are not part of this proceeding. There is no finding or conclusion that petitioner is tenured as a principal and has any reemployment right to such title. Those facts were not developed in this record.

ORDER

It is **ORDRED** that summary decision is granted in favor of respondent as indicated above (conclusions). It is further **ORDERED** that petitioner's cross-motion for summary decision is **DENIED**. The action field by petitioner is **DISMISSED**. This case is concluded.

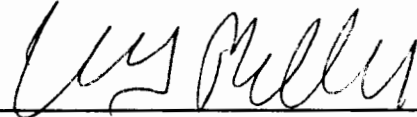
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11-16-12

DATE



W. TODD MILLER, ALJ

Date Received at Agency:

11-16-12

Date Mailed to Parties:

11-16-12

/sd

DOCUMENTS CONSIDERED

- Respondent's Motion for Summary Decision (with attachments, 7/13/12
- Brief in Opposition to Dennis Township Board of Education's Motion for Summary Decision
- Petitioner's Notice of Cross-Motion for Summary Decision (with attachments), 7/27/12
- Respondent's Response to Petitioner's Cross-Motion for Summary Decision, 8/16/12
- Job Description adopted by Dennis Township Board of Education for the position of Director of Special Education, submitted 10/11/12

OAL DKT. NO. EDU 9957-12
 AGENCY DKT. NO. 201-7/12

IN THE MATTER OF THE TENURE	:	
HEARING OF CHERRY BERNARD,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	
BOROUGH OF PARAMUS,	:	DECISION
BERGEN COUNTY.	:	

The record of this matter, the proposed "Employment Separation Agreement" (Agreement) and the Initial Decision of the Office of Administrative Law pursuant to *N.J.A.C. 1:1-19.1*, have been reviewed and found to be in compliance with *N.J.A.C. 6A:3-5.6*.

The Commissioner approves the Agreement terms and adopts the Initial Decision as the final decision in this case, with the following observations. Section 8 of the Agreement references an action which appears to have already taken place, and has therefore preceded consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same. In addition, the resignation letter referenced in Section 4 is not annexed to the settlement agreement, as that section suggests.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have either successfully implemented the settlement terms, or have agreed upon mutually satisfactory alternate dates for the effectuation of same. Assuming the foregoing, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

Date of Decision: 12/21/12
 Date of Mailing: 12/26/12



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 9957-12
AGENCY DKT. NO. 201-7/12

**IN THE MATTER OF THE TENURE HEARING OF
THE CHERRY BERNARD,**

Petitioner,

v.

**SCHOOL DISTRICT OF THE BOROUGH OF PARAMUS,
BERGEN COUNTY**

Respondent

Cherie L. Adams, Esq., for Petitioner (Adams Stern Gutierrez & Lattiboudere,
attorneys)

Alfred F. Maurice, Esq., for Respondent (Springstead and Maurice, attorneys)

Record Closed: November 7, 2012

Decided: November 14, 2012

BEFORE TAHESHA L. WAY, ALJ:

This matter was transmitted to the Office of Administrative Law on July 24, 2012, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Paramus Board of Education has approved the settlement, as evidenced by the attached Board resolution dated October 22, 2012.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

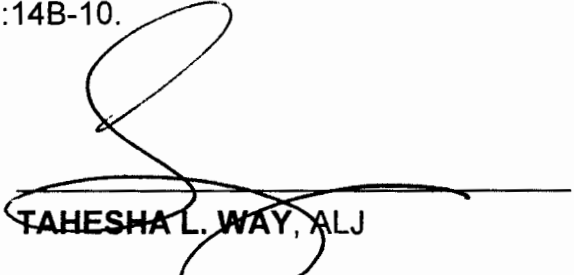
I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and N.J.A.C. 6A:3-5.6 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 14, 2012

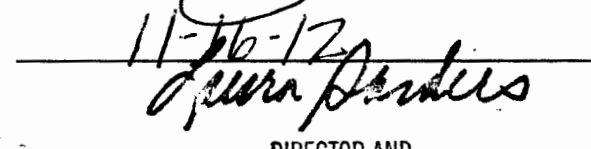
DATE


TAHESHA L. WAY, ALJ

Date Received at Agency:

Date Mailed to Parties:

NOV 16 2012


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

EXTRACT FROM THE MINUTES OF A MEETING OF
THE PARAMUS BOARD OF EDUCATION, BOROUGH OF PARAMUS
BERGEN COUNTY, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

IVED

2012 NOV -7 A 10:56

The Paramus Board of Education, Borough of Paramus, in the County of Bergen, New Jersey, convened in Regular session on October 22, 2012 at 7:30 p.m. in the Board of Education Conference Room, Administration Office, 145 Spring Valley Road, Paramus, New Jersey 07652.

The following member(s) of the Board of Education were present: Mr. Balestrieri, Mrs. Bower, Mrs. Criscione, Mr. Holzmann, Mrs. McCausland, Mr. Straka, Mr. Warren, Mrs. Bergmann, Mr. Feorenzo.

The following member(s) of the Board of Education were absent: None

The following resolution was offered by Trustee Straka and seconded by Trustee Holzmann and adopted by the Board of Education:

ER-5. Approve Settlement Agreement.

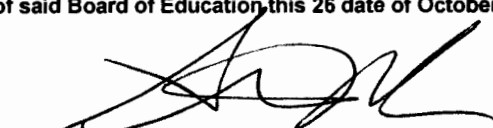
BE IT RESOLVED that the Paramus Board of Education hereby approves the settlement agreement of Agency Docket No. 210-7-12 and OAL Docket No: EDU 9956-12 discussed in executive session and authorizes the submission to the Office of Administrative Law and Department of Education.

ROLL CALL VOTE:

TRUSTEE	VOTE	TRUSTEE	VOTE	TRUSTEE	VOTE
Mr. Balestrieri	Yes	Mr. Holzmann	Yes	Mr. Warren	Yes
Mrs. Bower	Yes	Mrs. McCausland	Yes	Mrs. Bergmann	Yes
Mrs. Criscione	Yes	Mr. Straka	Yes	Mr. Feorenzo	Yes

STATE OF NJ)
) ss
COUNTY OF BERGEN)

I, Steven J. Cea, Secretary of the Paramus Board of Education, Borough of Paramus, in the County of Bergen, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on October 22, 2012 has been compared by me with the original minutes as officially recorded in my office in the minute book of the Paramus Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 26 date of October, 2012


Steven J. Cea
Business Administrator/Secretary to the Board of Education

RECEIVED
2012 NOV -7 A 10: 56
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

EMPLOYMENT SEPARATION AGREEMENT

THIS AGREEMENT, entered into as of the 18th day of October, 2012, by and between **THE BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY**, 145 Spring Valley Road, Paramus, New Jersey 07652 (hereinafter referred to as the "Board"), -and-

CHERRY BERNARD (hereinafter referred to as "Bernard"),
(Collectively "the parties")

WHEREAS, Bernard has been employed as a tenured payroll clerk/secretary with the Board, a position that does not require a certificate from the State of New Jersey; and

WHEREAS, certain issues have arisen regarding Bernard's employment that gave rise to the filing of a Petition with the Commissioner of Education of New Jersey under Agency Docket No. 210-7-12 and OAL Docket No. EDU 9957-12 and the filing of defenses to the same; and

WHEREAS the parties have determined that it is in their best interest to avoid the expense and uncertainty of a trial and reach an amicable resolution of all of the issues between them;

NOW, THEREFORE, in consideration of the mutual promises, covenants and representations of the parties contained herein and in exchange for the consideration as more particularly noted below, it is hereby agreed as follows:

1. In settlement of litigation and in exchange of the consideration contained herein, the Board agrees to pay Bernard the sum of forty five thousand dollars (\$45,000.00).

2. Said sum shall be paid in a lump sum without any deductions, setoffs or other reductions within 30 days following the approval of this settlement agreement by the Commissioner of Education or his designee. Payment shall be made to the "Law offices of Springstead & Maurice."

3. Bernard shall be solely responsible for the payment of any and all taxes of every type and nature that may be assessed, arising out of this payment. Bernard shall indemnify and hold the Board harmless from any liability therefor.

4. Bernard shall tender her irrevocable letter of resignation of her tenured employment to the Board, in the form annexed, upon the execution of this agreement by all parties. Said resignation shall be held in escrow pending final approval of this settlement agreement by the Commissioner of Education or his designee. Upon approval, said resignation shall be surrendered to the Board for appropriate action.

5. The parties agree to mutually release each other from any all claims arising out of or in the course of Bernard's employment with the Board as set forth below:

Release. The parties mutually release and give up any and all claims and rights which they may have against each other. It is the intention of this release to releases all claims, including those of which we are not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now, except for the right to enforce the terms of this agreement in an appropriate forum. The parties specifically release the following claims:

**The parties knowingly and voluntarily release, waive, acquit, disclaim
and forever discharge each other from any and all claims which they**

have or might have against each other from any and all lawsuits, charges, claims, complaints, demands, judgments, obligations, causes of action, controversies or any other proceedings with any administrative agency, or court or any other forum, under any federal, state or local laws or regulations, including, but not limited to claims arising under the Americans with Disabilities Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974, Title VII of the Civil Rights Act of 1964, the Vocational Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, as amended, and including the Older Worker Benefit Protection Act, the Federal Family Medical Leave Act, the Consolidated Budgetary Reconciliation Act, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, New Jersey Wage and Hours law, New Jersey Workers Compensation Act and/or any other federal, state or local employment, human rights, civil rights, wage hour, tenure, pension or labor law, rule, statute, regulation, constitution or ordinance and/or public policy, contract or tort law, or any claim of retaliation under such law, or any claim of breach of any contract, collective negotiations agreement or promise (whether express, oral, written or implied from any source), or any claim of intentional or negligent infliction of emotional distress, tortuous interference with contractual relations, wrongful or abusive discharge, constructive

discharge, common law retaliation, defamation, prima facie tort, fraud, misrepresentation, negligence, estoppel, or any action similar thereto against the each other including any claim for attorneys' fees, that our heirs, executors, administrators, successors, and assigns now have, ever had, or may hereafter have, whether known or unknown, suspected or unsuspected, based upon any conduct arising out of Bernard's employment with the Board .

6. The Board will withdraw the petition under the above referenced docket number, with prejudice, subject to the approval of this agreement by the Board and Commissioner of Education.

7. Unemployment Benefits. Bernard shall be free to apply for and receive unemployment benefits as permitted by law. The Board agrees not to challenge any application for benefits or the continuation of benefits once commenced.

8. The Board agrees to reimburse Bernard for the pension contribution deducted from Bernard's 7/15/12 pay and has done so by check issued October 15, 2012.

9. The Board will afford Bernard the opportunity to pick up any personal property located on the Board premises on a date and time and in a manner to be arranged by the parties.

10. If any prospective employer or any appropriate third party should enquire regarding Bernard's employment history, the Board shall provide a response

limited to the dates of her employment, her position and that she resigned following a maternity leave or provide such other information upon which the parties mutually agree.

11. The parties expressly agree that they shall act in good faith to ensure implementation of this Settlement Agreement.

12. Promises of Confidentiality. Bernard and the Board agree to instruct their individual agents, servants, employees and representatives to not divulge the contents of this Agreement. Bernard and the Board agree not to publicly disseminate the matters raised in this agreement matter before the Commissioner except as required by law. Bernard and the Board agree to be bound by the confidentiality provisions of this Agreement. This confidentiality provision shall survive, and be given full force and effect separately from any invalid, unenforceable or inoperative provision of this Agreement.

13. Neither Bernard nor the Board, publicly or privately, shall characterize the settlement of these matters as either a victory or a defeat. The parties, shall only state that the matters in difference were settled to the mutual satisfaction of the parties.

14. Bernard and the Board represent and warrant that they have not disclosed or disseminated and will not disclose or disseminate to any person or entity the terms or conditions of this Agreement, except as necessary for implementation or as required by law; nor shall Bernard or the Board disclose or disseminate the facts surrounding the same except that disclosure is permitted:

- (1) As necessary with regard to any proceeding for the enforcement of this Agreement,
- (2) As may be required by a court order from any court of competent jurisdiction; and (3)

As may be required by law. It shall not be considered a breach of the obligation of confidentiality for Bernard to make disclosure of the terms of this Agreement to her spouse or counsel or to make disclosure of the terms of this Agreement and the underlying events of this Agreement in order to obtain private and confidential professional advice, or to respond to any inquiry from any governmental entity or agency.

15. Non-Retaliation/Non-Disparagement. The parties agree that they will not publicly, orally, in writing or through electronic or other media, make any disparaging remarks, statements or innuendo about any other party either by inclusion or omission in any publication. Neither party will make any statement to the press or public. If asked by the press or public about any of the matters addressed in this agreement, the parties shall respond only that all administrative actions have been dismissed or withdrawn with prejudice.

16. Entire Agreement. The parties hereby acknowledge that no promises or inducement which is not herein expressed has been made, and in executing this Agreement. This Agreement contains the sole and the entire agreement between the parties, and completely and fully supersedes and replaces any and all prior contracts, agreements, discussions, representations, negotiations, understandings and any other communications between the parties pertaining to the subject matter hereof, the parties represent and acknowledge, in executing this Agreement, that they have not relied upon any representation or statement not set forth in this Agreement made by either party or their counsel or representatives with regard to the subject matter of this Agreement. No other promises or agreements shall be binding unless in writing, signed by the parties

hereto, and expressly stated to represent an amendment to this Agreement.

17. Accord and Satisfaction. This Agreement reflects a compromise and settlement of disputed claims in complete accord and satisfaction thereof. Neither the execution of the Agreement or performance of its terms and conditions shall be considered by any party or by any other person as an admission of liability or non-liability of any of the parties. The parties state that each of them has carefully read this Agreement and the attached Releases and that they have been fully explained to each by his/their attorneys, and that each fully understands that upon execution and performance of the covenants herein, are final and binding. The parties agree that they are bound by this Agreement.

18. Attorneys' Fees and Costs. Each party agrees to be responsible for their own attorney's fees and costs associated with this matter.

19. The parties represent that they are fully authorized to execute this agreement and that all formalities attendant to the execution of this agreement have been satisfied.

20. This agreement may be executed in counterparts, which when taken together, will constitute a completely and properly executed document.

21. If any provision, paragraph, or clause in this agreement is found to be void or illegal, the remainder of the agreement shall remain in full force and effect. Notwithstanding this provision, the cessation of all administrative proceedings against Bernard, the payment to Bernard as set forth herein and the resignation of tenured employment by Bernard are of the essence of this agreement and without which this

agreement cannot stand.

22. This Agreement shall not in any way be construed as an admission by either party of any liability, or of any unlawful or improper acts whatsoever against the other party or any other person.

23. The Board will, by resolution, accept Bernard's resignation, approve this agreement, and authorize the payments described in this agreement to Bernard at the next regularly scheduled or special Board meeting. Implementation shall be withheld until the Agreement is approved by the Commissioner of Education.

24. The parties expressly agree that they shall act in good faith to ensure implementation of this Settlement Agreement.

25. Nothing in this Agreement shall be construed as conferring any benefit upon any person, group or association not a direct signatory hereto. Further, this Agreement shall not be deemed to establish any "past practice" or other precedent requiring the Board to or restricting it from providing any benefit to any person, group or association other than Bernard.

26. The parties acknowledge that each has been represented by legal counsel of their own choosing; that they signed this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

27. This Agreement shall be subject to and construed under the laws of the State of New Jersey and may be enforced in any court of competent jurisdiction.

29. In the event the Commissioner of Education or other lawful authority disapprove this agreement, in whole or in part, the parties reserve the right to pursue the claims raised in the referenced litigation as if this agreement did not exist. Nothing herein, however, shall prevent the parties from amending this agreement to satisfy any requirements that the Commissioner, or other lawful authority may impose, by mutual agreement.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the dates set forth below.

CHERRY BERNARD:

By: Anthony Zeng, President

s: *C. Bernard*
Alfred F. Maurice
Attorney at Law
State of New York

By: [Signature], Secretary

Dated: 10/23/12

Dated: